

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL ELECTION COMMISSION,            )  
  Appellant,                            )  
  v.    ) No. 21-12  
TED CRUZ FOR SENATE, ET AL.,            )  
  Appellees.                            )  
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Pages: 1 through 87  
Place: Washington, D.C.  
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3   FEDERAL ELECTION COMMISSION,           )  
4                           Appellant,           )  
5                           v.                           ) No. 21-12  
6   TED CRUZ FOR SENATE, ET AL.,           )  
7                           Appellees.           )  
8   - - - - -

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10                           Washington, D.C.  
11                           Wednesday, January 19, 2022

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13                           The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 10:00 a.m.

16  
17   APPEARANCES:

18  
19   MALCOLM L. STEWART, Deputy Solicitor General,  
20                           Department of Justice, Washington, D.C.; on behalf  
21                           of the Appellant.

22   CHARLES J. COOPER, ESQUIRE, Washington, D.C.; on  
23                           behalf of the Appellees.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Sotomayor is participating remotely this morning.

We will hear argument first this morning in Case 21-12, the Federal Election Commission versus Ted Cruz for Senate.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART  
ON BEHALF OF THE APPELLANT

MR. STEWART: Mr. Chief Justice, and may it please the Court:

Appellees' suit should be dismissed for lack of standing, but if the Court reaches the merits, it should reverse the district court's judgment and hold that the statutory loan repayment limit is constitutional.

Appellees lack standing for two reasons. First, although they have directed their challenge to the statutory loan repayment limit, Appellees stipulated below that the first \$250,000 of Senator Cruz's loan was repaid with pre-election funds. The statute therefore does not currently restrict the

1 Senator's ability to obtain full repayment of  
2 his loan.

3 Second, the current regulatory barrier  
4 to repayment is self-inflicted. Appellees  
5 could have avoided any injury simply by  
6 behaving exactly as they would have if the  
7 statute and regulation did not exist.

8 Instead, they went out of their way to  
9 engage in transactions that would -- they would  
10 not otherwise have undertaken, solely to  
11 subject the Senator to a financial loss and  
12 thereby lay the groundwork for a lawsuit.

13 That deliberate self-infliction of  
14 injury for no purpose other than to facilitate  
15 litigation severed the causal link between the  
16 challenged laws and Senator Cruz's injury.

17 On the merits, the loan repayment  
18 limit is constitutional. It imposes  
19 insubstantial burdens on the financing of  
20 electoral campaigns, and it targets a practice  
21 that has significant corruptive potential. A  
22 post-election contributor generally knows which  
23 candidate has won the election, and  
24 post-election contributions do not further the  
25 usual purposes of donating to electoral

1 campaigns.

2 And be -- and because repayment of  
3 candidate loans increases the candidate's  
4 personal wealth, the conduct the statute  
5 regulates implicates the same concerns that  
6 underlie limits on gifts to federal officials.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Stewart, other  
9 than Section 304, is there any other basis for  
10 enforcing the regulation?

11 MR. STEWART: There is -- none has  
12 been identified so far. The Supreme --

13 JUSTICE THOMAS: So, if Section 304 is  
14 gone, there is no enforcement?

15 MR. STEWART: I think there is a  
16 substantial practical likelihood that that  
17 would be the result. It would still be open to  
18 the FEC to examine other provisions of the  
19 federal campaign finance laws and ask whether  
20 the 20-day limit would continue to serve a  
21 valid purpose even without the statute. But we  
22 would concede the most likely result, if the  
23 statute were declared invalid, is that the  
24 regulation would cease to be on the books or  
25 would cease to be enforceable.

1           But none of this was litigated below.  
2     The district court didn't decide the case on  
3     that basis. The district court was under the  
4     misimpression that the first \$250,000 of  
5     Senator Cruz's loan had been repaid with  
6     post-election funds.

7           The other thing I would say is,  
8     leaving aside the -- the point that the injury  
9     was self-inflicted, which I -- I do want to  
10    emphasize, there was a more straightforward way  
11    that this case could have been litigated; that  
12    is, Appellees could have identified the  
13    regulation as the provision of law that was  
14    causing their injury and filed suit to have the  
15    regulation set aside, and if they had done  
16    that, they could have identified as one  
17    potential ground for invalidating the  
18    regulation the -- the allegation that the  
19    regulation rested on an invalid statute.

20           Now, from Appellees' standpoint, there  
21    would have been two disadvantages to pursuing  
22    the claim that way. First, if they had  
23    identified the regulation as the target of  
24    their challenge, they wouldn't have been able  
25    to invoke the three-judge court mechanism with

1 a right of direct appeal to this Court.

2 And, second, they have alleged in  
3 Counts 3 through 5 of their complaint both  
4 constitutional and non-constitutional  
5 challenges to the regulation. And if they had  
6 identified the regulation as the source of  
7 their injury, then, under usual principles of  
8 constitutional avoidance, the court would have  
9 been obliged first to consider their con- --  
10 their non-constitutional challenges to the  
11 regulation, and only if those were rejected  
12 would it have proceeded to the constitutional  
13 issues.

14 And so --

15 JUSTICE ALITO: Mr. Stewart, is it  
16 your -- is -- is one of your arguments the  
17 following: A party cannot challenge the  
18 constitutionality of a law that imposes an  
19 allegedly unconstitutional restriction on the  
20 exercise of a right if the party could have  
21 very easily satisfied the preconditions for the  
22 exercise of the right?

23 MR. STEWART: I think we would  
24 probably say that, but I don't think it is  
25 necessary for the Court to go that far to



1 resolve the case in this --

2 JUSTICE ALITO: Well, how can that  
3 possibly be -- be the law? Suppose a -- a  
4 state university says that no person of a  
5 particular race may enter any of the university  
6 buildings unless that person pauses for two  
7 seconds, stands still for two seconds, before  
8 entering the building.

9 Would you say, well, you can't  
10 challenge that racial restriction because it's  
11 no big deal to pause for two seconds before you  
12 go into the building?

13 MR. STEWART: I mean, the Court in a  
14 case like that might say, in the context of  
15 race discrimination, that the mere fact of  
16 being subject to race -- racially disparate  
17 treatment is injury in fact, regardless of  
18 whether any other concrete consequence comes of  
19 that. And the Court has said, for example --

20 JUSTICE ALITO: Do you think that's  
21 limited to an unconstitutional instance of  
22 racial discrimination? It wouldn't apply to  
23 the other -- to -- to free speech rights?

24 MR. STEWART: Well, it's certainly  
25 true in -- in general that in order to

1 establish standing, a plaintiff has to show --  
2 allege and then show not just a deprivation of  
3 a legal right but some practical injury.

4 But the point --

5 JUSTICE ALITO: No newspaper may issue  
6 a -- may run an editorial criticizing the  
7 President unless it's in a particular font?

8 MR. STEWART: I guess the -- the  
9 reason I would say that the Court doesn't need  
10 to -- to address those more difficult  
11 hypotheticals is that, at least in order to  
12 challenge a limitation like that, the newspaper  
13 would have to allege, were it not for this  
14 restriction, we would use a different font.

15 What makes this case particularly easy  
16 in our view is that Appellees could have  
17 avoided their injury by doing precisely the  
18 thing that they would have done if the statute  
19 and regulation were not on the books.

20 JUSTICE ALITO: Well, let me give you  
21 one more example. A town passes an ordinance  
22 that has two sections. Section 1 says no  
23 newspaper may run an editorial criticizing the  
24 mayor except as provided in Section 2. Section  
25 2 says any editorial criticizing the mayor must

1 be published within -- criticizing a speech  
2 made by the mayor must be published within 20  
3 days after the speech.

4 Would the newspaper, after the 20 days  
5 passed, have standing to challenge Section 1 or  
6 only Section 2?

7 MR. STEWART: I'm sorry. Could you --  
8 I --

9 JUSTICE ALITO: Yeah. Okay. It's a  
10 little complicated. So two -- town passes an  
11 ordinance. Section 1, no newspaper may run an  
12 editorial criticizing any speech delivered by  
13 the mayor except as provided in Section 2.

14 Section 2, any editorial criticizing a  
15 speech delivered by the mayor must be published  
16 within 20 days after the mayor's speech.

17 Can the newspaper, after the 20 days  
18 have passed, challenge Section 1 or only  
19 Section 2?

20 MR. STEWART: I -- well, I think they  
21 could probably challenge both, but they could  
22 -- they would have to say, were it not for this  
23 legal restriction, we would publish an  
24 editorial critical of the mayor after 20 days.

25 JUSTICE BREYER: Well, where -- where

1 does this come from? I mean, I think that it's  
2 actually easy to find examples such as we've  
3 just heard. I mean, all you have to do is take  
4 anything that restricts time, the reason they  
5 want to do it after 20 days, so that's what  
6 they want. They want to do it after 20 days.

7           So -- so -- so where does -- where --  
8 where does that fact suddenly take standing  
9 away? I mean, all you have to do is take any  
10 statute you want that you think might be  
11 unconstitutional and you say it doesn't apply  
12 on a certain day and then you say, oh, but they  
13 could do it on that day, or it doesn't apply in  
14 a certain place, and you say, oh, they could go  
15 to, you know, the Aleutian Islands, I mean, and  
16 -- and some people can very easily.

17           And I just don't know of a case where  
18 we would look into, when they want to do a  
19 thing that the statute forbids, that we've  
20 looked how easy it would be to do it in a  
21 different way or to do it in a different place  
22 or to do it at a different time when they say  
23 we don't want to.

24           Now, okay, what is that case? I'm not  
25 saying it doesn't exist. All I can say is I

1 can't find it.

2 MR. STEWART: I -- I would say Clapper  
3 and it's implicit in TransUnion. But -- but  
4 let me come at it this way by saying it's  
5 helpful to think of how the standing issue  
6 would have played out if the Appellees had  
7 filed suit seven days before the election and  
8 they had said this provision impairs our  
9 constitutional rights by imposing burdens on  
10 the use of candidate loans for self-financing.

11 I think, for standing purposes, the  
12 first question a court would ask is, if this  
13 legal disability -- if this legal restriction  
14 were removed or if it didn't exist, would you  
15 make a loan to your campaign and would you wait  
16 for more than 20 days? And if the answer to  
17 that question was no, there would be no  
18 standing.

19 That -- that's Carney versus Adams.  
20 In Carney versus Adams, the plaintiff  
21 challenged Delaware law restrictions on the  
22 party affiliations of people who wanted to run  
23 for Delaware judgeships.

24 And, basically, the whole standing  
25 analysis was an effort to determine, would this

1 plaintiff actually run for a judgeship if these  
2 restrictions were removed? And the Court  
3 concluded we have insufficient confidence that  
4 he would and, therefore, there was no standing.

5 Now, if you'd asked that question of  
6 Appellees seven days before the election, the  
7 answer would clearly be no standing. They have  
8 stipulated that the only reason for making the  
9 loan and the only reason for the delay in  
10 repayment was to facilitate the lawsuit.

11 And, if there had been no statute, no  
12 regulation, there would have been no lawsuit to  
13 facilitate. So, if these laws were not on the  
14 books, they wouldn't have made the loan. If  
15 they had made the loan, it would have been  
16 promptly repaid.

17 They could have avoided injury simply  
18 by doing exactly the thing that --

19 CHIEF JUSTICE ROBERTS: Well, but I  
20 think --

21 MR. STEWART: -- they would have --

22 CHIEF JUSTICE ROBERTS: -- the  
23 analysis in Carney against Adams is a lot more  
24 concrete than your First Amendment  
25 hypothetical. I mean, these cases are hard

1 enough when you're trying to figure, well, what  
2 is the -- the weight of the infringement on the  
3 First Amendment values, you know, against what  
4 is the protective effect on potential  
5 corruption.

6 I mean, I don't -- you know, I don't  
7 -- I don't know how you do that in the first  
8 place. But to say that the standing is going  
9 to depend upon a particular calculation, I  
10 think it's much more concrete in Carney against  
11 Adams when you're asking would somebody really  
12 go to -- you know, go run for office. That --  
13 that's also hard, but not anywhere approaching  
14 the indeterminacy of the calculation we're  
15 supposed to make here.

16 MR. STEWART: Well, I -- I think the  
17 calculation on the merits may be difficult and  
18 it may -- and it may involve a complicated  
19 balancing. But the calculation on standing, I  
20 think, is very straightforward.

21 If -- if the Appellees had filed their  
22 suit seven days before the election and they  
23 had said in their complaint Senator Cruz has no  
24 intention of loaning money to his campaign  
25 regardless of the outcome of this suit, but he

1 feels strongly that the statute is  
2 unconstitutional and he would like a judicial  
3 determination to that effect, clearly, there  
4 would have been no standing, whatever the Court  
5 thought of the merits of the constitutional  
6 claim.

7           And what we have here is essentially  
8 that; that is, Appellees have stipulated that  
9 if there were no statute, if there were no reg,  
10 they never would have made the loan and they  
11 would have promptly repaid it if the loan had  
12 been made. And so the question --

13           CHIEF JUSTICE ROBERTS: Well, there's  
14 just sort of a -- I mean, there's -- test cases  
15 are not always -- you don't always have a lack  
16 of standing. If you get people challenging  
17 discriminatory housing practices and they go in  
18 and say, you know, we're thinking about buying  
19 this house and they're discriminated against  
20 because of their -- of their race and they  
21 don't say, well, you know, whatever, you can't  
22 buy the -- the -- the house.

23           They don't have to go in and prove  
24 that they would actually buy the house, do  
25 they?



1           MR. STEWART: Well, if -- if they were  
2 -- they might not have to prove that they would  
3 buy the house, in -- in the same way, for  
4 instance, that in the school admissions cases,  
5 where you have use of racial criteria in school  
6 admissions, the plaintiffs don't have to show  
7 that they would have been admitted if the laws  
8 were different, but they do have to show they  
9 were ready and able to apply.

10           And the question here really is, if  
11 they didn't have standing seven days before the  
12 election, can they manufacture standing by  
13 voluntarily subjecting themselves to an injury  
14 solely for the purpose of facilitating a  
15 lawsuit? I mean, imagine --

16           JUSTICE SOTOMAYOR: Mr. Stewart, if I  
17 might, sir, I -- I -- I do have difficulty  
18 understanding this manufacture business because  
19 he wasn't precluded from contributing to his  
20 campaign, so he could. He was only precluded  
21 from repaying it from certain funds. And so I  
22 don't know that this is a manufactured injury  
23 as such.

24           Can we go to the specific point or one  
25 of your many points on standing but the one

1 that I'm most concerned about, which is that  
2 he, in fact, did -- had no injury because he  
3 had used pre-election funds to repay his debt  
4 and there was no bar to him using post-election  
5 funds to pay the 10,000?

6 MR. STEWART: Yes. I mean, that --  
7 that --

8 JUSTICE SOTOMAYOR: That's -- that's a  
9 different kind of situation.

10 MR. STEWART: That -- that's a  
11 different standing argument. That is an  
12 argument that the -- the inability that he  
13 currently faces to repay the remaining \$10,000  
14 is attributable to the regulation rather than  
15 to the statute. But our argument about --

16 JUSTICE SOTOMAYOR: I'm not even sure  
17 it's attributable to the statute. The statute  
18 says that you can't use post-election funds to  
19 pay off more than 250,000 of pre-election  
20 funds. But, if he didn't have pre-election  
21 debts greater than 10,000, he would still have  
22 the money to pay.

23 MR. STEWART: Well, he -- he loaned  
24 the campaign \$260,000, so the campaign had a  
25 \$260,000 debt to him, and it repaid \$250,000 of

1 that amount and stipulated that --

2 JUSTICE SOTOMAYOR: From pre or post?

3 MR. STEWART: He stipulated that he --  
4 he alleged in the complaint that he paid it  
5 by -- through post-election funds. And the  
6 district court, at the motion to dismiss stage,  
7 rejected the standing argument, accepting as  
8 true that allegation.

9 But the Appellees subsequently  
10 stipulated that none of that 10,000 -- none of  
11 that \$250,000 was from money raised after the  
12 election. And the stipulation is binding on  
13 them. So, if they used pre-election funds,  
14 then --

15 JUSTICE SOTOMAYOR: They claim that  
16 they used 2024 election money instead of  
17 pre-election money. Why don't we get to their  
18 allegations and why you think -- I -- I -- I do  
19 have -- I have read the deposition of one of  
20 the assistant treasurers, who said he wasn't  
21 sure which funds were used, pre-election or  
22 2024 election money.

23 So the question I have for you is --  
24 and he said money is fungible and our intent  
25 was to use 2024 election fund money to pay this

1 debt.

2 MR. STEWART: Well, the 20 --

3 JUSTICE SOTOMAYOR: Why isn't that  
4 enough?

5 MR. STEWART: Well, first, the 2024  
6 election money that they were talking about was  
7 money that was received by the campaign before  
8 the 2018 election but was subsequently  
9 redesignated for the 2024 campaign because the  
10 people who had contributed it were already  
11 maxed out for the 2018 election.

12 And we would say those are  
13 pre-election contributions because they were  
14 received by the campaign before the election.

15 The Appellees say the redesignation  
16 effected a simultaneous refund of the earlier  
17 contribution and the making of a new  
18 post-election contribution. And there --  
19 there's a legal dispute about that.

20 I mean, one -- one thing I would say  
21 about that legal dispute is the -- the position  
22 we've taken is the one that is more favorable  
23 to campaigns generally. We're saying, if you  
24 give the money before the election and it's  
25 redesignated afterwards, that still counts as

1 pre-election contributions, so it doesn't count  
2 against the \$250,000 cap.

3           That's the pro-camp -- pro-campaign  
4 position. They -- they are taking the  
5 anti-campaign position in order to try to  
6 buttress their argument that they have been  
7 injured. But, at the end of the day, they  
8 don't even say we used those funds to repay the  
9 debt. They say those funds were available for  
10 use and we didn't attempt to trace the money  
11 because it was -- money is fungible and there  
12 was no point to it.

13           But, again, all that doesn't go to the  
14 self-inflicted character of the injury. And  
15 imagine a tort suit in which a plaintiff said  
16 it came to my attention that McDonald's was  
17 selling dangerously hot coffee, and so I went  
18 to McDonald's and bought a cup of coffee and  
19 poured it upon myself, and I'm suing for costs  
20 of medical treatment and for pain and  
21 suffering, and I stipulate that my only reason  
22 for buying the coffee and my only reason for  
23 pouring it on myself was to facilitate this  
24 lawsuit.

25           I think we'd all have the strong

1 reaction that suit can't go forward. And I  
2 think the best doctrinal basis for saying that  
3 the suit can't go forward is, even if we take  
4 as true the allegation that McDonald's was  
5 behaving negligently by selling the coffee, the  
6 plaintiff's own deliberate conduct in visiting  
7 injury upon herself solely in order to  
8 facilitate a lawsuit severed the causal link  
9 between any wrongdoing and her ultimate injury.

10 And that's basically what the Court  
11 said in Clapper. The plaintiffs in Clapper  
12 said we have paid out money to take protective  
13 measures to prevent our own communications from  
14 being intercepted. And the Court said, if you  
15 would otherwise lack standing to challenge the  
16 -- the laws that allow the interception of  
17 communications on the grounds that your injury  
18 is not sufficiently real and immediate, you  
19 can't manufacture standing simply through a  
20 self-inflicted harm. And the Court said that's  
21 a reason for holding that the injury is not  
22 traceable to the allegedly unconstitutional  
23 statutes.

24 And that's the -- the same position  
25 we're advocating here. They -- they didn't

1 have to adjust their conduct even in the most  
2 miniscule way to avoid injury. All they had to  
3 do was not make the loan or to repay it  
4 promptly if they did. And, crucially, those  
5 are exactly the things that they have said they  
6 would have done if the statute and reg didn't  
7 exist.

8           Again, by saying our only motivation  
9 for making the loan and for delaying repayment  
10 was to facilitate the -- the lawsuit --

11           JUSTICE BREYER: Yeah, the coffee  
12 sounds like -- what's the tort doctrine that  
13 used to be, you know, two workers and you say  
14 it's his fault, and the other one says, well,  
15 you did a lot of this yourself?

16           MR. STEWART: I mean, there's  
17 contributory negligence --

18           JUSTICE BREYER: Yeah, that's it,  
19 contributory negligence. Thank you. And --  
20 and I've never heard -- even in the case if  
21 they say, you know, McDonald's is negligent  
22 because the coffee was too hot. And then the  
23 contributory negligence was, yeah, maybe it  
24 was, but you poured it on yourself. I never  
25 heard of that as being a stand -- a -- a -- a

1 standing doctrine.

2 MR. STEWART: It -- it wouldn't --

3 JUSTICE BREYER: And so what I think  
4 of is the tracing cases where the person says,  
5 yeah, I went to see if they'd sell me a house.  
6 Because of my race, I think they wouldn't, but  
7 I wasn't going to live there. I just did it as  
8 a test case.

9 MR. STEWART: Well, contributory  
10 negligence generally presupposes that, you  
11 know, both sides are behaving unreasonably.  
12 But it -- it's not a doctrine that typically  
13 applies in circumstances where the plaintiff  
14 has deliberately caused harm to herself. The  
15 -- the McDonald's hypothetical is not simply  
16 the plaintiff herself was negligent in not  
17 taking good care of the coffee. It was she  
18 deliberately caused herself injury that she  
19 would not otherwise have suffered solely for  
20 the purpose of facilitating a lawsuit.

21 And that's basically what we have  
22 here. And I think, to the -- to the extent  
23 there is doubt about the -- the intricacies of  
24 the doctrine, it's helpful for the Court to  
25 think about the purposes of Article III



1 standing doctrine. It is to limit the  
2 jurisdiction of Article III courts to disputes  
3 that arise because the plaintiff's conduct of  
4 his own life is being interfered with in some  
5 way. It -- it is to prevent the courts from  
6 being used to resolve purely abstract disputes  
7 that don't -- that don't arise out of any  
8 actual injury to the plaintiff. And if the  
9 plaintiff can circumvent that restriction by  
10 manufacturing injury, the principle is lost.

11 I did allude earlier to TransUnion.  
12 And, in TransUnion, the Court said, if a  
13 plaintiff has not suffered concrete harm as a  
14 result of the defendant's legal violation, then  
15 the suit can't go forward, even if Congress has  
16 created an express cause of action with a  
17 statutory damages remedy. And the --

18 CHIEF JUSTICE ROBERTS: Well, you have  
19 artificial things. Can you get -- turn my  
20 question on standing into one on the merits?  
21 How are you supposed to weigh such  
22 imponderables such as the marginal burden on  
23 the exercise of First Amendment rights against  
24 the marginal assistance in preventing  
25 corruption?

1           I mean, it's -- there -- there isn't a  
2 sufficient corruption -- anti-corruption  
3 interest sort of up to \$250,000, but then all  
4 of a sudden there is. Exactly how is that  
5 analysis supposed to proceed in concrete terms?

6           MR. STEWART: I mean, we -- we don't  
7 pretend that it's a bright-line rule, but I  
8 think we would say two or three different  
9 things.

10           The first is there are severe  
11 restrictions on gifts to officials in all three  
12 branches of the government. So there is an  
13 established understanding that the government  
14 has a -- a substantial and legitimate interest  
15 in preventing the effects that might arise if  
16 federal officials were given money that would  
17 enrich themselves per -- personally.

18           And the campaign finance laws, in  
19 specifying the permissible purpose -- the  
20 permissible uses of campaign contributions,  
21 draw a line between campaign expenditures that  
22 will further the purposes of the campaign and  
23 campaign expenditures that will benefit the  
24 candidate personally. And so --

25           JUSTICE ALITO: Why is the --

1 JUSTICE BARRETT: But Senator Cruz  
2 says that this doesn't enrich him personally  
3 because he's no better off than he was before.  
4 It's paying a loan, not lining his pockets.

5 MR. STEWART: He's certainly no better  
6 off than he was before the loan was made, but  
7 the -- the whole thrust of his argument is,  
8 after a loan has made -- has been made, there  
9 may be a legal entitlement to be repaid, but  
10 there will often be practical uncertainty about  
11 whether repayment will actually occur. And  
12 that uncertainty may be sufficiently burdensome  
13 as a practical matter that some candidates will  
14 not make the loan at all for fear that they'll  
15 be left holding the bag.

16 And so a contributor who eliminates  
17 that uncertainty, who pays in the money that  
18 ensures that the debt will actually be repaid,  
19 is conveying a -- a financial benefit to the  
20 candidate just as if a gift had been made.

21 JUSTICE BARRETT: So is everyone -- so  
22 is everyone who contributes to a campaign in  
23 that respect.

24 MR. STEWART: Well, at the -- at the  
25 time that pre-election contributions were --

1 are made, there is still campaign literature to  
2 be distributed, there are television ads to be  
3 run, there are campaign activities still to be  
4 funded.

5 After the campaign is over, the only  
6 permissible use of post-election contributions  
7 is to repay debts outstanding by the campaign.  
8 And, in many instances, the only or the -- the  
9 principal debt that the campaign owes is to the  
10 candidate himself.

11 And if a donor knows that, then the  
12 donor will understand that by giving money, he  
13 or she is enriching the candidate personally in  
14 the sense of making the candidate richer than  
15 she would be but for the repayment.

16 JUSTICE KAVANAUGH: Why isn't the 2900  
17 limit that applies sufficient to address the  
18 anti- -- government's anti-corruption interest,  
19 especially given, as Justice Barrett says, it  
20 is a loan, not a gift?

21 MR. STEWART: I think for two reasons.  
22 The first is the general \$2900 limit has in  
23 mind contributions that will be used for  
24 campaign-related activities, for speech, and  
25 that is -- and the -- the limits on gifts to --

1 if I could --

2 CHIEF JUSTICE ROBERTS: Sure.

3 MR. STEWART: The limits on gifts to  
4 federal officials are much lower, reflecting  
5 the insight that we worry about corruption at a  
6 much lower monetary level when the money is  
7 going into the candidate's pocket.

8 And the other thing I would say is, in  
9 drafting the -- the \$2900 limit, Congress was  
10 attempting to balance the desire to avoid  
11 corruption against the desire to enable  
12 contributors to participate meaningfully in the  
13 electoral process, and that opportunity is  
14 basically over once the election occurs.

15 CHIEF JUSTICE ROBERTS: Thank you.

16 Justice Thomas, anything further?

17 JUSTICE THOMAS: Mr. Stewart, just a  
18 couple of questions to satisfy my curiosity.

19 One on the merits. Could you -- if  
20 you determine -- if the government determined  
21 that certain media outlets had an outsized  
22 influence on election, could it similarly limit  
23 the amount that they spend on editorials to  
24 equalize the influence?

25 MR. STEWART: No, it could not do

1 that, and it could not do that with candidates.  
2 That is, this is not a limit on the amount of  
3 money that a candidate can spend or even the  
4 amount of money that the candidate can loan.  
5 It's purely a limit on the funds that can be  
6 used to repay the candidate loan after it's  
7 been made.

8 JUSTICE THOMAS: I don't quite see the  
9 difference, but, okay. My final question is,  
10 going back to your standing, you -- you said a  
11 number of times that these self-inflicted  
12 injuries can't be a basis for standing. At  
13 least that's I -- what I understand.

14 But how would you -- using that at  
15 that level of generality, what would you say  
16 about Plessy sitting in the wrong car?

17 MR. STEWART: I would -- we would not  
18 say that that is self-inflicted in the relevant  
19 sense.

20 JUSTICE THOMAS: Well, why not? I  
21 mean, it's just -- all he has to do is go to  
22 another car.

23 MR. STEWART: That is, Plessy is  
24 attempting to assert a -- a legitimate  
25 constitutional right and is attempting to do

1 something in the real world that presumably he  
2 would do if the law were not on the books; that  
3 is, if there had been no law mandating  
4 segregation on the -- the means of  
5 transportation, presumably, Plessy would have  
6 sat in an integrated section and would have had  
7 an interest in doing so.

8 This is self-inflicted not just in the  
9 sense -- it's -- it's a different case when  
10 plaintiffs stand on their rights and insist on  
11 doing what they would do if the law were not in  
12 effect and experience injury as a result of it.

13 This is a case in which the plaintiffs  
14 did something they would not otherwise have  
15 done solely for the purpose of being injured  
16 and then filing a suit.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Breyer, anything further?

19 Justice Alito?

20 JUSTICE ALITO: I -- I'm not sure I  
21 understand your explanation why the repayment  
22 of this loan is a gift when the repayment of  
23 other loans is never considered a gift.

24 If we were writing an opinion in your  
25 favor on the merits, how would we explain that?

1           MR. STEWART: I -- I mean, suppose you  
2     have a federal officer who it -- it -- it has  
3     become publicized that he loaned money to  
4     somebody and that person defaulted, didn't pay  
5     him back. And so the can -- the -- the federal  
6     officeholder is out \$10,000.

7           And some other person comes in and  
8     says: I want to make this -- the officer hold  
9     because I -- whole because I respect what he's  
10    doing, I'm going to give him the \$10,000.

11           That would surely be a gift for  
12    purposes of the separate limitations on gifts  
13    to federal officeholders.

14           JUSTICE ALITO: I'm curious. In that  
15    case, you have the intervention by a third  
16    party. You don't have the repayment of the  
17    loan by the person who -- to whom the loan was  
18    given in the first place.

19           MR. STEWART: I -- I think the gift  
20    rules would cover indirect gifts as well. And  
21    so, if -- if, rather than giving the money  
22    directly to the officeholder in my  
23    hypothetical, the -- the person had given money  
24    to the borrower, the borrower who was otherwise  
25    in default, and said I'm giving you this money



1 on the understanding that you will pay it to  
2 the officeholder in satisfaction of your debt,  
3 I think that would count as a gift for purposes  
4 of the gift rules.

5 It would certainly implicate the  
6 interests that underlie the gift rules because  
7 it would be apparent that the effect of this  
8 practice was to make the officer richer than he  
9 otherwise would be at this point in time, even  
10 though it didn't make him any richer than he  
11 had been before the loan was made.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Sotomayor?

14 JUSTICE SOTOMAYOR: Counselor, the  
15 Chief asked a question about how do you  
16 determine where the risk of corruption arises.  
17 Congress has chosen the \$250,000 figure. But I  
18 guess what he was asking is, is that figure  
19 defensible and on the basis of what?

20 MR. STEWART: I think there are two  
21 ways you can defend Congress's ability to -- to  
22 set some cap and -- and not simply to impose a  
23 blanket prohibition on all use of post-con- --  
24 post-election contributions for candidate  
25 repayment.

1           The first is Congress can balance  
2 competing interests, and the Court often says  
3 no law pursues its principal objective to -- to  
4 the furthest possible degree. So Congress  
5 could say: We also want to make it feasible  
6 for candidates to use loans as seed money to  
7 finance their campaigns and we're going to  
8 strike a balance.

9           The other thing I'd say is I do think  
10 a large outstanding balance creates a  
11 corruptive potential that a small one may not  
12 because, if an officeholder is confident that  
13 he will be able to receive enough in  
14 post-contribution -- post-election  
15 contributions to repay the loan with a  
16 substantial cushion, then no one donor can say  
17 I made you richer than I otherwise would be.

18           No one donor will have significant  
19 leverage over the -- the candidate. And, by  
20 contrast, if the loan is large and the  
21 candidate is unsure whether repayment will be  
22 forthcoming, then each potential donor has  
23 greater leverage.

24           And Congress could use a dollar  
25 threshold as -- as a rough surrogate for a loan

1 that implicates this uncertainty about whether  
2 full repayment will be forthcoming.

3 And with respect to the \$250,000  
4 figure in particular, I think that's just the  
5 same as what the Court said in Buckley about  
6 the individual contribution limit, that once we  
7 are satisfied that some limit is warranted, we  
8 don't probe with a scalpel to determine whether  
9 they -- the one that Congress has chosen is the  
10 -- the precisely best one.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: Mr. Stewart, part of  
13 Mr. Cooper's argument is that we should  
14 analogize this to an expenditure limit. You  
15 know, in the same way that our law has -- has  
16 -- has clearly held you can't limit a  
17 candidate's ability to spend money on his own  
18 campaign, so too it -- it -- it's -- it's --  
19 it's -- it's a similar burden to say that the  
20 candidate can't loan as much money as he wants  
21 to to his campaign.

22 And I'm wondering what you think the  
23 difference is between those two propositions.

24 MR. STEWART: I -- I think there are  
25 really two differences.

1           First, one of the reasons that the  
2 Court in Buckley gave for why expenditure  
3 limits were no good was that a candidate's own  
4 expenditures on his campaign will typically  
5 reduce the likelihood of corruption because the  
6 candidate will be less dependent on outside  
7 contributors for the -- the running of the  
8 campaign.

9           And -- and a loan, to the extent that  
10 it can be repaid with post-election  
11 contributions, really has the opposite effect.  
12 It causes the candidate to be more dependent on  
13 outside contributors not just for running the  
14 campaign but for his own personal financial  
15 well-being.

16           And the other thing I would say is the  
17 -- the Court set in Buckley a -- a limit on the  
18 amount of money that you can spend on campaign  
19 speech is de facto a limit on the amount --  
20 amount of speech that you can engage in  
21 because, in the -- even in the 1976 modern  
22 world, let alone the -- the current world,  
23 effective electoral speech requires  
24 expenditures of money, and so a limit on  
25 expenditures limits speech.

1           Here, the impact is much more  
2   attenuated and uncertain; that is, when they  
3   say that speech will be suppressed, what they  
4   mean is some number of candidates will be less  
5   willing to lend money to their campaigns or  
6   will be willing to lend less money and, as a  
7   result, fewer funds will be available to the  
8   campaigns to engage in speech.

9           There may be some marginal effect of  
10   that nature, but it's much less direct and  
11   immediate than a limit on the amount of money  
12   that the candidate can actually spend.

13           CHIEF JUSTICE ROBERTS: Justice  
14   Gorsuch, anything further?

15           JUSTICE KAVANAUGH: Yeah. You said  
16   earlier, Mr. Stewart, it's not a limit on the  
17   amount that a candidate can spend or even loan.  
18   And I want to focus on that, or even loan,  
19   because it would seem to me that the law puts  
20   the candidate to a choice of spending your own  
21   money for a loan above \$250,000 or forgoing --  
22   forgoing repayment of any amount above 250 --  
23   and forgoing any repayment for an amount above  
24   \$250,000, so the choice is to spend that  
25   without any possibility of -- of getting it

1 back or not spending it at all.

2 And that seems to be, therefore, a  
3 chill on your ability to loan your campaign  
4 money. Why is that not right?

5 MR. STEWART: I -- I think the third  
6 option is loan the cam- -- you can loan the  
7 campaign as much money as you want and you can  
8 get full repayment as long as the loan is  
9 repaid with pre-election funds. And --

10 JUSTICE KAVANAUGH: Well, suppose --  
11 sorry to interrupt -- but it's a close  
12 election. You're emptying the coffers. It's  
13 down to the wire. There are no pre-election  
14 funds left. That's how close elections work.  
15 You spend it all a lot of times or come close  
16 to it, so you have to rely on post-election  
17 funds.

18 In that instance, the candidate coming  
19 down in the last few days is quite a bit  
20 chilled from using his or her own resources  
21 above \$250,000 because there's no possibility  
22 of repayment under this statute, even in \$2900  
23 chunks.

24 MR. STEWART: I -- I think the two  
25 things -- I -- I'd first concede your premise

1 that there will be situations in which very  
2 close to the election the candidate will be  
3 faced with a choice of either limiting the size  
4 of the loan he makes or being willing to -- to  
5 eat a portion of it.

6 I -- I think the two things I would  
7 say are, first, Congress has the -- the  
8 objective that it has of reducing candidates'  
9 reliance on outside contributors for financial  
10 well-being, and Congress can be concerned about  
11 candidates who put themselves in their position  
12 where, in order to be repaid in full, they have  
13 to solicit post-election contributions from  
14 donors who know that the candidate has won and  
15 know that the donor is dependent on new money  
16 in order to be made whole.

17 The second thing I would say is, even  
18 if you thought the statute would be  
19 unconstitutional as applied to that particular  
20 scenario, it wouldn't be a basis for -- for  
21 accepting the as-applied challenge here because  
22 the campaign here made the -- the loan for an  
23 entirely different purpose, and it wouldn't be  
24 --

25 JUSTICE KAVANAUGH: One -- one more --

1 one more, sorry, but why allow the \$2900  
2 repayments up to the \$250,000 cap then? Aren't  
3 those people who give those \$2900 post-election  
4 contributions also triggering the same  
5 corruption problem that happens with the person  
6 who happens to give the \$2900 when the 250 cap  
7 has been exceeded?

8 MR. STEWART: I -- I guess the two  
9 things I would say are closely related to what  
10 I said before.

11 The -- the first is, if the loan is  
12 small and the candidate is very confident of it  
13 being repaid, then the -- no individual donor  
14 will have particular leverage over the  
15 candidate.

16 And the second is it -- it --

17 JUSTICE KAVANAUGH: Well, timeout  
18 there. It's \$2900 from each person. And the  
19 theory has to be that each person's \$2900  
20 triggers -- in a post-election contribution,  
21 triggers some corruption appearance problem.

22 I don't see why that's different where  
23 your \$2900 comes in the wall before or after  
24 you exceed the 25 -- 250 cap.

25 MR. STEWART: I agree. And as we said



1 in the opening brief, we think Congress  
2 constitutionally could have eliminated all use  
3 of post-election contributions to repay  
4 candidate loans. Indeed, I think Congress  
5 constitutionally could forbid post-election  
6 contributions altogether and could say any  
7 money that is donated after one election has to  
8 be directed to -- to the next one.

9 And the question is just can Congress  
10 attempt to balance competing interests, or can  
11 it focus on the very worst manifestation --  
12 manifestations of the behavior without having  
13 the statute held unconstitutional?

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Barrett?

17 JUSTICE BARRETT: Mr. Stewart, I want  
18 to give you a chance to talk a little bit about  
19 the other side of the balance. The Chief  
20 pointed out we're balancing burdens against the  
21 government's interest in stopping corruption.

22 And the court below found that you  
23 hadn't introduced sufficient evidence of  
24 corruption coming from these post-election  
25 contributions both because there wasn't factual

1 evidence, there was conflicting legislative  
2 history, and the difficulties with this YouGov  
3 survey.

4 So, given that there wasn't any  
5 evidence of actual quid pro quo corruption  
6 causing problems, do you want to address that?

7 MR. STEWART: I think the -- the --  
8 maybe the three things I would say are, first,  
9 we do think there's an analogy to the gift  
10 rules. And so, when Congress is building upon  
11 an existing body of law, there -- there's less  
12 need to -- four things, actually. There's --  
13 there's less need to make a new record.

14 The second is Congress is owed a  
15 certain amount of deference both because it's a  
16 coordinate branch of government and because it  
17 has special knowledge about the way that  
18 campaign financing works. The --

19 JUSTICE BARRETT: But even in a case  
20 where some heightened scrutiny applies of some  
21 sort?

22 MR. STEWART: I think, to the extent  
23 that you are asking is this a -- a realistic  
24 fear or is this a -- is this a theoretical  
25 practice that we would expect to materialize,

1 then, yes, you would give some weight to  
2 Congress's judgment, even if you're applying  
3 heightened scrutiny. Certainly, with respect  
4 to contribution limits, the Court has given  
5 some deference to the legislative judgment even  
6 though it applies closely drawn scrutiny.

7           The third thing I would say is we have  
8 introduced, I think, significant evidence  
9 showing that people in the real world think  
10 this is a problem. People in the real -- not  
11 -- not -- I don't mean the -- the recipients of  
12 the surveys. I mean the -- the commentators,  
13 the people who follow politics closely. They  
14 -- they may disagree as to the extent, but they  
15 -- they agree that this is actually a practice  
16 of concern.

17           And then the fourth thing I would say  
18 is BCRA's on -- been on the books for 20 years,  
19 and so, in the nature of things, it's difficult  
20 to amass empirical evidence about what would  
21 have happened if BCRA had not been the law.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24           MR. STEWART: Thank you.

25           CHIEF JUSTICE ROBERTS: Mr. Cooper.

1 ORAL ARGUMENT OF CHARLES J. COOPER

2 ON BEHALF OF THE APPELLEES

3 MR. COOPER: Thank you, Mr. Chief

4 Justice, and may it please the Court:

5 The government's arguments against  
6 Senator Cruz's standing are meritless.

7 First, even assuming, as the  
8 government claims, that Cruz's \$10,000 injury  
9 was directly caused by the 20-day regulation  
10 and not by operation of Section 304 itself, the  
11 government cannot escape the fact that the  
12 20-day rule is parasitic to Section 304. It  
13 has no life independent of the authorizing  
14 statute. And so, if Section 304 is invalid,  
15 then the 20-day rule is per force also invalid.

16 Nor does it matter whether Cruz's  
17 \$10,000 injury was self-inflicted. At least  
18 since Mr. Plessy sat down in the train car  
19 reserved for whites, this Court has repeatedly  
20 held that a plaintiff who deliberately subjects  
21 himself to the injury of unconstitutional  
22 government action for the admitted purpose of  
23 challenging it has created his standing, not  
24 defeated it.

25 On the merits, the government defends

1 Section 304 as a measure that serves to protect  
2 against what it says is the special threat of  
3 quid pro quo corruption from the use of  
4 post-election contributions to repay candidate  
5 loans.

6 But Section 304 permits up to \$250,000  
7 worth of such post-election contributions. So,  
8 according to the government, Congress  
9 effectively gives a corruption hall pass to the  
10 first 86 donors who max out after an election  
11 but abruptly closes the corrupt -- corruption  
12 window on donor number 87.

13 That incongruity alone -- and there  
14 are many others -- betrays the genuine and  
15 illegitimate purpose of the loan repayment  
16 limit. It is to level the playing field, as  
17 its sponsor in the Senate openly proclaimed.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Mr. Cooper, could you  
20 just take a minute and tell us exactly whose --  
21 how this loan repayment regulation or provision  
22 affects speech or impedes speech? Is it the  
23 speech of candidate -- of Senator Cruz? Is it  
24 the speech of his donors?

25 It's one thing to -- to say that,

1 well, it burdens it in some way, but I -- I'd  
2 like you just to precisely tell us whose speech  
3 and what speech and how it does that.

4 MR. COOPER: Well, thank you, Mr.  
5 Justice.

6 It -- it most dominantly burdens and  
7 creates a drag on the campaign's speech, on the  
8 candidate's speech. If -- if a candidate has  
9 to go through the calculus of deciding whether  
10 or not I'm going to loan more than \$250,000 to  
11 my campaign because my ability to have it  
12 repaid is going to be compromised by the  
13 statute and by the regulation, Your Honor, to  
14 whatever extent the candidate doesn't loan that  
15 additional money, that candidate is forgoing  
16 the speech that that additional money would --  
17 would -- would purchase, as Justice Kavanaugh  
18 mentioned.

19 JUSTICE KAGAN: Of -- of course, Mr.  
20 Cooper, the candidate can spend all the money  
21 he wants of his own money. I mean, put aside  
22 the loan question. He can spend a gazillion  
23 dollars of his own money if he wants to on his  
24 campaign, right?

25 MR. COOPER: That's true --

1 JUSTICE KAGAN: So -- so --

2 MR. COOPER: -- by Constitution.

3 JUSTICE KAGAN: I'm sorry?

4 MR. COOPER: Under the First  
5 Amendment.

6 JUSTICE KAGAN: So -- so this  
7 restriction, which is a restriction on loan  
8 repayment, is really a restriction on how a  
9 candidate can use third parties to finance his  
10 speech, isn't it?

11 MR. COOPER: Your Honor, no more so  
12 than any other campaign contribution.

13 JUSTICE KAGAN: Correct.

14 MR. COOPER: Every time -- every --

15 JUSTICE KAGAN: I think -- I think  
16 that that's exactly right. It's a restriction  
17 on how a candidate can use third parties to  
18 finance his speech, which is exactly what  
19 contribution limits are. From the candidate's  
20 perspective, it's one and the same thing. Is  
21 that -- is that right?

22 MR. COOPER: No, Your Honor. A loan  
23 is clearly a form of self-financing by the  
24 candidate. Obviously, to whatever extent --  
25 whatever extent that that loan is not repaid,

1 it does become a contribution. But the  
2 important thing is that that --

3 JUSTICE KAGAN: I guess I don't really  
4 quite understand the distinction. If -- if --  
5 if this is a restriction on how a candidate can  
6 use third parties to finance his speech, not a  
7 restriction on how the candidate finances his  
8 own speech but a restriction on third-party  
9 financing of the campaign, why isn't it  
10 completely identical to contribution limits,  
11 which we have a well-established set -- law  
12 which is very different from our law respecting  
13 expenditures?

14 MR. COOPER: Your Honor, when a --  
15 when a candidate loans his own money to his own  
16 campaign to purchase speech to increase the  
17 amount of expression in the advocacy of his own  
18 election, as Buckley protects, that candidate  
19 is calling upon the candidate's own financial  
20 wherewithal. That is an expenditure --

21 JUSTICE KAGAN: Well, for -- for --  
22 for --

23 MR. COOPER: -- the statute itself --

24 JUSTICE KAGAN: -- for a time, until  
25 the third parties repay that money. So it's



1 not an expenditure. It's -- it's -- it's just  
2 a financing mechanism. It's a timing mechanism  
3 that puts contributions -- that enables you to  
4 switch contributions at one time to  
5 contributions at another time.

6 MR. COOPER: And, Your Honor, the --  
7 the -- the Congress has placed no limit  
8 whatsoever on the amount of loans that a  
9 candidate may make and may be pre- -- paid back  
10 with pre-election contributions.

11 The -- the -- the -- the place where  
12 this loan restriction creates a drag, Your  
13 Honor, is with particularly challengers. And  
14 that was its purpose. It -- it creates a drag  
15 because a challenger who needs and can't rely  
16 on contributions early in a campaign and has to  
17 get his campaign off the ground often has to  
18 loan that campaign money, Your Honor, and --  
19 and that becomes critical to the campaign's  
20 ability to speak on that day, on that day.

21 JUSTICE KAGAN: But it --

22 MR. COOPER: So, to the extent --

23 JUSTICE KAGAN: -- it just limits the  
24 amount of speech that a candidate can make on  
25 somebody else's dime. It does not limit the

1 amount of speech that a candidate can make on  
2 his own dime.

3 And what I'm suggesting is that when  
4 we think about limits on the amount of speech  
5 that a candidate can make on somebody else's  
6 dime, the appropriate place to look in the law  
7 of campaign finance is to the law respecting  
8 contribution limits rather than expenditure  
9 limits.

10 MR. COOPER: Well, Your Honor, I would  
11 simply push back by saying the statute itself  
12 defines loans as a thing of value. It defines  
13 loans as an expenditure.

14 The Congress recognizes that when a --  
15 when a candidate calls upon his own financial  
16 resources to -- to fund his campaign, even if  
17 it is ultimately a loan and hopefully is going  
18 to be repaid by contributions and any other  
19 fundraising by the campaign itself, those are  
20 the candidate's own funds.

21 And -- and, again, Congress has -- has  
22 itself defined that as an expenditure.

23 JUSTICE BREYER: However you  
24 characterize it, haven't you just answered your  
25 own question? You started out by saying this

1 is very incongruous because they let you --  
2 you're limited before election to 2900 and --  
3 \$2900.

4 Why? Because we're afraid, take as a  
5 given, that \$2901 will be seen as buying  
6 something else and the election will be seen as  
7 a corrupt thing, possibility. That's why  
8 that's supposed to be okay, all right?

9 So you say now Mr. Jones gives Mr.  
10 Smith the same \$2901, but he gives it having  
11 known that Mr. Smith was elected. So whatever  
12 -- whatever appearance was there beforehand, it  
13 seems to be worse after, you see.

14 But why then do they allow 250,000?  
15 And you just answered it: Because, with  
16 250,000, you can help candidates challenge  
17 incumbents. We can help the candidate who  
18 isn't too popular at the beginning but has  
19 assurance that I will become.

20 So Congress has two conflicting  
21 interests. On the one hand, it wants to help  
22 those candidates challenge the incumbents or  
23 poor candidates or ones who have great  
24 confidence, and, on the other hand, it doesn't  
25 want the 200 -- 2,901 appearance. You have two

1 conflicting interests. We'll resolve them.  
2 Raise the amount. Instead of 2,901, it becomes  
3 250,000, okay?

4 So what's incongruous about that? I  
5 don't see anything incongruous. I just see  
6 conflicting interests, and, here, they have a  
7 -- a compromise. What's wrong with that?

8 MR. COOPER: Your Honor, the -- the  
9 contribution base limits apply whether the  
10 contribution is made before the election or  
11 made after the election. And, Your Honor, this  
12 Court said in McCutcheon that, so long as the  
13 contribution base limits apply, then Congress  
14 has determined that there is no cognizable risk  
15 of corruption.

16 So a -- a limit -- a -- a contribution  
17 made after the election has no more cognizable  
18 risk of corruption than one made before the  
19 election. It still --

20 JUSTICE BREYER: Well, yes, but you  
21 say, yes, it does, you're right, absolutely  
22 right. The only problem here is, in addition  
23 to being a contribution or however you want to  
24 characterize it, you are also helping the  
25 candidate put money up front, and that is a pro

1 -- that is a pro-competitive democratic  
2 interest.

3           And, therefore, the interest with --  
4 the interest that we're trying to deal with --  
5 the same point I just made -- it's not  
6 incongruous. There is a risk of corruption  
7 once you get to 2901, but it isn't a pure  
8 contribution. It is paying back money that the  
9 candidate advanced, and that's a plus, and it's  
10 a big plus.

11           And so we say we will, with this  
12 particular kind of contribution -- which isn't  
13 really a contribution, it's a payback -- with  
14 this particular kind, we'll offset. That's the  
15 same point I just made. I just don't see an  
16 incongruity in that.

17           MR. COOPER: Your Honor, it -- it  
18 seems, and I would submit to you, it is very  
19 incongruous. If Congress, as the government  
20 suggests, is concerned about the corrupting  
21 effect of post-election contributions, that it  
22 has allowed \$250,000 worth of those very  
23 post-election corrupting contributions.

24           JUSTICE BREYER: Yes. Yes. Correct.

25           MR. COOPER: Everybody is, Your Honor,

1 limited by the base contribution limits. All  
2 contributors are.

3 JUSTICE BREYER: Yeah.

4 MR. COOPER: But, here, we have 86  
5 contributors who get to come in and --

6 JUSTICE BREYER: Yeah.

7 MR. COOPER: -- and make this alleged  
8 gift --

9 JUSTICE BREYER: Why?

10 MR. COOPER: -- to -- to --

11 JUSTICE BREYER: Why? Why do -- why  
12 might Congress want to let them do that? I've  
13 -- I've -- I've said the same thing in my  
14 question. I don't know if I need to repeat it.  
15 But you haven't quite said why that's a bad  
16 reason.

17 Why might they want to do that? They  
18 want to do it -- and I'll repeat for the third  
19 time -- because they want to encourage  
20 candidates to loan money to their campaign at  
21 least for a while until they take off.

22 MR. COOPER: They --

23 JUSTICE BREYER: That's a  
24 pro-democratic interest.

25 MR. COOPER: They actually want to

1 discourage candidates. The whole purpose of  
2 the -- of -- of -- of Section 304 is to deter  
3 candidates from loaning money to their  
4 campaign, at least money that might make a  
5 difference, money and -- above the \$250,000  
6 level.

7 JUSTICE KAVANAUGH: On -- on Justice  
8 Breyer's question, I think you're saying, if  
9 the interest were truly anti-corruption, they  
10 shouldn't allow any post-election contributions  
11 because each person is similarly situated in  
12 terms of threatening that corruption interest,  
13 whether it's the first one or the 87th one. Is  
14 that --

15 MR. COOPER: That's precisely --

16 JUSTICE KAGAN: Well, each --

17 MR. COOPER: -- my point.

18 JUSTICE KAGAN: -- person might be  
19 similarly situated, the first and the 87th, but  
20 the candidate is not similarly situated. The  
21 candidate with \$3,000 of debt is a lot less  
22 likely to start thinking about how he can sell  
23 his votes than the candidate with \$500,000 of  
24 debt.

25 So the candidate is in a very

1 different situation the more the debt mounts.  
2 And Congress here came in and said these are  
3 hard things. We're striking balances. We're  
4 picking \$250,000 at the time where candidates  
5 really start worrying about the kind of debt  
6 that they have and the kinds of things that  
7 they can do to reduce that debt.

8 So even though it is formally true  
9 that the 87th person is the same as the first  
10 person in terms of they both spent \$2900, at  
11 the 87th person, the candidate is in a very  
12 different situation and is thinking about those  
13 quid pro quos.

14 MR. COOPER: He's thinking about them,  
15 Your Honor, because Congress has not allowed  
16 the 87th person to come in and make that claim.  
17 And I'm glad you have focused on the candidate,  
18 and the candidate as the candidate is deciding  
19 whether he's going to call upon his own  
20 financial wherewithal to fund speech, Your  
21 Honor, First Amendment political speech.

22 He is going to think twice, yes, if he  
23 can't afford to just give his campaign money,  
24 he's going to think twice whether or not he  
25 loans more than \$250,000 in -- in -- in -- in



1 order to advocate his -- of his own money to  
2 advocate his own election. And that was the  
3 purpose of Section 304, to make sure that --  
4 that the challenger didn't loan more than  
5 \$250,000 to his campaign or at least that if he  
6 did --

7 JUSTICE KAGAN: Well, this goes back  
8 --

9 MR. COOPER: -- he accepted that risk.

10 JUSTICE KAGAN: -- to my first  
11 question, which I think we've probably covered  
12 in sufficient detail, but it's just the same as  
13 Congress saying we're not going to allow a con-  
14 -- a -- a -- a candidate to go get a \$500,000  
15 contribution from somebody.

16 That's another way that the candidate  
17 could finance his campaign. So -- so --

18 MR. COOPER: I -- I -- I -- I'm sorry.

19 JUSTICE KAGAN: -- this is not  
20 candidate expenditure. This is candidate  
21 financing of a campaign. It's a structure to  
22 allow a candidate to finance a campaign without  
23 spending any of his own money.

24 MR. COOPER: Your Honor, if I  
25 understood your -- your -- your point

1 correctly, I -- I don't think it's at all  
2 comparable that you -- that you have many  
3 contributors contributing only the based limit  
4 at most versus a single contributor  
5 contributing \$500,000.

6 The base limits, again, under  
7 McCutcheon and under common sense, are  
8 Congress's judgment that anything at that  
9 amount or below has no cognizable risk of  
10 corruption. And so --

11 JUSTICE KAGAN: Right. I was just  
12 suggesting that the kind of burden this is is  
13 the kind of burden that expended -- that  
14 contribution limits are, not the kind of burden  
15 that expenditure limits are.

16 And our law treats those two burdens  
17 very differently. That's --

18 MR. COOPER: Yes.

19 JUSTICE KAGAN: -- that's the point I  
20 was making.

21 MR. COOPER: And I well understand  
22 that. And my -- my response is that these are  
23 expenditures, Your Honor, and the -- and the  
24 law that governs contributor limits applies to  
25 all of them across the board.

1 JUSTICE KAVANAUGH: But don't you have

2 --

3 MR. COOPER: It doesn't say that the  
4 first 86 --

5 JUSTICE KAGAN: I don't understand,  
6 Mr. Cooper --

7 MR. COOPER: -- are preferred to the  
8 87th.

9 JUSTICE KAGAN: -- why you contest  
10 that this is like a gift. I -- I guess this  
11 puzzles me. If I have a debt of \$10,000 and  
12 somebody comes along and says you're doing such  
13 a good job, I'm going to re- -- I'm going to  
14 pay that debt off for you, isn't that a  
15 financial benefit to me?

16 MR. COOPER: Of course.

17 JUSTICE KAGAN: It's a gift.

18 MR. COOPER: And that would be --  
19 you're describing a gift. But the repayment of  
20 a loan, Your Honor, is not a gift.

21 JUSTICE KAGAN: But a third party is  
22 repaying my loan, and so the third party is  
23 providing a gift to me.

24 MR. COOPER: Your Honor --

25 JUSTICE KAGAN: I mean, that's just

1 like of course, right?

2 MR. COOPER: Your Honor --

3 JUSTICE KAGAN: If a third party says  
4 you're doing such a good job, I want to repay  
5 your loan for you, I mean, one day I had a  
6 \$10,000 loan; the next day I don't. I'm  
7 \$10,000 richer. Somebody just made me a  
8 \$10,000 gift.

9 MR. COOPER: Your Honor, if -- if a  
10 contributor comes in and gives the can -- the  
11 candidate a \$10,000 gift, then, yes, that --  
12 that violates not just the gift statutes but --  
13 but, if -- if there's a quid pro quo involved,  
14 the bribery statutes.

15 This is a -- we're -- we're talking  
16 about campaign --

17 JUSTICE KAGAN: But that's the entire  
18 point of this law. I mean, the entire point of  
19 this law is that we start getting worried when  
20 people start repaying the candidate's  
21 indebtedness because that's just another way of  
22 putting money in his pocket.

23 MR. COOPER: Your Honor, it -- what  
24 about the rest of the campaign's debts? This  
25 campaign ended up with \$2.7 million worth of

1 debt. Only 10 percent -- less than 10 percent  
2 of it was the candidate's debt. Is every  
3 contribution made after the election a gift to  
4 all of those creditors? Of course it's not.

5 And nobody would view it that way.  
6 It's not a gift, Your Honor, when a -- a -- a  
7 -- the -- when the debtor pays the creditor  
8 what the creditor is owed. And that's -- and  
9 that's what we have here.

10 Yes, it is true that all of the  
11 campaign's debts are paid by contribute -- con-  
12 -- contributions limited by the base  
13 contribution limits. All of them are. But the  
14 -- the candidate's debts don't stand in any  
15 different shoes from the ad agency's or the  
16 consultants' or the landlords' of a campaign.

17 JUSTICE KAGAN: Well, it stands in --

18 JUSTICE ALITO: Mr. Cooper, is -- does  
19 this statute apply any differently to  
20 candidates who lose than to candidates who win?

21 MR. COOPER: No, Your Honor, it  
22 doesn't. It applies to losers as well as to  
23 winners. And that's -- in that respect, it's  
24 over-inclusive. It's under-inclusive in many  
25 respects, but it's over-inclusive in that

1 respect.

2 JUSTICE SOTOMAYOR: Counselor, what is  
3 the possibility that a loser is going to  
4 necessarily or in most instances get  
5 contributions afterwards?

6 MR. COOPER: Your Honor, certainly,  
7 losers of elections typically are not able to  
8 generate post- --

9 JUSTICE SOTOMAYOR: So, generally, we  
10 don't look at people who are not likely to be  
11 injured when we're deciding the  
12 constitutionality of a statute?

13 MR. COOPER: Your Honor, to whatever  
14 extent the -- the -- Section 304 and the loan  
15 repayment limit does operate with re- -- on a  
16 loser to prevent repayment of a loan, it  
17 operates in the same way. Yes, I certainly  
18 concede that the opportunity for losers to --  
19 to -- to generate post-election contributions  
20 are nothing like winners'.

21 CHIEF JUSTICE ROBERTS: Counsel --

22 JUSTICE ALITO: Well, they may not  
23 have the same -- I'm sorry, Chief.

24 CHIEF JUSTICE ROBERTS: -- just to  
25 return briefly to the standing issue, accepting

1 your stipulation, as Mr. Stewart does, about  
2 the \$250,000 being paid out of pre-election  
3 funds, the statute itself imposes no burden on  
4 you paying the remaining 10,000 out of  
5 post-election funds, right?

6 MR. COOPER: The statute does not.

7 CHIEF JUSTICE ROBERTS: The statute  
8 itself.

9 MR. COOPER: The statute does not.  
10 The regulation does --

11 CHIEF JUSTICE ROBERTS: The regulation  
12 does.

13 MR. COOPER: -- if you accept his  
14 reading of that --

15 CHIEF JUSTICE ROBERTS: I know. We're  
16 -- we're beyond that.

17 MR. COOPER: Yeah. If you accept it.

18 CHIEF JUSTICE ROBERTS: Or at least  
19 for purposes of the hypothetical.

20 MR. COOPER: Yes, Your Honor.

21 CHIEF JUSTICE ROBERTS: So it's only  
22 the regulation that imposes the injury on you.  
23 Now you say, well, it's a -- in your evocative  
24 manner, it's a parasite on the -- the Act, and  
25 so you should be able to challenge the Act.

1 And I'll give you that, again, for purposes of  
2 the hypothetical.

3 But that's not the question. The  
4 question is, do you get a three-judge court?  
5 And, in that respect, your challenge is only to  
6 the regulation, not to the constitutionality of  
7 the statute. So -- and the parasite doesn't  
8 help you because, yes, if you're in district  
9 court, I think you're -- you're right that you  
10 can challenge the statute that gave birth to  
11 the regulation, if you don't want to use the  
12 parasite, then -- but that's a different  
13 question.

14 The question is your access to the  
15 three-judge district court.

16 MR. COOPER: Mr. Chief Justice, with  
17 respect, I don't believe it is a different  
18 question, and it's not because the -- the -- it  
19 is true that the regulation is the immediate  
20 cause of the injury to -- to the campaign and  
21 its inability to pay back \$10,000 of that loan.

22 But, Your Honor, that -- the -- the --  
23 the -- the cause, it is fairly traceable to the  
24 statute itself. And even if we had never made  
25 a claim, any independent claim against the



1 regulation, and had only --

2 CHIEF JUSTICE ROBERTS: But you win --

3 MR. COOPER: -- made a constitutional  
4 claim --

5 CHIEF JUSTICE ROBERTS: Sorry to  
6 interrupt. But you win, regardless of whether  
7 the statute is constitutional or  
8 unconstitutional, if you're able to strike the  
9 regulation, for example, that it's arbitrary  
10 and capricious or some other administrative law  
11 basis. So you do not have the requirement of a  
12 constitutional challenge that's necessary to  
13 trigger the three-judge district court.

14 MR. COOPER: Your Honor, if -- if I  
15 had a independent constitutional challenge  
16 against the regulation, then I would not need  
17 to --

18 CHIEF JUSTICE ROBERTS: Right.

19 MR. COOPER: -- to challenge and  
20 defeat the --

21 CHIEF JUSTICE ROBERTS: Right, if you  
22 had a constitutional --

23 MR. COOPER: -- authorizing statute.

24 CHIEF JUSTICE ROBERTS: -- a  
25 constitutional challenge to the regulation.

1           MR. COOPER: I don't know what  
2 constitutional challenge I would have to the  
3 regulation, other than the notion that it was  
4 arbitrary and capricious. And, yes, we did  
5 make that claim.

6           But -- but -- but, Your Honor, if --  
7 if my only challenge to the regulation is that  
8 its authorizing statute is unconstitutional, I  
9 can still challenge the authorizing statute.  
10 Again, the --

11           CHIEF JUSTICE ROBERTS: I don't -- I  
12 think that's right if you're in --

13           MR. COOPER: Yes.

14           CHIEF JUSTICE ROBERTS: -- district --  
15 normal district court, you have one judge up  
16 there. But, if you're seeking a three-judge  
17 district court, I don't know that a challenge  
18 to the regulation is enough to get you in --

19           MR. COOPER: Well --

20           CHIEF JUSTICE ROBERTS: -- because you  
21 -- you prevail if you strike the regulation  
22 down under arbitrary and capricious grounds,  
23 and you would be making that argument. And  
24 that's not a constitutional argument. That's  
25 an administrative law argument.

1           MR. COOPER: But if -- but if I had  
2 never made those claims and I had only claimed  
3 --

4           JUSTICE BREYER: Yeah, but -- but it  
5 isn't absolute. Can I pick up --

6           MR. COOPER: -- surely, if --

7           CHIEF JUSTICE ROBERTS: Go ahead. I'm  
8 --

9           MR. COOPER: Surely, Your Honor, the  
10 -- the injury, the actual injury, is fairly  
11 traceable, that's the standing -- the standard  
12 here, fairly traceable to the host, if you  
13 will, authorizing statute.

14          JUSTICE GORSUCH: If you --

15          JUSTICE BREYER: Think of this. Think  
16 of this, because this is actually, I think, an  
17 unanswered question, and I don't know the  
18 answer.

19                 Look, imagine there's a challenge to  
20 the SEC, okay? Improperly constituted.

21          MR. COOPER: Yes.

22          JUSTICE BREYER: And the person's hurt  
23 because of a regulation. He says the agency's  
24 improperly constituted. And I don't think  
25 there's any problem. We haven't had a problem

1 reaching the constitutional issue.

2 But does this three-judge court  
3 statute intend to pick up that kind of  
4 constitutional issue where the distance between  
5 what you're complaining about and the  
6 regulation that actually hurts you is pretty  
7 broad?

8 Now I have a hard time thinking the  
9 answer's, yes, always you can, and I have a  
10 hard time thinking, no, you never can. So any  
11 light you can shed on that to me would be  
12 appreciated.

13 MR. COOPER: Your Honor, my -- the --  
14 the light I want to shed on that is the -- this  
15 Court's standard with respect to the  
16 traceability of the -- of the injury itself.  
17 And I -- I just don't think there's any  
18 question that the -- the injury is fairly  
19 traceable to the statute that gave birth,  
20 Mr. Chief Justice, as you say, to the  
21 regulation itself. It -- it did, indeed, visit  
22 the immediate injury on us.

23 But -- but it's -- you know, it's like  
24 saying the murder committed by Frank Nitti is  
25 not traceable to Al Capone, the man who ordered

1 and paid for it. It's clearly traceable. Our  
2 injury is clearly traceable.

3 JUSTICE KAGAN: Mr. Cooper, do you  
4 think that this regulation is, in fact,  
5 authorized by the statute?

6 MR. COOPER: I -- I haven't -- we --  
7 we did -- we did not have an APA challenge that  
8 it was in excess of statutory authority. We --  
9 we did not advance that argument.

10 And as I sit here today, I can't think  
11 of that argument. I think that the -- that --  
12 that -- that the quest -- or at least I don't  
13 believe we did. I -- I -- I -- but I -- but,  
14 Your Honor, our claim from the beginning was  
15 that the 20-day regulation cannot survive an  
16 unconstitutional authorizing Section 304.

17 JUSTICE KAGAN: I mean --

18 CHIEF JUSTICE ROBERTS: Your -- your  
19 --

20 JUSTICE KAGAN: -- one of the things  
21 that --

22 CHIEF JUSTICE ROBERTS: No, go ahead.

23 JUSTICE KAGAN: -- that makes this  
24 standing argument sort of weird and interesting  
25 is that -- is that the regulation actually

1 doesn't seem to have all that much to do with  
2 the statute. In other words, the regulation  
3 imposes its own requirement that's separate and  
4 apart from what the statutory requirement is.

5           And usually where we see something  
6 like that and we say, well, the regulation went  
7 beyond the bounds of the statute, that's its  
8 own legal problem.

9           MR. COOPER: Yes.

10           JUSTICE KAGAN: I mean, here, we sort  
11 of -- we're sort of thinking about this because  
12 of the way the standing arguments were  
13 presented, but separate and apart from  
14 standing, it just seems as though it's its own  
15 legal problem that this 20-day requirement is  
16 in there in the regulation when it's -- it's --  
17 it's -- it's not mentioned or -- or in some  
18 sense comprehended by the statute itself.

19           And I'm wondering whether we have a  
20 statutory question before we get to any  
21 constitutional question?

22           MR. COOPER: Your Honor, to -- to  
23 whatever extent there are statutory objections  
24 to the 20-day regulation, the parties did not  
25 join that issue.

1 CHIEF JUSTICE ROBERTS: Well, I  
2 mean --

3 MR. COOPER: And I --

4 CHIEF JUSTICE ROBERTS: -- to whatever  
5 extent, I mean, you can see it. It jumps off  
6 the page. I mean, you've got a statute that  
7 does not impose a First Amendment inhibition on  
8 a -- on a -- a -- a candidate, but some  
9 administrator in an agency said, well, I'm  
10 going to add a 20-day limit on these First  
11 Amendment rights.

12 I mean, you're the one telling us how  
13 important they are. Why would you let an  
14 agency make this up on their own? I would have  
15 thought that would be the first -- Count 1 in  
16 your -- your complaint. And the only problem  
17 is that would have had to have been brought  
18 before a single-judge district court.

19 MR. COOPER: That claim would, Your  
20 Honor, if we had brought it as Count 1. But  
21 Count 2, Your Honor, that -- that is the  
22 authorizing statute itself, is  
23 unconstitutional, and so the regulation cannot  
24 survive it, would articulate a -- a claim over  
25 which a three-judge court would have -- would

1 have constitutional jurisdiction or statutory  
2 jurisdiction.

3 JUSTICE ALITO: Mr. Cooper, we  
4 generally don't ask questions during rebuttal,  
5 so I'm going to ask a question now that is  
6 similar to the one that you're being asked, and  
7 I hope Mr. Stewart will address it when he  
8 delivers his rebuttal, and that is whether the  
9 FEC is conceding that the 20-day limit is un-  
10 -- is unlawful? I mean, there's pressure --

11 JUSTICE KAGAN: Because not  
12 authorized, is that --

13 JUSTICE ALITO: Yeah, he hasn't --  
14 they haven't done it up to this point. I mean,  
15 neither one of you -- I don't think either of  
16 you should be pressed to express a view on this  
17 issue which is not the issue in the case.

18 MR. COOPER: Well, it wasn't --

19 JUSTICE ALITO: But Mr. Stewart can  
20 respond to that as -- as he chooses.

21 CHIEF JUSTICE ROBERTS: I would just  
22 say it's an interesting issue. I don't know if  
23 it --

24 (Laughter.)

25 JUSTICE KAVANAUGH: Mr. Cooper, can I



1 follow up on Justice Kagan's questions earlier,  
2 because you were discussing with her whether it  
3 should be analyzed as an expenditure or as a  
4 contribution, and you were pushing back and  
5 saying it should be an expenditure.

6 But, in your brief, you also argued, I  
7 believe, that even if the other level of  
8 scrutiny, closely drawn scrutiny, applied that  
9 attaches to other than expenditures, you still  
10 prevail. And I just wanted you to tell us why  
11 you think that.

12 MR. COOPER: Thank you, Your Honor.  
13 Yes, we believe that any level of heightened  
14 scrutiny, closely drawn scrutiny under  
15 contribution limits, would doom this statute  
16 for the incongruities, if you will, that make  
17 it quite clear, I would submit to you, Justice  
18 Kavanaugh, that the statute itself does not --  
19 it does not advance the interest that Congress  
20 may have in quid -- preventing quid pro quo  
21 corruption.

22 Rather, it advances the illegitimate  
23 interest of incumbent protection and equalizing  
24 and -- and leveling the playing field, that  
25 those interests fit this Section 304 like a

1 glove, Your Honor.

2           The quid pro quo claim -- the -- the  
3 quid pro quo corruption costume that the  
4 government knows it has to dress this -- this  
5 statute in because it's the only interest that  
6 this Court has accepted as sufficiently  
7 compelling to justify a drag on First Amendment  
8 rights just -- just doesn't fit. It just  
9 doesn't fit.

10           JUSTICE KAGAN: Mr. Cooper, I have --  
11 I have to say the opposite intuition. I mean,  
12 I understand the equalization argument, and if  
13 I think about it, I can understand how an  
14 equalization interest would support this law.

15           But, honestly, the thing that to me  
16 jumps off the page is that when contributors  
17 find a way to put money not in the campaign but  
18 into a candidate's own personal pocket, when --  
19 when -- when -- when the question is  
20 contributors repaying indebtedness of the  
21 candidate so as to make the candidate himself  
22 financially better off, richer, that to me  
23 screams quid pro quo corruption -- corruption  
24 interest, not equalization interest.

25           MR. COOPER: Well, even -- even if you

1 attribute that interest to this statute, it  
2 just doesn't do it in a rational way. It -- it  
3 places no limit, Your Honor, on the  
4 pre-election contributions that a candidate may  
5 use to repay the candidate. And those alleged  
6 gifts to the candidate, it makes no limit on  
7 that.

8           It only makes a limit on \$250,000 of  
9 post-election contributions, and, Your Honor,  
10 again, it only does that for the 87th max-out  
11 contributor. It makes no sense to say that the  
12 first 86 get to -- get to make that gift, Your  
13 Honor.

14           It -- it -- it -- those gifts apply no  
15 less to every other creditor of the campaign  
16 than they apply to the -- the candidate  
17 himself, and the idea that those gifts is just  
18 not, I would submit --

19           JUSTICE SOTOMAYOR: Counsel --

20           MR. COOPER: -- a serious point.

21           And, finally, those gifts are limited  
22 by the base contribution limits that this Court  
23 in McCutcheon made clear that Congress had --  
24 made the judgment that they don't reflect or  
25 represent a cognizable risk of quid pro quo

1 corruption.

2 JUSTICE BREYER: So I finally got it.  
3 I finally got it. Your point is, with  
4 \$250,000, you're saying, the 86 real evil  
5 people, see, who are trying to --

6 MR. COOPER: Corrupters.

7 JUSTICE BREYER: -- corrupt  
8 everything, they jump in on second one because  
9 they know who to get and because he's been  
10 elected.

11 And -- and, actually, the -- the other  
12 people who are a little slower on the mark,  
13 well, they -- they can't give even a dime on  
14 this, and -- and they're the ones who are more  
15 honest. Oh, that's your point there. And with  
16 that arise, I see the point now finally, and --  
17 and that's progress.

18 And the -- the -- the -- but the --  
19 the -- it's a -- it's a -- it's a -- it's an  
20 interesting argument, but I think it's probably  
21 true of any dollar amount that's greater than  
22 the individual amount, that problem will arise.

23 And then the question is, is there  
24 something good about this that your client  
25 should love because it's bigger than 20 -- than

1 -- you know, than 2900, and the reason that  
2 it's bigger is because there are interests on  
3 the other side.

4           It seems -- that's how I've got it  
5 thought in my mind. And you can say I still  
6 don't understand it at all if you want.

7           MR. COOPER: I -- Your Honor, I'm  
8 hesitant to say you don't understand it. I --  
9 I just would respectfully say that -- that our  
10 submission about the total mismatch, the  
11 incongruities, the lack of fit between the  
12 claim of quid pro quo corruption prevention and  
13 what this statute actually does to my  
14 submission reflects what its genuine purpose  
15 was.

16           CHIEF JUSTICE ROBERTS: Thank you.  
17 Justice Thomas, anything further?

18           JUSTICE THOMAS: Nothing for me,  
19 Chief, no.

20           CHIEF JUSTICE ROBERTS: Justice  
21 Breyer?

22           Justice Kagan?

23           Justice Sotomayor?

24           JUSTICE SOTOMAYOR: Counsel, we know  
25 that after an election that your contribution

1 as a contributor is not being used to promote a  
2 candidate because the candidate has already  
3 won. So it's not going to be an expenditure to  
4 promote your speech in electing the candidate.

5 So my normal reaction is, why do you  
6 give after an election to a candidate who's not  
7 going to spend it on getting elected? He's  
8 going to spend it on something in the past but  
9 certainly not -- nothing with respect to the  
10 actual election and his getting his post.

11 And, to me, that's a natural quid pro  
12 quo. I'm giving because I want to draw my  
13 attention to you. I guess I'm having a hard  
14 time understanding your counter-argument that  
15 that needs to be somehow proven. I mean, there  
16 were studies that the court below discounted.  
17 I'm not quite sure what the ground -- complete  
18 ground of discounting -- it wasn't enough,  
19 basically. But, you know, they showed that  
20 voting patterns by senators seemed to tie into  
21 post-election contributions.

22 And I think that's enough to support  
23 the sensical thinking that if money that I give  
24 is being used to pay the candidate, the  
25 candidate's going to pay more attention to me.

1           What more do you need to prove that  
2 simple proposition?

3           MR. COOPER: Your -- Your Honor,  
4 Congress hasn't limited post-election  
5 contributions. It allows post-election  
6 contributions both to be designated for the  
7 past election if the individual contribute --  
8 contributor hasn't maxed out already, and it  
9 allows post-election contributions to be  
10 designated for the upcoming election.

11           Congress obviously does not believe  
12 that in a -- a post-election contribution,  
13 whether it's designated for the last election  
14 or for the next election, either -- either of  
15 which can be used to retire all debts,  
16 including candidate debts, of the previous  
17 election. So Congress does not see those  
18 post-election contributions as being payoffs  
19 quid pro quo.

20           Now, in terms of the -- I think the  
21 question implies and the government has stated  
22 that there can't be any legitimate reason for a  
23 post-election contribution. But, Your Honor, I  
24 -- I -- I would beg to differ with that.

25           The -- first of all, as I just

1 mentioned, Congress hasn't in any way limited  
2 that. So Congress certainly believes there's a  
3 legitimate reason for post-election  
4 contributions. But even if they are just what  
5 the government has called makeup contributions,  
6 designed for no purpose other than to associate  
7 now -- exercise the First Amendment right to  
8 associate with the winner and to hope that that  
9 will result in the kind of influence and access  
10 that support for a candidate -- that support  
11 for a candidate begets and that this Court has  
12 in several different cases recognized that  
13 Congress cannot seek to -- to -- to deter, as  
14 opposed to seeking to deter and to prevent  
15 actual quid pro quo corruption, then those are  
16 reasons -- Your Honor, those are reasons enough  
17 for a -- a contributor to come after an  
18 election and make a contribution to the winner.

19           It's just that -- that -- what -- the  
20 candidate has now become effectively an  
21 incumbent.

22           JUSTICE SOTOMAYOR: But you just said  
23 the magic words, to make a contribution to the  
24 winner. Not to a campaign and for its debts,  
25 but for the pockets of the winner. That's a



1 very different corrupting influence.

2 MR. COOPER: Your Honor, to -- to the  
3 -- to the extent that the -- that the  
4 post-election contribution pays for  
5 pre-election speech, it is paying for speech.  
6 If I go to a restaurant tonight and pay for my  
7 meal with a credit card, a month from now I  
8 will have to repay the credit card company for  
9 that meal.

10 That's -- that's what these  
11 post-election contributions that actually  
12 retire debts pay for. Whether they're paying  
13 -- whether they're retiring the debt of the  
14 candidate or any of the other creditors, it's  
15 paying for speech that was uttered before and  
16 -- and was financed through -- through credit,  
17 the candidates and others uttered before the  
18 election.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?  
20 Justice Gorsuch?  
21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: One question. You  
23 had also mentioned that you think the statute  
24 is designed for or has the effect of incumbency  
25 protection, and I just wanted you to connect

1 the dots and spell out why you say that.

2 MR. COOPER: Your Honor, I -- I -- I  
3 -- the -- the millionaire's amendment, which --  
4 of which this was a part and -- and which this  
5 Court struck down the other part, obviously, in  
6 the Davis case, was enacted by Congress with  
7 explicit references to the fact that  
8 well-financed challengers to incumbents  
9 represented a threat and that the -- and that  
10 the -- the then incumbents in Congress wanted  
11 to make sure there was a level -- level playing  
12 field.

13 The -- the -- the -- the ability of a  
14 candidate to loan without repayment limits such  
15 as the Section 304 places on the candidate, to  
16 loan money to his campaign to advocate his own  
17 election, is a threat to incumbents, Your  
18 Honor, just as much as -- as the ability to  
19 contribute or to make expenditures on behalf of  
20 the challenger's campaign.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24 Thank you, counsel.

25 MR. COOPER: Thank you, Mr. Chief

1 Justice.

2 CHIEF JUSTICE ROBERTS: Mr. Stewart,  
3 rebuttal?

4 REBUTTAL ARGUMENT OF MALCOLM L. STEWART  
5 ON BEHALF OF THE APPELLANT

6 MR. STEWART: Thank you, Mr. Chief  
7 Justice.

8 Let me respond first to Justice  
9 Alito's question. We're not prepared to  
10 concede that the FEC regulation is invalid, but  
11 Appellees did challenge that in this lawsuit;  
12 that is, at page 26 of the Joint Appendix,  
13 Count 4 of Appellees' complaint alleged that  
14 the 20-day limit in the regulation was  
15 arbitrary, capricious, and not in accordance  
16 with law, and Count 5 asserted a different  
17 non-constitutional challenge to the regulation.

18 And the three-judge district court  
19 exercised supplemental jurisdiction over the  
20 regulatory challenges but held them in abeyance  
21 while it adjudicated the constitutional  
22 challenge to the statute, and I think that was  
23 for two reasons.

24 First, the district court was under  
25 the misimpression that the statute itself was

1 the current legal barrier to full repayment.  
2 And, second, the three-judge court  
3 understandably viewed its mandate as being the  
4 resolution of challenges to the  
5 constitutionality of the statute. And then,  
6 having held that the statute was  
7 unconstitutional, it said we're dismissing the  
8 regulatory claims as moot.

9 The implication was, if the statute  
10 had been held constitutional, then the court  
11 would have proceeded to the reg- -- the  
12 non-constitutional challenges to the regulatory  
13 provisions.

14 And so the way the case was litigated  
15 produced this weird inversion of the way that  
16 litigation is supposed to be handled. That is,  
17 it's bedrock that if you have both  
18 non-constitutional and constitutional claims  
19 before you, the court is supposed to resolve  
20 the non-constitutional issues first and proceed  
21 to the constitutional issues only if it is  
22 necessary to do so. And, here, the district  
23 court did the reverse because of the -- the way  
24 that the -- the case was pleaded and the fact  
25 that it was a three-judge court.

1           The -- the second thing I'd like to  
2 say is -- to follow up on something that  
3 Justice Kagan said when she pointed out this is  
4 really not a limit on self-financing or the  
5 ability to -- of a candidate to spend money on  
6 his own campaign; it's a limit on the  
7 candidate's ability essentially to -- to pass  
8 the expenses of campaigning along to others.

9           And the Court has sometimes -- and the  
10 Appellees' response is the existence of this  
11 limit will create a disincentive to the making  
12 of candidate loans, and that, in turn, will  
13 result in less campaign speech.

14           And the Court has sometimes resolved  
15 very similar claims where a candidate, as  
16 opposed to a contributor, will challenge  
17 contribution limits on the ground that they  
18 have an indirect effect on the campaign's  
19 ability to engage in speech.

20           And the Court has said, from the  
21 candidate's perspective, so long as the limits  
22 are not so low that they prevent the candidate  
23 from amassing funds sufficient for effective  
24 advocacy, then the candidate has no valid  
25 constitutional challenge.

1           The contributor may still have a  
2 constitutional challenge because the -- the  
3 limits may impinge unduly on his own ability to  
4 affiliate himself with campaigns to assist in  
5 the electoral process.

6           But the -- the limit here really  
7 doesn't have that effect. The contributor can  
8 still donate as much as -- as he wants up to  
9 the base limit, can do so at any point up until  
10 the election, can continue to do so after the  
11 election subject to the proviso that the funds  
12 can't be used for repayment of candidate loans.

13           But, since a contributor ordinarily  
14 has no legal right to insist that his donations  
15 be used for a particular purpose, that --  
16 that's a very small intrusion on any liberty  
17 that he might have.

18           The third thing I wanted to say is  
19 about the leveling the playing field. The  
20 companion provision that was at issue in Davis,  
21 there was a leveling purpose apparent on the  
22 face of the statute because the statute said,  
23 if one candidate spends a lot of his own money,  
24 then the other candidate will be able to raise  
25 more money himself. And so the rules that

1 applied to one candidate were kind of  
2 contingent on what the other candidate did.

3 That was leveling on its face, but  
4 there's nothing similar going on here.

5 The -- yes, it's true that the loan  
6 repayment limit applies to each candidate in  
7 the race, but the rules that apply to one  
8 candidate don't depend on what his opponent  
9 does.

10 The other thing about the fact that  
11 the loan repayment limit applies to losing  
12 candidates, I'd say three things.

13 The first is what Justice Sotomayor  
14 said, that it doesn't have much practical  
15 impact on losing candidates because they can  
16 rarely raise sufficient post-election  
17 contributions to be over the limit.

18 The second thing is that, as we see in  
19 Davis, ordinarily, the presumption is that the  
20 same rules will apply to all candidates in a  
21 race, and, indeed, there can be constitutional  
22 problems if -- even if they don't.

23 And the third is, as the Court said in  
24 Buckley, there are some circumstances where  
25 Congress decides that the same rules should

1 apply to each candidate, even though the  
2 interests underlying a particular rule may not  
3 be as directly implicated by minor party  
4 candidates, for instance, who are unlikely to  
5 win and, therefore, are unlikely to -- to do  
6 favors for the -- the donor.

7 Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel. The case is submitted.

10 (Whereupon, at 11:29 a.m., the case  
11 was submitted.)

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