

ORAL ARGUMENTS APPROACH IN THE CASE OF FEC VS TED CRUZ FOR SENATE

TOPLINE:

Our campaign finance laws are designed to prevent political spending that results in political favors. If candidates are given the ability to solicit unlimited funds after Election Day to repay personal loans they make to their campaigns, wealthy special interests will have found a new way to spend big money to rig the political system in their favor.

OVERVIEW:

Federal law limits candidates from using more than \$250,000 in contributions raised after Election Day to repay personal loans candidates make to their campaigns. Shortly before the 2018 general election, Sen. Ted Cruz loaned his campaign \$260,000 to set the stage for a constitutional test challenge to this limit, which was originally enacted in 2002 as part of the Bipartisan Campaign Reform Act (BCRA) and has operated largely without controversy in the two decades since. This narrow provision regulates candidates' use of post-election contributions to pay themselves back for loans they have made to their campaigns. The limit thus places a reasonable cap on the amount of post-election fundraising from which a candidate can benefit financially, and does not impinge on candidates' ability to self-finance their campaigns.

In June 2021, at the behest of Sen. Cruz and his senate campaign committee, a three-judge district court held that the limit was unconstitutional. The case now heads to the U.S. Supreme Court under a special review provision in BCRA that provides for direct appeal to the Supreme Court.

Oral argument is scheduled for Jan. 19, 2022.

Campaign Legal Center (CLC) has filed two amicus briefs in this case: The first, filed on Aug. 6, 2021, urged the Supreme Court to summarily reverse the lower court judgment and restore this important anti-corruption measure; the second, filed on Nov. 22, 2021, by CLC, together with Citizens for Responsibility and Ethics in Washington (CREW), Common Cause and Democracy 21, urged the Court to uphold the constitutionality of the challenged law.

Q & A:

Q: Why is post-election loan repayment capped? If the amount a candidate can loan to their campaign is unlimited, shouldn't fundraising for repayment of that loan also have no cap?

A: Without that post-election repayment limit, the opportunity for corruption is enormous: it would enable candidates to raise millions of dollars from special interests and lobbyists after the election in question—years after it, even—and allow candidates to effectively pocket that money in the form of loan repayment.

- It is constitutional to place limits on money donors put directly into the pockets of officials (in other words, money that can't be used to pay for any campaigning).
- Funds that go directly to the pocket of an already elected official create an obvious and acute risk of corruption: donors don't run the risk of backing a losing candidate, and the funds can't go to influence an election that has already transpired.

Q: What is the difference between a donor giving money for loan repayment after an election and making an ordinary contribution before an election?

A: This kind of loan repayment comes with a self-evident and acute risk of corruption—because, unlike contributions raised in the normal course of an election cycle to facilitate campaign messaging, funds raised post-election to repay a candidate loan essentially flow right back into the candidate's pocket for his personal benefit.

Q: How significant is it that the fundraising in question happens after election day?

A: It could be quite significant. The Supreme Court has long held that in a system of privately financed campaigns, campaign finance laws implicate First Amendment speech rights because candidates need to be able to raise and spend money to communicate their messages to voters. When funds change hands AFTER an election, however, these First Amendment interests are marginal at best.

- And when candidates in effect accept cash gifts from donors, the corruption concerns are abundantly clear. In the post-election context, wealthy donors can more readily target contributions to officeholders in a position to exchange political quid pro quos. Donors also catch candidates at a vulnerable time, when they face personal losses if they are unable to raise enough to repay their personal loans.
- If the fundraising cap is lifted and candidates no longer have a limit on the amount they are able to raise to repay loans after an election, the risk of corruption and abuse will only be magnified.

Q: What was the lower court’s argument for siding with Sen. Cruz, and why should the Supreme Court reverse that decision?

A: This three-judge court reasoned that the federal government had not provided an adequate anti-corruption justification for the limit and struck it down as unconstitutional.

- This conflicts not only with the Supreme Court’s longstanding recognition that giving money directly to candidates creates an *inherent* risk of corruption but also with common sense and historical experience.
- There is abundant evidence from across the country that post-election contributions can give rise to actual and apparent corruption.
 - In Ohio, former AG (now Governor) Mike DeWine drew scrutiny by repeatedly making substantial personal campaign loans and reimbursing himself with post-election contributions from entities seeking—and often obtaining—state contracts administered by his office.
 - Corruption concerns tied to candidate loan repayment have arisen in other states, including Oklahoma, Kentucky and Alaska.
- This is exactly the kind of issue that Congress — not the Court — is best positioned to evaluate. Legislators, unlike federal judges, have experienced the pressures of fundraising and of repaying campaign debt and are uniquely positioned to make the practical and empirical judgments necessary to craft campaign finance restrictions like this one.

Q: How does the limit challenged by Sen. Cruz compare to existing state and federal laws regulating personal gifts to public officials?

A: The limit is very similar to many gift statutes. A payment that goes directly into the personal bank account of a candidate is effectively a gift and raises the same obvious corruption concerns associated with gifts to officeholders.



ABOUT CAMPAIGN LEGAL CENTER

The nonpartisan Campaign Legal Center advances democracy through law at the federal, state and local levels, fighting for every American's rights to responsive government and a fair opportunity to participate in and affect the democratic process.

ABOUT CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON: CREW

CREW is a non-partisan legal watchdog group, founded in 2003. In a political moment where profits are prioritized over ethics and anonymous money damages the democratic process, CREW highlights these violations of the law and abuses of power through aggressive research and legal action.

ABOUT COMMON CAUSE

Common Cause is a nonpartisan, grassroots organization dedicated to upholding the core values of American democracy. We work to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process.

ABOUT DEMOCRACY 21

Democracy 21, a nonpartisan, nonprofit organization that works to strengthen democracy by ensuring the integrity of our elections and government decisions, challenging Washington political influence money, protecting the right to vote, holding public officials accountable for abuses of office, and empowering citizens in the political process.