THE UNIQUE APPEARANCE OF CORRUPTION IN PERSONAL LOAN REPAYMENTS

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Under U.S. campaign finance jurisprudence, electoral candidates have the right to self-fund their campaigns without limitation. The majority of self-funded candidates do so by issuing personal loans—i.e., personal money given to their campaign with the expectation of having it paid back. Many such candidates rely on outside contributions to help repay these personal loans, leaving them susceptible to partaking in corrupt quid pro quo exchanges.

To counter this risk, many jurisdictions have implemented personal loan repayment limits ("PLRL"s), which regulate the extent to which candidates can rely on contributions to recover the funds they loaned to their campaigns. Up until recently, PLRLs were seen as straightforward anticorruption measures justified by the government's interest in reducing the actuality and, importantly for this Article, the appearance of corruption in our democratic institutions.

Nevertheless, in May 2022, the U.S. Supreme Court overturned the federal PLRL governing congressional elections—Section 304 of the Bipartisan Campaign Reform Act of 2002—in the case FEC. v. Ted Cruz for Senate, finding that the Federal Election Commission had not demonstrated a unique anticorruption interest. This latest instance of judicial deregulation of campaign finance by the Roberts Court will almost certainly lead to a surge in litigation challenging similar laws in state and local jurisdictions.

By conducting a comprehensive survey consisting of 2,428 participants, however, this Article finds that PLRLs are in fact quite defensible in a post-Cruz world. Indeed, survey respondents perceived a significantly greater likelihood of quid pro quo corruption when a candidate receives a contribu-

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tion to repay personal loans as opposed to covering campaign expenses. Such a finding provides empirical support for a distinctive appearance of corruption in personal loan repayments, which in turn strengthens the government's interest in regulating them. This Article thus contributes to the campaign finance literature by offering a vital first quantitative look into exactly how personal loan repayments affect the public's perception of corruption.

INTRODUCTION

> *"Everyone knows people (including politicians) will often do things for money."*[1]
>
> – Justice Elena Kagan

A congressional candidate decides to personally loan their campaign committee $500,000 with an attached interest of 10%. The candidate runs a hard-fought campaign and ultimately prevails as the winner. Following the election, the candidate wishes to recoup the money they loaned to their campaign and accordingly solicits outside contributions to do so.[2] A lobbying firm representing oil and gas interests hosts fundraising events for said candidate over the next year, which amass $550,000 in contributions.[3] The candidate uses these contributions to repay their personal loans and interest, meaning they effectively channeled over half a million dollars into their personal bank account through the help of lobbyists and contributors (for a $50,000 net profit!). In return, the candidate—now a member of Congress—pushes for legislation friendly to the oil and gas industry. Seems like the type of situation that should be prevented by law, right? Well, the Supreme Court just made it even *more* possible for this kind of corruption to happen following its May decision in *FEC v. Ted Cruz for Senate*.[4]

How did this happen? Like many campaign finance problems, the story begins with the seminal case of *Buckley v. Valeo*.[5] In *Buckley*, the Court held that candidates have a First Amendment interest in using an unlimited amount of personal money to fund their campaigns.[6] According to the *Buckley* Court, the government has no anticorruption interest in limiting such self-funding because "the use of personal funds

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1 FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1662 (2022) (Kagan, J., dissenting) (cleaned up).

2 Under federal law, a "contribution" is any "gift, subscription, loan[,] . . . advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 11 C.F.R. § 100.52(a) (2022). Candidates may receive contributions post-election to help repay their personal campaign loans. *See In re* Helms for Senate, FEC Advisory Op. 1990-30, at 1 (1991), https://www.fec.gov/files/legal/aos/1990-30/1990-30.pdf [https://perma.cc/L27E-4RWW].

3 This "bundling" of contributions is a common tactic used by campaigns and lobbyists. *See* Peter Overby, *Explainer: What Is a Bundler?*, NPR (Sept. 14, 2007), https://www.npr.org/templates/story/story.php?storyId=14434721 [https://perma.cc/T7RF-9BVJ].

4 142 S. Ct. 1638 (2022).

5 424 U.S. 1 (1976).

6 *See id.* at 51–54.

reduces [a] candidate's dependence on outside contributions" and therefore makes them less likely to grant favors for money.[7] This principle has since stood strong in the world of campaign finance law, with courts routinely striking down any statute that might frustrate a candidate's constitutionally bestowed right to spend untold sums of their own money to win an election.[8]

The issue with this logic, however, is that many self-funded candidates *do* depend on outside contributions. Indeed, at the federal level, over 77% of self-funding consists of personal loans rather than personal contributions.[9] And when a candidate self-funds through personal loans, they do so with the expectation of recovering at least some of the loaned amount. To do this, self-loaning candidates will often rely on money received through individual contributions to repay themselves.[10] The corruption risk here is evident: "You help me repay my personal loans, and I'll do X for you in return."

To address this corruption concern, Congress and many state and local legislatures have enacted personal loan repayment limits ("PLRL"s). While these limits vary somewhat,[11] in general they regulate and often cap the extent to which candidates can use outside contributions to repay personal loans. For years, PLRLs were seen as innocuous, straightforward anticorruption measures; thousands of candidates operated within these limits without issue.[12] This arrangement changed though when Senator Ted Cruz of Texas challenged the constitutionality of the federal PLRL—Section 304 of the Bipartisan Campaign Reform Act of 2002 ("BCRA").

Section 304's PLRL was a relatively modest one, imposing on congressional candidates a limit of $250,000 solely on the use of post-election contributions to repay their personal

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7 *Id.* at 53.

8 *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 755 (2011); Davis v. FEC, 554 U.S. 724, 744–45 (2008); Anderson v. Spear, 356 F.3d 651, 672–73 (6th Cir. 2004).

9 *See infra* note 172 and accompanying text.

10 *See, e.g.*, *In re* Helms for Senate, FEC Advisory Op. 1990-30, at 1 (1991), https://www.fec.gov/files/legal/aos/1990-30/1990-30.pdf [https://perma.cc/L27E-4RWW] ("The Committee will be soliciting over 120,000 previous supporters by mail to seek contributions to pay its debt."); Rick Hasen (@rickhasen), TWITTER (Nov. 6, 2020, 4:25 PM), https://twitter.com/rickhasen/status/1324825242716446725 [https://perma.cc/KZ5K-VW87] [hereinafter Hasen, Trump Tweet] ("If you give money to Trump's recount/postelection litigation efforts, half of that money will go towards retiring his campaign debt instead, per the fine print.").

11 *See infra* section II.B.3, fig.1.

12 *See infra* note 88 and accompanying text.

loans.[13] Candidates could still put toward repayment an unlimited amount of contributions raised *before* an election. Yet, after willingly incurring an "injury,"[14] Senator Cruz asserted that Section 304 violated his First Amendment rights. Specifically, Cruz claimed that the PLRL discouraged candidates from self-loaning to their campaigns beyond the $250,000 cap, which in turn reduced political speech via campaign advocacy.[15]

The case eventually made its way to the Supreme Court in *FEC v. Cruz*, at which time it was far from certain how the Court would rule.[16] Up until that point, there had been zero litigation over PLRLs, and consequently no guiding case law on the matter. Thus, it was unclear where exactly PLRLs fit within the contribution–expenditure distinction that has come to dominate U.S. campaign finance jurisprudence.[17] In some ways, PLRLs resemble contribution limits—which are constitutional[18]—in that both only indirectly impact how much money a candidate might accumulate for their campaign.[19] In other ways, PLRLs resemble expenditure limits—which are typically unconstitutional[20]—since both debatably affect how much advocacy the expender (in this case, the candidate) can engage in.[21] PLRLs were therefore in somewhat of a doctrinal limbo.

The Court ultimately decided in favor of Cruz and invalidated Section 304's PLRL. In reaching this conclusion, the Court did not disturb the *Buckley* framework as some feared,[22]

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13 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, sec. 304(a)(2), § 315(j), 116 Stat. 81, 98–99 (codified as amended at 52 U.S.C. § 30116(j)).

14 Senator Cruz deliberately loaned his campaign $260,000 during his 2018 senatorial race so that he could bring forth this lawsuit. Brent Kendall & Jess Bravin, *Ted Cruz Loaned His Campaign $260,000. Supreme Court Weighs Whether He Can Get It All Back*, WALL ST. J. (Jan. 19, 2022), https://www.wsj.com/articles/ted-cruz-loaned-his-campaign-260-000-supreme-court-weighs-whether-he-can-get-it-back-11642618086 [https://perma.cc/8DKC-DRNZ].

15 Ted Cruz for Senate v. FEC, 542 F. Supp. 3d 1, 4–5, 8–9 (D.D.C. 2021).

16 *See* Daniel I. Weiner & John J. Martin, *Campaign Finance Returns to Supreme Court in Ted Cruz Case*, BRENNAN CTR. FOR JUST. (Jan. 13, 2022), https://www.brennancenter.org/our-work/analysis-opinion/campaign-finance-returns-supreme-court-ted-cruz-case [https://perma.cc/AFA9-WBY2].

17 *See* J. Robert Abraham, Note, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1078 (2010) ("Since 1976, *Buckley v. Valeo*'s contribution-expenditure distinction has been the touchstone of the campaign finance framework.").

18 *See infra* notes 58–61 and accompanying text.

19 *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1658–60 (2022) (Kagan, J., dissenting).

20 *See infra* notes 62–65 and accompanying text.

21 This comparison is certainly questionable, though. *See infra* section II.A.1.

22 *See infra* note 138.

but instead did a run-of-the-mill weighing of the plaintiff's First Amendment burden against the government's interests. First, the Court found that Section 304's speech burden was "evident and inherent" because it forced candidates to face a choice when deciding how much to self-loan themselves.[23] In doing so, the Court doubled down on its disregard of empirical evidence to the contrary, as it has done multiple time under Chief Justice Roberts' tenure.[24]

Next, the Court asserted that the Federal Election Commission ("FEC") had not demonstrated a valid governmental interest in regulating personal loan repayments. Under the modern-day Court, only one such interest has been deemed acceptable to justify a campaign finance law: reducing the actuality or appearance of quid pro quo corruption, i.e., illicit arrangements in which candidates grant political favors in exchange for money.[25] Moreover, it is not enough to simply show a broad anticorruption interest. Rather, the government must show that the corruption risk of the regulated conduct is unique and not already served by another law. Otherwise, the challenged law is simply "prophylaxis-upon-prophylaxis," in the Court's words.[26] The *Cruz* Court found that the FEC had not satisfied this standard, dismissing all the media reports and studies the agency had provided in the record.[27]

Notably (at least for this Article's purpose), the Court rejected a poll provided by the FEC to prove that the use of contributions to repay personal loans created an appearance of corruption. The FEC framed the poll to focus purely on the timing of a contribution, asking respondents whether "those who donate money to a candidate's campaign *after* the election expect a political favor in return from candidates who later take office."[28] While most responded "likely," the Court found three specific flaws with the poll: (1) it provided no comparison to pre-election contributions; (2) it did not account for prophylaxis-upon-prophylaxis by mentioning the existence of contribution limits; and (3) its scenario was not about illicit quid pro

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23 *Cruz*, 142 S. Ct. at 1651 (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 745 (2011)).

24 *See infra* section II.A.1.

25 *See* McCutcheon v. FEC, 572 U.S. 185, 199, 227 (2014) (plurality opinion) (citing FEC v. Nat'l Conserv. Pol. Action Comm., 470 U.S. 480, 496–97 (1985)).

26 *See Cruz*, 142 S. Ct. at 1652 (quoting *McCutcheon*, 572 U.S. at 227).

27 *See infra* notes 118–127 and accompanying text.

28 FEC's Reply in Support of Its Motion for Summary Judgment at 29–30, Ted Cruz for Senate v. FEC, 542 F. Supp. 3d 1 (D.D.C. 2021), 2020 WL 5541759 (emphasis added).

quo, but rather mere influence.[29] More generally, the poll did not address why Section 304 should apply to losing candidates, who the *Cruz* Court claimed are "in no position to grant official favors."[30] Consequently, the Court invalidated Section 304's PLRL, leaving congressional personal loan repayments wholly unregulated.

This Article does not attempt to relitigate *Cruz*, but rather focuses on the future of campaign finance laws following the decision. In particular, many states and localities continue to have PLRLs on the books,[31] whose survival remains uncertain. On the one hand, the *Cruz* Court did not find PLRLs unconstitutional per se.[32] The decision will, nonetheless, almost certainly lead to a surge in litigation challenging similar laws in other jurisdictions. Governments defending these PLRLs—as well as any that wish to enact new limits in the future—will need to explain why they have a distinctive anticorruption interest in regulating personal loan repayments. As *Cruz* illustrates, this task can be an uphill battle, as it is difficult to find evidence that satisfies the Court's idiosyncrasies in reviewing campaign finance laws.

Scholars have tried to quantify the effects of campaign finance laws on corruption.[33] Nevertheless, these works often define corruption more broadly than the Court's narrow focus on quid pro quo.[34] None have looked specifically into the topic of personal loan repayments, either.

Similarly, many scholars have measured how campaign finance laws impact the appearance of corruption to the public.

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29 *See Cruz*, 142 S. Ct. at 1654.

30 *Id.* at 1656. *But see infra* section IV.A.3.

31 *See infra* section II.B.3.

32 *See Cruz*, 142 S. Ct. at 1656–57.

33 *See, e.g.*, Daniel Bromberg, *Can Vendors Buy Influence? The Relationship Between Campaign Contributions and Government Contracts*, 37 INT'L J. PUB. ADMIN. 556, 564 (2014); Saad Gulzar, Miguel R. Rueda & Nelson A. Ruiz, Do Campaign Contribution Limits Curb the Influence of Money in Politics? 2 (Sept. 1, 2020) (unpublished manuscript), http://miguelrueda.net/documents/limits_sent.pdf [https://perma.cc/8RJQ-VH43]; Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 814 (1990); Mark Hand, Campaign Contribution Limits and Corruption: Evidence from the 50 States 6 (May 23, 2018) (unpublished manuscript) (on file with author); Christopher Witko, *Campaign Contributions, Access, and Government Contracting*, 21 J. PUB. ADMIN. RSCH. & THEORY 761, 761, 772–74 (2011).

34 John J. Martin, *Danger Signs in State and Local Contribution Limits*, 74 ALA. L. REV. 415, 454–55 (2022).

Again though, only a few define corruption as "quid pro quo,"[35] and none have discussed in particular how PLRLs interact with public perceptions of corruption.[36] The only quasi-attempt to determine if personal loan repayments affect the appearance of corruption in fact seems to be the FEC's poll conducted for *Cruz*, which, for reasons already stated, is flawed from the perspective of the judiciary.[37]

This Article thus provides the first empirical analysis into whether and to what extent the use of contributions by a candidate to repay personal loans influences how the public—namely voting-age Americans—perceives the likelihood of a quid pro quo exchange occurring between the contributor and the candidate. To do this, the author conducted a survey of over 2,400 respondents selected through non-probability sampling,[38] who were divided into six groups. Each group received a different question concerning the likelihood of quid pro quo in a given scenario.

The questions were carefully written to avoid repeating the same three issues the *Cruz* Court found with the FEC poll. More importantly, the questions were not simply framed temporally—only three of them provided a comparison of pre-election versus post-election contributions. The other three questions sought to explore another comparison: the use of contributions to repay personal loans versus the use of contributions to pay for more traditional campaign expenses (e.g., advertising). The FEC poll was flawed in focusing solely on the timing of the contribution, since *how* a contribution is spent seems just as much, if not more, relevant to public perception of corruption than *when* it is received. Lastly, within each subset of questions, one scenario had the candidate as a winner while another presented them as the loser of their election. By doing this, the survey results could show whether the *Cruz* Court's presumption is correct that the government has no interest in subjecting losing candidates to PLRLs. The individual responses for each of the six groups were then assigned corresponding numbers, which were used to quantify a "mean corruption rating" for all six scenarios—the higher the mean, the greater the appearance of corruption.

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35 *See, e.g.*, Matthew DeBell & Shanto Iyengar, *Campaign Contributions, Independent Expenditures, and the Appearance of Corruption: Public Opinion vs. the Supreme Court's Assumptions*, 20 ELECTION L.J. 286, 292 (2021).

36 *See infra* notes 230–240 and accompanying text.

37 *See supra* note 29 and accompanying text.

38 *See infra* note 266 and accompanying text.

The survey results were quite telling. First, respondents sensed a marginally higher likelihood of quid pro quo corruption when a winning candidate received a contribution post-election as opposed to pre-election, though the opposite was true of losing candidates.[39] More crucially, respondents perceived a *significantly* higher likelihood of quid pro quo corruption when a candidate used a contribution to repay personal loans instead of to cover the costs of campaign expenses.[40] It thus appears that the use of a contribution indeed matters more than its timing when it comes to the appearance of corruption. Finally, regarding the personal loan repayments versus campaign expenses scenarios, the perception of corruption for the former remained greater than the latter regardless of whether the candidate was described as a winner or a loser.[41]

These results support the argument that the government does in fact have a unique anticorruption interest in regulating personal loan repayments. If reducing the appearance of corruption is a compelling governmental interest, and the use of contributions by a candidate to repay personal loans emanates a greater appearance of corruption than their use for other purposes, it stands to reason that governments should be able to implement and maintain PLRLs to fulfill their anticorruption interest. The survey results also have further doctrinal implications. For one, they challenge the belief espoused in *Buckley* that candidates should have an absolute right to unlimited self-funding.[42] Furthermore, they undermine the notion that there is no need to subject losing candidates to PLRLs.[43] Legislatures should therefore feel undeterred in implementing new PLRLs post-*Cruz*,[44] lest the Court's streak of judicial deregulation completely hamper the use of innovative policy solutions to reel in "big money" in politics.

It is important to emphasize that this is not purely an academic thought exercise. Democracies suffer when campaign finance laws are few or nonexistent. Scholars have found that such an environment leads to more corruption,[45] more misalignment between voter preferences and policy out-

39 *See infra* section III.C.1.
40 *See infra* section III.C.2.
41 *See infra* section III.C.3.
42 *See infra* section IV.A.2.
43 *See infra* section IV.A.3.
44 *See infra* section IV.B.
45 *See infra* notes 182–184 and accompanying text.

comes,[46] and more legislative polarization.[47] On top of that, the appearance of corruption diminishes the public's trust in government, which leads to less voter participation.[48] This Article thus seeks to contribute to a body of literature on which judges and litigants can rely to fully ascertain the extent of the government's anticorruption interest. This will ideally help ensure that each campaign finance law is given its due consideration rather than having its invalidation seen as a given under our hostile campaign finance jurisprudence.

This Article proceeds in the following order. First, Part I provides some necessary background information on where PLRLs fit into the broader realm of U.S. campaign finance law. Part I also discusses Section 304 of BCRA in detail and overviews the *Cruz* decision. Next, Part II goes over some post-*Cruz* considerations, including what we can learn about the newly 6-3 Court's approach to campaign finance as well as which questions we should be asking following the decision. Part III examines the survey conducted for this Article, including the existing literature on the appearance of corruption, the survey's methodology, and the survey results. Finally, Part IV explores the doctrinal implications of the results and offers some legislative solutions that could more safely withstand litigation than existing PLRLs.

I
THE JURISPRUDENCE OF PERSONAL LOAN REPAYMENT LIMITS

Despite its somewhat esoteric nature, there is much to say about the law surrounding PLRLs. Campaign finance jurisprudence in the United States is overall a bit of an unwieldy mess these days (and that may be an understatement). Over the past few decades, the Supreme Court has struck down a myriad of campaign finance laws passed by Congress and state legislatures, resulting in a laundry list of doctrinal dos and don'ts that have made it nigh impossible to implement robust regulations of election spending.[49] The Roberts Court is especially culpable, with the post-Alito conservative majority em-

46 Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1474–81 (2015).

47 Michael S. Kang, *Hyperpartisan Campaign Finance*, 70 EMORY L.J. 1171, 1191 (2021).

48 *See infra* notes 227–228 and accompanying text.

49 As Richard Briffault aptly puts it, "The Court's campaign finance jurisprudence is a mess, marked by doctrinal zigzags, anomalous, distinctions, unworkable rules, and illogical results." Richard Briffault, *On Dejudicializing American*

ploying what some have described as an incoherent deregulatory approach to campaign finance.[50] Indeed, the Roberts Court has issued seven decisions invalidating various components of federal and state campaign finance laws since 2006.[51] These decisions have greatly influenced how today's lawmakers, advocates, and scholars think about modern campaign finance reform.[52]

Accordingly, this Part fulfills the necessary task of bringing the reader up to speed both on the Court's broader campaign finance doctrine and on recent developments in the specific legal status of PLRLs. The first section covers the Court's more general doctrine, though only briefly.[53] It provides just enough background information for readers to sufficiently understand how courts presently scrutinize campaign finance laws—what some call the "*Buckley* framework." The next section then overviews PLRLs, with a particular focus on the now-defunct federal PLRL: Section 304 of BCRA. Finally, the third section summarizes the Court's most recent campaign finance deci-

Campaign Finance Law, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *Citizens United* 173, 174 (Monica Youn ed., 2011).

50 *See id.*; Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 618–22 (2011).

51 *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1656–57 (2022) (striking down Section 304 of BCRA); McCutcheon v. FEC, 572 U.S. 185, 227 (2014) (plurality opinion) (striking down FECA's aggregate contribution limits); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 755 (2011) (striking down a provision of Arizona's Clean Elections Act that increased a candidate's public funding if they were outspent by a privately funded candidate); Citizens United v. FEC, 558 U.S. 310, 365–66 (2010) (striking down limits on corporate and labor union independent expenditures); Davis v. FEC, 554 U.S. 724, 744–45 (2008) (striking down BCRA's Millionaire's Amendment); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 482 (2007) (holding that BCRA may not ban issue ads within the months preceding a primary or general election); Randall v. Sorrell, 548 U.S. 230, 262–63 (2006) (plurality opinion) (striking down Vermont's low contribution limits). In addition to these decisions, the Court recently questioned the constitutionality of Alaska's contribution limits, which were subsequently invalidated by the Ninth Circuit on remand. *See* Thompson v. Hebdon, 140 S. Ct. 348, 351 (2019) (per curiam); Thompson v. Hebdon, 7 F.4th 811, 822–23 (2021). Moreover, while the case did not deal with campaign finance specifically, the Court rendered a decision two years ago that subjects campaign disclosure laws to a stricter level of scrutiny. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) (requiring disclosure laws to be narrowly tailored).

52 *See, e.g.*, *Dark Money*, BRENNAN CENT. FOR JUST., https://www.brennancenter.org/issues/reform-money-politics/influence-big-money/dark-money [https://perma.cc/BZU6-GG6F] (last visited Mar. 18, 2023) (demonstrating how campaign finance reform advocates have shifted focus toward combatting dark money post-*Citizens United*).

53 For a thorough overview of U.S. campaign finance law, see DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI & NICHOLAS O. STEPHANOPOULOS, ELECTION LAW: CASES AND MATERIALS 853–1194 (7th ed. 2022).

sion—*FEC v. Cruz*—in which the Court struck down Section 304 as violative of the First Amendment.

A. The *Buckley* Framework

There are, generally speaking, three types of restrictive campaign finance regulations[54]: (1) contribution limits, (2) independent-expenditure limits, and (3) candidate-spending limits. Courts apply different levels of scrutiny to each type of regulation. These divergent standards trace back to the Supreme Court's seminal 1976 decision in *Buckley v. Valeo*,[55] which is essentially the founding document of modern U.S. campaign finance jurisprudence.[56] And while the Court has tweaked its approach to campaign finance law over the years, all roads still ultimately lead back to *Buckley*. Hence, courts operate under the *Buckley* framework when reviewing restrictive campaign finance regulations.[57]

To begin, contribution limits—i.e., dollar limits on the amount a person or entity can directly contribute to a candidate, PAC, or party—are judged under an intermediate form of scrutiny. Specifically, for a contribution limit to be constitutional, it need only be "closely drawn" to a "sufficiently important" governmental interest.[58] While the *Buckley* Court recognized that contribution limits implicate contributors' associational rights, the Court saw the association as existing largely within the act of contributing itself rather than the quantity of the contribution, hence the use of intermediate scrutiny.[59] More recently, however, the Court has emphasized the First Amendment right of candidates to engage in effective

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54 The key word here is "restrictive," as there are plenty of other campaign finance regulations that perform other tasks, such as disclosure requirements and the public funding of elections. *See, e.g.*, L. PAIGE WHITAKER, CONG. RSCH. SERV., IF11398, CAMPAIGN FINANCE LAW: DISCLOSURE AND DISCLAIMER REQUIREMENTS FOR POLITICAL CAMPAIGN ADVERTISING 1–2 (2019), https://crsreports.congress.gov/product/pdf/IF/IF11398 [https://perma.cc/3VTW-V7CX]; *Public Campaign Finance Board*, N.Y. BD. OF ELECTIONS, https://www.elections.ny.gov/PublicCampaignFinanceBoard.html [https://perma.cc/QFN5-BHDG] (last visited May 30, 2022).

55 424 U.S. 1 (1976).

56 Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U. L. REV. 397, 409 (2015) (describing how *Buckley* "laid the foundation of modern campaign finance jurisprudence").

57 *See* Wolfson v. Concannon, 750 F.3d 1145, 1154 (9th Cir. 2014) (referring to the *Buckley* framework); Republican Party of N.M. v. King, 741 F.3d 1089, 1094 (10th Cir. 2013) (same); Dallman v. Ritter, 225 P.3d 610, 623 (Colo. 2010) ("We adopt the *Buckley* framework here.").

58 *Buckley*, 424 U.S. at 25.

59 *See id.* at 21.

campaign advocacy when evaluating contribution limits.[60] Basically, contribution limits cannot be so low that candidates cannot raise enough money to properly campaign. This shift, nevertheless, has not disrupted the intermediate standard, and most contribution limits—spanning the federal, state, and local levels—can still pass constitutional muster these days.[61]

Meanwhile, independent-expenditure limits—i.e., dollar limits on the amount a person or entity may spend to advocate for a candidate without coordinating with said candidate[62]—are subject to strict scrutiny; they must be narrowly tailored to achieve a "compelling" governmental interest in the least restrictive way possible.[63] Independent expenditures receive this enhanced protection because, from the *Buckley* Court's perspective, quantity matters much more for expenditures: the more someone spends on political ads, the more speech they create.[64] In turn, independent-expenditure limits are rarely upheld by courts.[65]

While this contribution–expenditure distinction has come to dominate the *Buckley* framework, it matters little when it comes to putting forth a "sufficiently important" or "compelling" governmental interest, as the modern Court only recognizes one valid interest for either standard: reducing the actuality or appearance of quid pro quo corruption.[66] In other

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60 *See* Thompson v. Hebdon, 140 S. Ct. 348, 351 (2019) (per curiam); Randall v. Sorrell, 548 U.S. 230, 248 (2006) (plurality opinion); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397 (2000). Some credit this shift from a contributor-oriented approach to a candidate-oriented approach to Justice Breyer being influenced by Samuel Issacharoff and Richard Pildes's article, *Politics as Markets*. *See, e.g.*, Stuart Chinn, *Procedural Integrity and Partisan Gerrymandering*, 58 HOUSTON L. REV. 597, 630 (2021); *see also* Samuel Issacharoff & Richard J. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998).

61 *See* Martin, *supra* note 34, at 451 (identifying nine states as currently at risk of having existing contribution limits invalidated).

62 Coordinated expenditures are treated the same as contributions. *See id.* at 8 n.38.

63 The *Buckley* Court used the term "exacting scrutiny," but today's Court applies strict scrutiny. *See* Buckley v. Valeo, 424 U.S. 1, 44 (1976); Michael T. Morley, *Contingent Constitutionality, Legislative Facts, and Campaign Finance Law*, 43 FLA. ST. U. L. REV. 679, 691 (2016).

64 *See Buckley*, 424 U.S. at 19.

65 *See* Morley, *supra* note 63, at 691 ("[B]ecause independent expenditures constitute pure speech, limits upon them are subject to strict scrutiny and are almost invariably unconstitutional.").

66 *See* McCutcheon v. FEC, 572 U.S. 185, 199, 227 (2014) (plurality opinion) (citing FEC v. Nat'l Conserv. Pol. Action Comm., 470 U.S. 480, 496–97 (1985)). A three-judge panel in the District of Columbia, affirmed by the Supreme Court, has also found "limiting the participation of foreign citizens in activities of American democratic self-government" to be a compelling interest, but this only applies in

words, for a contribution or expenditure limit to survive its respective scrutiny, the limit must be crafted to combat an existence or perception of illicit exchanges in which big-money contributors are granted political favors from a candidate or political party to which they have contributed money. Any other legislative aims—e.g., reducing money in politics, equalizing candidate resources, limiting donor influence—will be rejected by the judiciary.[67] This approach is why independent-expenditure limits seldom survive legal challenges: since they are uncoordinated in nature, they supposedly create no risk for quid pro quo between the spender and the beneficiary of the spending.[68] And while this constraining doctrine has been met with understandable criticism,[69] it is very crucial to keep in mind when considering how to approach modern campaign finance issues, as will become evident later in this Article.[70]

Finally, fitting not-so-neatly in the contribution–expenditure distinction, there are candidate-spending limits. For the purpose of this Article, such limits can be separated into three categories: (1) limits on campaign-related spending, (2) limits on personal-use spending, and (3) limits on loan repayments. Limits on campaign-related spending are typically subject to strict scrutiny and deemed unconstitutional. The underlying rationale is similar to that of independent expenditures: preventing candidates from spending money to advocate for themselves is a massive speech burden. Moreover, there is theoretically no coordinated corruption risk to justify such a burden.[71] Candidates therefore have a constitutional right to self-fund their campaigns as much as possible, whether through personal contributions or personal loans.[72]

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the situation of prohibiting or limiting independent expenditures made by foreign nationals. *See* Bluman v. FEC, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge panel), *aff'd*, 565 U.S. 1104 (2012).

67 *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1652 (2022).

68 *See Buckley*, 424 U.S. at 47. This is, at least, the Court's theory, though real-world politics has called this theory into question. *See generally* Kaveri Sharma, Note, *Voters Need to Know: Assessing the Legality of Redboxing in Federal Elections*, 130 YALE L.J. 1898 (2021) (detailing the phenomenon of "redboxing," through which candidates are able to secretly coordinate with super PACs engaging in independent expenditures).

69 Many commentators, for instance, believe it opens the door for all kinds of undue influence in our government beyond quid pro quo exchanges. *See, e.g.*, Anna A. Mance & Dinsha Mistree, *The Bribery Double Standard: Leveraging the Foreign-Domestic Divide*, 74 STAN. L. REV. 163, 190–91 (2022); John A. Barrett, Jr., *Free Speech Has Gotten Very Expensive: Rethinking Political Speech Regulation in a Post-Truth World*, 94 ST. JOHN'S L. REV. 615, 638–39 (2020).

70 *See infra* section I.C.1.

71 *But see infra* section IV.A.2.

72 *See Buckley*, 424 U.S. at 51–54.

Likewise, candidates typically cannot be limited in how much funds they spend on campaign-related expenses, such as staff, travel, and ads.[73] On the other hand, limits on using campaign funds for personal use are presumptively constitutional and scrutinized under rational basis review,[74] as using campaign funds to, for instance, pay for a fancy vacation is not an act of expression or association. Rather, it is an act of personal enrichment, and so the First Amendment remains unimplicated.[75]

Sandwiched between these two limits are loan-repayment limits. As the name suggests, loan-repayment limits, among other things, cap the amount of campaign funds that a candidate can use to pay off loans made to their campaign committee. Nearly all loan-repayment limits are PLRLs, for a couple reasons. First, more than 90% of campaign debt in the United States consists of personal loans, as opposed to loans from third parties.[76] Second, it would simply be bad policy to prevent third-party lenders from recouping money owed to them by a candidate.[77] Accordingly, the law of loan-repayment limits is basically the law of PLRLs.

Yet, up until recently, PLRLs were a bit of a doctrinal enigma (and, to some degree, they still are[78]). In some ways, PLRLs resemble campaign-related spending limits, in that they could potentially prevent a candidate from loaning themselves enough money to engage in enough campaign advocacy.[79] In other ways, though, they resemble personal-use limits given that when a candidate uses campaign funds to repay a personal loan, that money inevitably ends up in the candidate's personal bank account. Despite this ambiguity, courts never

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73 *See* Randall v. Sorrell, 548 U.S. 230, 240–46 (2006) (plurality opinion). The one exception to this is that publicly funded candidates can be required to accept spending limits as a condition of receiving funds. *See, e.g.*, *Presidential Spending Limits*, FEC, https://www.fec.gov/help-candidates-and-committees/understanding-public-funding-presidential-elections/presidential-spending-limits [https://perma.cc/57SR-2RWK] (last visited May 31, 2021).

74 *See, e.g.*, FEC v. O'Donnell, 209 F. Supp. 3d 727, 740 (D. Del. 2016).

75 *See id.*

76 Brief for the FEC at 35, FEC v. Ted Cruz for Senate, 142 S. Ct. 1639 (2022), 2021 WL 5365403.

77 For one, there is not the same corruption risk in third-party loaning that there is in contributions because lenders expect to receive their money back. Furthermore, unlike candidates who issue their campaigns personal loans, third-party lenders gain nothing from a debtor candidate's potential quid pro quo exchanges, and so would have no incentive to loan past the amount of a loan-repayment limit if one existed.

78 *See infra* section II.B.3.

79 This argument is, however, a bit questionable. *See infra* notes 144–151 and accompanying text.

established how exactly to scrutinize PLRLs, mainly due to a lack of litigation on the subject. The potential for clarity nevertheless arose following the 2018 general election, when Senator Cruz challenged the constitutionality of the PLRL for congressional candidates—Section 304 of BCRA.

B. Section 304

In 2002, Congress passed BCRA (a.k.a. the McCain-Feingold Act) to close existing loopholes in federal campaign finance law.[80] The law had three titles, the first of which limited the amount of "soft money" that national political parties could receive.[81] Title II prohibited corporations and labor unions from engaging in electioneering communications—ads that refer to a clearly identified candidate—within a certain amount of time before an election,[82] though the Court dismantled this title in its infamous *Citizens United* decision.[83] Lastly, Title III contained miscellaneous provisions, including the PLRL of Section 304.

Section 304's language was fairly straightforward, stating that "[a]ny candidate who incurs personal loans . . . in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election."[84] In other words, candidates who loaned themselves money for their campaign could not use more than $250,000's worth of contributions raised post-election to pay off said loans. What was less clear, however, was Congress's intent in implementing this PLRL. If one were to ask its sponsors, Section 304's primary goal was to prevent quid pro quo exchanges between self-loaning candidates and

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80 MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 99 (2005).

81 *See id.* at 111; *see also* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-555, secs. 101–03, 116 Stat. 81, 82–88. Soft money is "money that is donated to political parties where the purpose is not to promote a specific candidate." Gordon Scott, *Soft Money*, INVESTOPEDIA, https://www.investopedia.com/terms/s/softmoney.asp [https://perma.cc/CPQ5-YUHF] (last updated Apr. 14, 2021).

82 *See* UROFSKY, *supra* note 80, at 112; *see also* Bipartisan Campaign Reform Act secs. 201–14, 116 Stat. at 88–95.

83 *See* Citizens United v. FEC, 558 U.S. 310, 365–66 (2010).

84 Bipartisan Campaign Reform Act sec. 304(a)(2), § 315(j), 116 Stat. at 98–99 (codified as amended at 52 U.S.C. § 30116(j)).

their contributors in the aftermath of an election.[85] There is, after all, some obvious grounds for suspicion when an elected official can use other people's money to personally pay herself back hundreds of thousands, if not millions, of dollars. At the same time, other members of Congress expressed a desire to protect incumbents from self-funded candidates in their support for Section 304,[86] an aim to which courts are far less sympathetic.[87]

Legislative motives aside, Section 304's PLRL went unchallenged for over a decade and a half. During this time, thousands of self-loaning congressional candidates tolerated its $250,000 cap.[88] This changed, however, following the 2018 U.S. Senate election in Texas—the most expensive Senate race in U.S. history up until that point[89]—during which Senator Cruz deliberately loaned his campaign $260,000 with an intent to challenge the constitutionality of Section 304's PLRL.[90] Challenge it he did, and the case ended up before a three-judge panel in the U.S. District Court for the District of Columbia (as mandated for any constitutional challenge of a BCRA provision[91]).

To briefly summarize the parties' respective arguments, Cruz claimed that Section 304 violated his First Amendment rights because its PLRL burdened his political speech.[92] Specifically, he argued that because some candidates may refrain from loaning their campaigns more than $250,000 out of fear of Section 304's PLRL inhibiting full repayment, the limit encroached upon candidates' right to amass enough funds to engage in effective campaign advocacy.[93] Moreover, Cruz as-

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85 *See* 147 CONG. REC. 3882 (2001) (statement of Sen. Domenici) (wanting to avoid situations in which self-loaning candidates who win elections receive repayment money from contributors and then ask "How would you like me to vote[?]"); *id.* at 3970 (statement of Sen. Hutchison) (stating that candidates "do not have a constitutional right to resell [their office]").

86 *See, e.g.*, 147 CONG. REC. 3884–85 (statement of Sen. Sessions).

87 *See, e.g.*, Thompson v. Hebdon, 7 F.4th 811, 819–21 (9th Cir. 2021); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 305 (4th Cir. 2008); Voting for Am., Inc. v. Andrade, 888 F. Supp. 2d 816, 840 (S.D. Tex. 2012).

88 *See* Alexei V. Ovtchinnikov & Philip Valta, Self-Funding of Political Campaigns 9 (Nov. 15, 2021) (unpublished manuscript), https://ssrn.com/abstract=2804474 [https://perma.cc/6ZZY-TUDH].

89 *See* Alexi McCammond, *The Texas Senate Race Is the Most Expensive in History*, AXIOS (Oct. 26, 2018), https://www.axios.com/2018/10/26/texas-senate-race-most-expensive-in-history [https://perma.cc/MJ3A-PP56].

90 Kendall & Bravin, *supra* note 14.

91 52 U.S.C. § 30110 (2018) (statutory notes).

92 Ted Cruz for Senate v. FEC, 542 F. Supp. 3d 1, 6 (D.D.C. 2021).

93 *See* Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment at 14–15, Ted Cruz for Senate v. FEC, 542 F.

serted that the government could not justify this burden because it could not demonstrate any risk of quid pro quo corruption or its appearance in the usage of post-election contributions to repay personal loans.[94] In response, the FEC argued that Section 304's PLRL did not implicate speech rights because (1) candidates still had the ability to loan themselves as much as they wanted, and (2) candidates could use an unlimited amount of pre-election contributions to pay off said loans.[95] Regarding its anticorruption interest, the FEC provided reports of potential quid pro quo exchanges, an academic article discussing the effect of special interest groups on indebted politicians, and a YouGov poll gauging the public's perception of post-election contributions.[96]

From a high-level perspective, the parties' contentions were nothing unique for a campaign finance case: the plaintiff points to the First Amendment, and the government points to corruption. Still, the case was one of first impression in that none prior had dealt specifically with a PLRL. The parties and district court were not even certain about which standard of scrutiny to apply.[97] Ultimately though, the three-judge panel voted unanimously in favor of Cruz, finding that Section 304 violated congressional candidates' constitutional rights.[98] The FEC appealed to the Supreme Court, which granted cert in September 2021.[99] Months later, the Court issued a baffling, although not too surprising, opinion that affirmed the district court's decision.

C. The (Unsurprisingly) Baffling *Cruz* Opinion

The Court heard oral arguments for *FEC v. Cruz* in January 2022, and issued its opinion in mid-May that year. The decision was split 6-3 along the usual conservative–liberal divide,

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Supp. 3d 1 (D.D.C. 2021) (No. 19-908), 2020 WL 3396200 [hereinafter Plaintiffs' Memorandum]; *see also* Randall v. Sorrell, 548 U.S. 230, 256 (2006) (plurality opinion) (recognizing candidates' First Amendment interest in "amassing the resources necessary for effective . . . advocacy" (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

94 *See* Plaintiffs' Memorandum, *supra* note 93, at 21–33.

95 *See Cruz*, 542 F. Supp. 3d at 9.

96 *See id.* at 12–15.

97 *See id.* at 11; *see also supra* notes 78–79 and accompanying text.

98 *See Cruz*, 542 F. Supp. 3d at 19.

99 Amy Howe, *Justices Add Fives New Cases to Their Docket from "Long Conference," Including Cruz Campaign Case*, SCOTUSBLOG (Sept. 30, 2021), https://www.scotusblog.com/2021/09/justices-add-five-new-cases-to-their-docket-from-long-conference-including-cruz-campaign-case [https://perma.cc/MK4E-8AAX].

finding in favor of Cruz,[100] thus creating another hole in the regulatory Swiss cheese that is our campaign finance regime. Still, because *FEC v. Cruz* is effectively THE caselaw of PLRLs, it is necessary to dissect the case before proceeding. This section overviews *Cruz*, providing synopses of both the Court's majority opinion (written by Chief Justice Roberts) and Justice Kagan's dissent.[101] Questions, comments, and concerns about the opinion are reserved for Part II.

1. *The Majority Opinion*

After settling standing issues, the Court began its opinion by establishing that Section 304's PLRL burdened congressional candidates' First Amendment rights. It reached this conclusion through a couple observations. First, the Court pointed to a study indicating that congressional candidates' personal loan amounts began clustering at the $250,000 mark following the passage of BCRA.[102] Overall, the percentage of candidates loaning themselves exactly $250,000 increased during this time.[103] The Court interpreted this finding as proof that Section 304's PLRL prevented candidates from loaning themselves enough money to properly campaign, the idea being that many candidates were only loaning themselves up to the limit out of fear of being unable to recoup additional money following the election.[104]

Beyond quantitative indicators, the Court stated that Section 304's First Amendment burden was "evident and inherent" in the fact that its PLRL forced candidates to confront a choice in their decision to self-loan.[105] While, as the Court acknowledged, the PLRL did not impose a hard cap on congressional candidates' expenditure of personal funds,[106] the simple risk

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100 *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1656–57 (2022).

101 It should be noted that the case dealt with a couple standing issues, which comprise a decent chunk of the opinion. Since these issues are irrelevant to the constitutionality of PLRLs, they are not discussed in this section. In short, though, the Court determined that Cruz still had standing despite willfully incurring his injury. *Id.* at 1646–48. Moreover, the Court disagreed with the FEC's assertion that Cruz should be challenging the regulatory provision that implemented Section 304 rather than Section 304 itself. *Id.* at 1648–50; *see also* 11 C.F.R. § 116.11 (2022).

102 *See Cruz*, 142 S. Ct. at 1650–51; *see also* Ovtchinnikov & Valta, *supra* note 88, at 28.

103 *See* Ovtchinnikov & Valta, *supra* note 88, at 28.

104 *See Cruz*, 142 S. Ct. at 1651.

105 *Id.* (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 745 (2011)).

106 Such a cap would almost certainly be deemed per se unconstitutional. *See supra* notes 72–73 and accompanying text. *But see infra* section IV.A.2. (explain-

that some candidates may potentially choose not to self-loan past the $250,000 limit was enough to produce a "drag" on candidates' political speech.[107] To underscore this "drag" (a term the Court borrowed from its *Davis* opinion[108]), the Court emphasized the fact that personal loans constitute the vast majority of campaign debt.[109] The Court also noted how loans are particularly crucial for new candidates and challengers, who may lack the initial funds and popularity needed to win an election.[110] All in all, the Court had "no doubt that the law . . . burden[ed] First Amendment electoral speech,"[111] thus requiring the federal government to demonstrate a permissible interest—i.e., an interest in combatting the actuality or appearance of corruption in the use of post-election contributions to repay personal loans.[112]

The Court began its inquiry into the government's interest by refusing to settle whether strict scrutiny or the more intermediate "closely drawn" scrutiny applies to PLRLs.[113] For the Court's purpose, this did not matter, as its decision would turn on whether the government established a need to prevent quid pro quo corruption.[114] And, as noted earlier, such an interest can satisfy either level of scrutiny.[115]

Simply proving an existence or appearance of quid pro quo corruption, however, was not enough for the FEC to win this case. As the Court stressed, post-election contributions are already covered by an existing anticorruption measure: contribution limits (which were $2,900 for individuals and $5,000 for PACs and parties at the time of the case).[116] Thus, unless the FEC could demonstrate a *heightened* corruption risk in the use

ing why courts should rethink the constitutionality of regulations on self-funding campaigns in light of the appearance-of-corruption risk that personal campaign loans create).

107 *See Cruz*, 142 S. Ct. at 1651.

108 *See* Davis v. FEC, 554 U.S. 724, 739 (2008).

109 *See Cruz*, 142 S. Ct. at 1651.

110 *See id.* The Court thus appeared to hearken back to Justice Breyer's focus on electoral competition that he espoused in his *Randall* plurality. *See* Randall v. Sorrell, 548 U.S. 230, 248 (2006) (plurality opinion); Chinn, *supra* note 60, at 630.

111 *Cruz*, 142 S. Ct. at 1652.

112 *See supra* note 66 and accompanying text.

113 *See Cruz*, 142 S. Ct. at 1652.

114 This decision will matter, however, for future cases challenging state and local PLRLs. *See infra* section II.B.3.

115 *See supra* note 66 and accompanying text.

116 *See* Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 86 Fed. Reg. 7867, 7869 (Jan. 28, 2021); *Archive of Contribution Limits*, FEC, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/archived-contribution-limits [https://perma.cc/S7X3-GJLY] (last visited Feb. 25, 2023).

of post-election contributions to repay personal loans—beyond the general risk found in all campaign contributions—Section 304's PLRL would be regarded by the Court as a "prophylaxis-upon-prophylaxis approach."[117] In plainer terms, the PLRL would be redundant and therefore unnecessary. In the end, the Court found this to be so.

To its credit, the FEC provided multiple sources illustrating an increased risk, though to no avail. First, focusing on the actuality of corruption, the FEC cited numerous real-world examples of post-election contributors seemingly receiving political favors and access. For instance, in Kentucky, two governors with millions of dollars in personal loans had received post-election contributions from companies seeking no-bid contracts.[118] In another example, an Ohio attorney general granted $9.6 million dollars in contracts to lawyers who had given him almost $195,000 following his election to repay personal loans.[119] The Court, nevertheless, dismissed these jarring scenarios as "a handful of media reports and anecdotes," mainly because they lacked explicit proof that a quid pro quo exchange had been arranged.[120] The examples instead showcased the "appearance of mere influence [and] access," rather than true corruption.[121]

The FEC also cited a scholarly article and BCRA's legislative history to support the government's interest. The Court rejected both. While the article found that self-loaning politicians were more likely than other politicians to vote for pro-interest group legislation if they received contributions from said interest group,[122] the Court again could not discern whether this was mere influence or illicit quid pro quo.[123] Moreover, the Court placed little weight on the legislative history due to competing statements made by multiple U.S. senators during BCRA discussions.[124]

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117 *Cruz*, 142 S. Ct. at 1652 (cleaned up) (quoting McCutcheon v. FEC, 572 U.S. 185, 227 (2014) (plurality opinion)).

118 Brief for the FEC, *supra* note 76, at 37.

119 *Id.*

120 *See Cruz*, 142 S. Ct. at 1653.

121 *Id.* (quoting *McCutcheon*, 572 U.S. at 208). Many scholars have criticized this distinction as gray—when does spending money and subsequently gaining favors in return stop being "mere influence" and instead arise to the level of quid pro quo? *See, e.g.*, Usha R. Rodrigues, *The Price of Corruption*, 31 J.L. & POL. 45, 80 (2015) ("[T]he defenders of such contributions cannot deny that donors' payments are getting them *something*."). That is a topic for another day, however.

122 *See* Ovtchinnikov & Valta, *supra* note 88, at 22.

123 *See Cruz*, 142 S. Ct. at 1654.

124 *See id.*; *see also supra* notes 85–86 and accompanying text.

Finally, the FEC provided a poll that it had conducted through YouGov to show that post-election contributions create an appearance of corruption. Specifically, the poll asked respondents whether "those who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office."[125] An overwhelming 78% of Democratic, 78% of Republican, and 84% of independent respondents answered that this was "likely."[126] Yet, the Court remained unconvinced by these results, finding the poll flawed in three ways: First, the poll did not ask respondents their thoughts on *pre*-election contributions, thus providing no comparison between the two types. Second, the poll did not mention that a $2,900 contribution limit applied to post-election contributions, meaning it failed to account for the prophylaxis-upon-prophylaxis concern. Lastly, the question did not clarify whether an illicit quid pro quo actually took place in the hypothetical.[127] Taken all together, the Court found that the poll did not properly substantiate the claim that post-election contributions used to repay personal loans pose a unique risk of the appearance of corruption, at least in congressional elections.

The Court concluded its opinion by making two final points. First, it disputed the FEC's argument that "post-election contributions used to repay a candidate's loans are akin to a 'gift' because they 'add to the candidate's personal wealth.'"[128] According to the Court, such contributions cannot be considered "gifts," as they simply "restore the candidate to the status quo ante"—the financial position they were in before the election.[129] In addition, the Court took special issue with the fact that Section 304's PLRL applied to losing candidates, who the Court asserted "are . . . in no position to grant official favors."[130] Because the government provided no anticorruption rationale for why PLRLs should apply to such candidates, the Court viewed Section 304 as overbroad. Thus, the Court

[125] FEC's Reply in Support of Its Motion for Summary Judgment, *supra* note 28, at 29–30.

[126] *Id.*

[127] *See Cruz*, 142 S. Ct. at 1654.

[128] *Id.* at 1655.

[129] *Id.* at 1655–56. As discussed further along in this Article, this claim seems a tad dubious when candidates are able to attach interest rates to their personal loans. *See infra* section IV.B.1.

[130] *Cruz*, 142 S. Ct. at 1656. Again, this claim is questionable, to say the least. *See infra* section IV.A.3.

ultimately held that the provision "burdens core political speech without proper justification," and struck it down.[131]

2. *The Dissent*

Justice Kagan wrote the sole dissent in *Cruz* (joined by Justices Breyer and Sotomayor), in which she laid out three main points. To begin, Kagan argued that the Court should have treated Section 304's PLRL the same way that the *Buckley* Court handled contribution limits because both impose only indirect burdens on candidates' speech.[132] Next, Kagan found there to be unique corruption risks in personal loan repayments, pointing out a crucial distinction between using contributions for such repayments and using them for campaign activities: in the former instance, "post-election donors can be confident their money will enrich a candidate *personally*."[133] That money does not go to political ads or staff salaries, but rather directly into the candidate's bank account. Consequently, in Kagan's view, the $2,900 individual contribution limit that the Court highlighted did not constitute enough "prophylaxis" to fully curb the potential for quid pro quo exchanges between candidates and post-election contributors.

Finally, Kagan believed that the Court subjected the government to an overly stringent burden of proof in proving its anticorruption interest. Quoting *McConnell v. FEC*, Kagan emphasized that "[t]he quantum of empirical evidence needed" to uphold a campaign finance law "var[ies] up or down with the novelty and plausibility of the [law's] justification."[134] Moreover, Kagan painted Section 304's PLRL as common-sense policy. As she puts it, "everyone knows people (including politicians) will often do things for money."[135] Accordingly, applying *McConnell*'s standard, Kagan found the FEC's evidence—the "media reports," studies, legislative history, and poll—to be more than sufficient to justify the PLRL.

Kagan's closing thoughts issued a simple warning: the invalidation of Section 304 would only facilitate the danger of

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131 *Cruz*, 142 S. Ct. at 1656.

132 *See id.* at 1658–60 (Kagan, J., dissenting). She also noted how being able to use an unlimited amount of contributions to repay personal loans undermines the *Buckley* Court's rationale in striking down self-funding limits—that such candidates would be uncorruptible in relying solely on their own money. *See id.* at 1659–60; Buckley v. Valeo, 424 U.S. 1, 51–54 (1976). Section IV.A.2 covers this concern in more detail.

133 *Cruz*, 142 S. Ct. at 1660–62 (emphasis added).

134 *Id.* at 1662 (alterations in original) (quoting McConnell v. FEC, 540 U.S. 93, 144 (2003)).

135 *Id.*

candidates and contributors saying to each other, "I'll make you richer and you'll make me richer."[136]

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In many ways, the *Cruz* decision was quite expected. The Roberts Court had already been judicially deregulating the campaign finance sphere for sixteen years prior.[137] Furthermore, the decision itself broke little doctrinal ground, instead applying the same "quid pro quo"-focused approach to the *Buckley* framework that the Court had largely adopted since *Citizens United*.[138] Yet, it is precisely the decision's predictability that makes it so puzzling. Section 304 was not, after all, some sweeping provision outlawing candidate advocacy or disrupting the associational rights of millions of contributors. Rather, it was a relatively obscure law that affected a tiny cohort of Americans—congressional candidates—by laying down some basic ground rules for repaying personal loans. Yet, the Court, in defiance of the numbers and (debatably) common sense, found a First Amendment burden. And the Court, despite the FEC citing multiple incidents of shady dealings and corroborating statistics, held that the government had not demonstrated a unique risk of corruption or its appearance.

Part II further examines this dogmatic behavior, overviewing what *Cruz* can teach us about how future campaign finance cases will be handled under the current Court. Moreover, it covers some of the many questions and concerns that arose following the *Cruz* decision: How will a lack of a PLRL potentially influence the behavior of our congressional representatives? What standard of scrutiny should be applied to lawsuits challenging other PLRLs? Does it matter? Also, how will *Cruz* impact state- and local-level PLRLs? Are their invalidations

136 *Id.* at 1664.

137 *See* Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L. & POL'Y REV. 471, 481–96 (2019); Daniel P. Tokaji, *Campaign Finance Regulation in North America: An Institutional Perspective*, 17 ELECTION L.J. 188, 190–94 (2018) (overviewing judicial deregulation in the United States).

138 In the immediate aftermath of the opinion, scholars and practitioners seemed to generally agree that the doctrinal implications of *Cruz* were limited. *See, e.g.*, Rick Hasen (@rickhasen), TWITTER (May 16, 2022, 10:52 AM), https://twitter.com/rickhasen/status/1526213884402606080 [https://perma.cc/N3TV-KKW7] ("I breathed a sign [sic] of relief in reading the opinion because it broke no new ground."); Daniel I. Weiner (@DanWeiner329), TWITTER (May 16, 2022, 2:03 PM), https://twitter.com/DanWeiner329/status/1526262009364369413 [https://perma.cc/75NM-NQMH] ("[I]t's actual implications for campaign finance are pretty limited . . . .").

imminent or can they stand a chance in court? Part II contemplates these questions.

II
POST-*Cruz* Considerations

While *Cruz* did little to shake up the *Buckley* framework, the opinion still reveals much about how the current 6-3 Court thinks about not only PLRLs, but campaign finance issues in general. On the other hand, the decision has opened many new questions for scholars, judges, and legislators alike that will prove significant in future legal challenges against other PLRLs as well as during potential attempts to enact new policies regulating loan repayments. This Part thus addresses both what we learned from *Cruz* and what we should be asking following the case.

A. What We Learned

Despite dealing with a very specific BCRA provision, *Cruz* can teach us a great deal about the state of this Court's campaign finance jurisprudence. For one, the case has undermined the lengths to which the Court will go to find a First Amendment burden stemming from a campaign finance regulation. Conversely, the Court has further illuminated just how high the bar is for governments to demonstrate a valid anticorruption interest. Finally, the unfractured six-justice majority suggests that the conservative wing of the Court has settled on upholding a restrictive interpretation of the *Buckley* framework rather than outright overturning *Buckley*.

1. *An Ever-Present First Amendment Burden*

The notion that the Supreme Court applies an extraordinarily broad, libertarian interpretation of the First Amendment is nothing new,[139] especially in the context of campaign finance. The Court has routinely found First Amendment burdens tied to campaign finance laws, even in instances of upholding

[139] *See* FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT 25–27, 111 (2017); Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231, 269 n.198 (2021). In general, Americans tend to value free speech more than citizens of any other nation worldwide (at least according to some metrics). *See Countries with Freedom of Speech 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/countries-with-freedom-of-speech [https://perma.cc/43BV-8ZGG] (last visited June 15, 2022).

them.[140] And, in all fairness, widespread speech and associational burdens are often—in the Court's words—"evident and inherent" in various regulations of campaign finance.[141] For instance, contribution limits affect millions of Americans annually, restricting both how much contributors can give to candidates and in turn how much money candidates can raise for their campaigns.[142] Disclosure requirements affect every candidate running in a given jurisdiction, forcing them to reveal what they may have otherwise kept secret. These types of laws have an innate, concrete impact on peoples' First Amendment rights.

Yet, when it comes to PLRLs, the picture is not so clear. The affected group is so small: only candidates who self-loan their campaigns above the repayment limit. Moreover, their influence on candidates' speech is far less tangible than that of other campaign finance regulations. PLRLs do not limit how much a candidate can raise, nor do they directly impede how much a candidate can spend on campaign advocacy. Despite this, the *Cruz* Court found Section 304's burden "evident and inherent," and described it as "no small matter."[143] The road it took to arrive at this conclusion illustrates how deep the Court is willing to dig, and how many assumptions it is willing to make, to find First Amendment interests implicated by a campaign finance law.

Take, for example, the Court's concerns over clustering. The Court observed that a sizeable group of congressional candidates loaned themselves exactly $250,000 post-BCRA, and made the assumption that these candidates "clustered" at that precise amount due to trepidations over loaning above the Section 304 limit.[144] FEC data made available to the Court, however, suggests an alternative story. Indeed, as Table 1 indicates, $250,000 was not the only dollar amount at which self-loaning congressional candidates clustered post-BCRA. Notably, a higher percentage of self-loaning candidates issued personal loans respectively in the exact amounts of $50,000

140 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 23 (1976) (finding that contribution limits implicate fundamental First Amendment interests).

141 FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1651 (2022) (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 745 (2011)).

142 *See* Adam Hughes, *5 Facts About U.S. Political Donations*, PEW RSCH. CTR. (May 17, 2017), https://www.pewresearch.org/fact-tank/2017/05/17/5-facts-about-u-s-political-donations [https://perma.cc/3276-KK65] (noting that 12% of adult Americans donated to candidates in 2016).

143 *Cruz*, 142 S. Ct. at 1651.

144 *See supra* notes 102–103 and accompanying text.

and $100,000. Moreover, a decent amount of candidates self-loaned precisely at the $150,000, $200,000, $300,000, and $500,000 marks. These numbers indicate a strong possibility that candidates clustered at $250,000 not just because of the PLRL, but also because $250,000 is simply a clean, round number.[145] Of course, because we cannot speak with each candidate individually about their motives, we cannot know for certain the reasons for these clusters. Nevertheless, the fact that self-loaning congressional candidates cluster at certain round dollar amounts at higher rates than the $250,000 amount should at least call into doubt the idea that Section 304's PLRL was the driving factor behind the clustering at $250,000. And yet, the Court confidently interpreted the data as proof of a speech burden.

TABLE 1 – PERSONAL LOAN CLUSTERING OF CONGRESSIONAL CANDIDATES POST-BCRA[146]

	$50K	**$100K**	**$150K**	**$200K**	**$250K**	**$300K**	**$500K**
No. of Candidates	134	129	31	55	79	25	26
% of Total Self-Loaning Candidates	1.82%	1.75%	0.42%	0.75%	1.07%	0.34%	0.35%

Similarly, the Court was quick to presume that Section 304's PLRL forced some congressional candidates to make difficult choices over how much to self-loan to their campaigns.[147] But again, the data indicates something different. As Table 2 shows, only 79 out of the 26,320 congressional candidates between 2003 and 2020 loaned themselves exactly $250,000. That represents 0.30% of all such candidates (and 1.07% of candidates who issued personal loans). In other words, approximately 99.70% of congressional candidates during the

145 There are, in fact, psychological studies suggesting that humans have a preference for round numbers. *See* David Nield, *Humans Actually Have an Irrational Preference for Round Numbers*, SCI. ALERT (July 11, 2020), https://www.sciencealert.com/we-actually-prefer-round-numbers-even-when-the-real-number-is-better-news [https://perma.cc/F6VL-DVVH].

146 This data was originally gathered for the Brennan Center for Justice's amicus brief in *FEC v. Cruz*. The dataset covers all 26,320 House and Senate candidates between 2003 and 2020—of which 7,360 issued personal loans to their campaigns—and can be retrieved from the FEC's website. *See Browse Data*, FEC, https://www.fec.gov/data/browse-data/?tab=bulk-data [https://perma.cc/MC8Q-TBW9] (last visited June 16, 2022). Credit is owed to Coryn Grange for compiling the data.

147 *See Cruz*, 142 S. Ct. at 1651.

post-BCRA, pre-*Cruz* time period felt no need to loan themselves directly up to and no further than Section 304's $250,000 limit, either because they issued no personal loans, found a sub-$250,000 loan to be adequate for campaign purposes, or felt comfortable issuing a personal loan beyond the limit. For sure, the fact that only a small percentage of candidates may feel affected by a PLRL does not alone justify its constitutionality.[148] At the same time, it is impossible to fully know why these 79 candidates loaned themselves exactly $250,000.[149] What we *do* know is that none of the 79 candidates felt so restricted by the PLRL that they felt a need to challenge Section 304 in court. Instead, it took Senator Cruz—who managed to spend over $45 million in his 2018 race (quite a bit of political speech!)[150]—and his deliberately incurred "injury" to bring a case against Section 304. When combining this procedural posture with the FEC data, it becomes fairly clear that, at a minimum, "many politicians [were] unaffected by BCRA" in terms of issuing personal loans.[151] That is, at least, the conclusion of Alexei Ovtchinnikov and Philip Valta, the political scientists on which the *Cruz* majority heavily relied. Nevertheless, despite all this, the Court overlooked this conclusion and described Section 304's speech burden as evident.

148 *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (describing how a law can be facially invalidated if "no set of circumstances exist[ ] under which [it] would be valid"); Louis W. Tompros, Richard A. Crudo, Alexis Pfeiffer & Rahel Boghossian, *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-*Alvarez*, Social Media-Obsessed World*, 31 HARV. J.L. & TECH. 65, 90 n.156 (2017) (noting how, in a First Amendment context, laws "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application").

149 *See supra* note 145 and accompanying text.

150 *Texas Senate 2018 Race*, OPEN SECRETS, https://www.opensecrets.org/races/summary?cycle=2018&id=TXS2 [https://perma.cc/MLM5-LRZ4] (last visited June 18, 2022).

151 *See* Ovtchinnikov & Valta, *supra* note 88, at 28 (noting that 44% of all congressional candidate personal loans between $100,000 and $1 million exceeded $250,000).

TABLE 2 – CONGRESSIONAL CANDIDATE PERSONAL LOAN USE BREAKDOWN POST-BCRA[152]

	No Personal Loan	Less Than $250K	Exactly $250K	Above $250K	Total
No. of Candidates	18,960	6,419	79	862	26,320
% of Total Candidates	72.04%	24.39%	0.30%	3.28%	100.00%
% of Total Self-Loaning Candidates	N/A	87.21%	1.07%	11.71%	100.00%

The point of this section is not, of course, to relitigate the *Cruz* case. Rather, the above-cited examples reveal how low a bar today's Court may employ when finding a First Amendment burden in a campaign finance case. The Court, in spite of the data strongly supporting the contrary, found a speech burden in Section 304 because a few candidates may or may not have limited their personal loans to $250,000 due to the PLRL. The *Cruz* Court thus doubled down on its bold disregard of empirical evidence in *Arizona Free Enterprise*, no longer simply disregarding such evidence but also selectively citing statistics that bolster its speech-burden narrative (while ignoring statistics that do not).[153] Accordingly, the main takeaway from *Cruz* on this front seems to be that the Roberts Courts will almost assuredly find First Amendment rights implicated when evaluating a campaign finance regulation. Any inkling of a burden on speech or association—no matter how indirect, no matter how small, no matter how ambiguous—appears to be enough. And so, with burden being a foregone conclusion, the true litigation in campaign finance cases will be over the government's anticorruption interest.

152 This data was also originally gathered for the Brennan Center's *Cruz* amicus brief. *See supra* note 146.

153 *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 746 (2011) ("[W]e do not need empirical evidence to determine that the law at issue is burdensome."); *see also* Roya Rahmanpour, Comment, Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*: Money Talks, Matching Funds Provision Walks*, 45 LOY. L.A. L. REV. 657, 667–69 (2012) (arguing that the Court's disregard of empirical evidence will lead to unprincipled decisions in campaign finance cases).

2. *The Anticorruption Interest: Prophylactic in Name Only*

Campaign finance laws are supposed to be preventative—i.e., prophylactic. As the Court stated in *Citizens United* and reiterated in *McCutcheon*, such laws "are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements."[154] This framing makes sense, as it would be ridiculous to reduce the regulation of campaign finance to purely post-hoc enforcement. At that point, campaign finance laws would be indistinguishable from antibribery laws.[155] For a campaign finance regime to be effective, corruption must be stopped before it happens. Despite this recognition, however, the Roberts Court has consistently overturned bright-line prophylactic campaign finance laws,[156] ironically citing in many instances a lack of evidence of quid pro quo corruption (the very thing these laws are designed to prevent).[157] The *Cruz* case now joins this line of cases, further solidifying the notion that governments cannot implement a campaign finance law simply as a prophylactic measure, but must instead justify it by referencing a litany of examples of quid pro quo exchanges or the appearance of such.

Indeed, whereas the *Cruz* Court applied a very generous read of the record to find a First Amendment burden, it granted the federal government no such grace when reviewing its anticorruption interest. Recall that the FEC pointed to numerous instances of elected officials in states without PLRLs (as well as pre-BCRA federal officials) receiving substantial post-election contributions from private entities and later giving contracts to said entities.[158] While the average person could put two and two together when reading such stories, the Court refused to make such inferences. These were not, according to the Court, examples of illicit quid pro quo, but instead speculative "media reports" of potentially legal political influence.[159] Same too with the academic paper the FEC cited. And a reputable poll

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154 McCutcheon v. FEC, 572 U.S. 185, 221 (2014) (plurality opinion) (emphasis in original) (quoting Citizens United v. FEC, 558 U.S. 310, 357 (2010)).

155 *But see* Joshua S. Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 FLA. ST. U. L. REV. 657, 666 (2018) (arguing that quid pro quo exchanges should be dealt with exclusively through criminal prosecutions).

156 Christopher Robertson, D. Alex Winkelman, Kelly Bergstrand & Darren Modzelewski, *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 423 (2016).

157 *See, e.g.*, *Citizens United*, 558 U.S. at 357 ("The Government does not claim that these expenditures have corrupted the political process in those States.").

158 *See supra* notes 118–119 and accompanying text.

159 FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1653 (2022).

that plainly demonstrated public corruption concerns about post-election contributions was not enough because it did not mention the existence of other campaign finance regulations or explicitly clarify that the presented scenario involved quid pro quo.[160] Suffice to say, the Court was not content with Section 304 being a prophylactic measure. Quite the opposite, it demanded that the government lay out a robust record evidencing the existence of corruption issues. Section 304's PLRL could not simply be preventative; it had to be reactive, too.

Going forward, then, one can expect the Court to subject governments to an extraordinarily high burden of proof in defending the constitutionality of restrictive campaign finance laws—i.e., contribution limits and spending limits.[161] To exhibit an actuality of corruption, government-defendants will likely need to compile a robust record laying out multiple incidents of verifiably illegal quid pro quo exchanges in the specific context of the type of behavior the challenged law regulates; the need for any insinuation will be disqualifying. This will be a tall order, as bribery of public officials is significantly under-prosecuted and difficult to detect.[162] Furthermore, to show the appearance of corruption, any cited polls will have to satisfy a checklist of Court demands, such as making the type of corruption in question unambiguously quid pro quo, as well as taking into account prophylaxis-upon-prophylaxis concerns. This will prove tricky when many pollsters may not be fully aware of the idiosyncrasies of the Roberts Court's campaign

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160 *See id.* at 1654.

161 This reflects a continuation of a trajectory started by the Court in its 2021 decision of *AFP v. Bonta*, in which the Court intensified the standard of scrutiny it applies when evaluating disclosure laws. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021); *see also* Tyler Valeska, *First Amendment Limitations on Public Disclosure of Protest Surveillance*, 121 COLUM. L. REV. F. 241, 265 (2021) (describing *Bonta*'s inclusion of a narrow tailoring requirement as an "enunciation").

162 Tom Ginsburg & Nicholas Stephanopoulos, *The Concepts of Law*, 84 U. CHI. L. REV. 147, 161 (2017) ("When politicians trade votes for money, they do so in secret. When officeholders merely offer access or influence to their funders, they again do so as furtively as possible. Precisely for these reasons, social scientists have rarely been able to quantify corruption itself . . . ."). The prosecution of elected officials for quid pro quo is so rare that when it does happen, it becomes a giant media spectacle. A recent example would be the resignation of New York Lieutenant Governor Brian Benjamin, who had been charged with bribery and wire fraud for procuring illicit campaign funds. *See* Ayana Archie, *New York's Lieutenant Governor Resigns After Being Charged with Bribery and Fraud*, NPR (Apr. 13, 2022), https://www.npr.org/2022/04/13/1091973669/new-york-lieutenant-governor-brian-benjamin-resigns-bribery-fraud-campaign [https://perma.cc/X4PK-EZB7]. Ironically, the Robert Court's own confusion over how to discern illegal quid pro quo from donations leading to access and influence proves this very point. *See Cruz*, 142 S. Ct. at 1653.

finance jurisprudence. Plus, taking all such concerns into consideration may sacrifice the efficacy of poll questions, which generally should be as concise as possible.[163] Overall, the *Cruz* Court has taken the uphill challenges of presenting an anticorruption interest established in *Citizens United* and *McCutcheon* and steepened them into a near cliff.

3. *A Conservative Consensus on Buckley*

Finally, and perhaps a slim silver lining for campaign finance reform advocates, the *Cruz* opinion has signaled that the newish 6-3 conservative majority will not wholly dismantle the *Buckley* framework. Such a scenario was not outside the realm of possibility. For one, this case marked Justice Barrett's first time dealing with campaign finance issues while on the bench (even while on the Seventh Circuit).[164] And while Justices Gorsuch and Kavanaugh had handled campaign finance cases during their respective tenures as federal appellate judges, it remained unclear prior to *Cruz* whether they might try to disrupt the framework once they sat in the nation's highest court.[165] Moreover, Justice Thomas has historically been a vocal critic of *Buckley*, often writing dissents or concurrences in campaign finance cases indicating that he would hold virtually all campaign finance regulations as violative of the First Amendment.[166] With such a composition, the Court could have potentially positioned itself to invalidate BCRA in its entirety as well as overturn the regulation-friendly parts of *Buckley*.[167]

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163 1 ARLENE FINK, HOW TO ASK SURVEY QUESTIONS 123 (2002) ("Keep questions short.").

164 *See* Nathan Leys, Note, *"Masters of War"? The Defense Industry, the Appearance of Corruption, and the Future of Campaign Finance*, 39 YALE L. & POL'Y REV. 655, 659 n.10 (2021).

165 *See* Lee Fang, *Brett Kavanaugh, Who Has Ruled Against Campaign Finance Regulations, Could Bring an Avalanche of Big Money to Elections*, INTERCEPT (July 12, 2018), https://theintercept.com/2018/07/12/brett-kavanaugh-supreme-court-donor-disclosure [https://perma.cc/HL3A-QCRZ]; Ciara Torres-Spelliscy, *Neil Gorsuch Understands Campaign Finance—And That's the Problem*, BRENNAN CTR. FOR JUST. (Feb. 3, 2017), https://www.brennancenter.org/our-work/analysis-opinion/neil-gorsuch-understands-campaign-finance-and-thats-problem [https://perma.cc/Z8LM-7UDZ] ("The bad news is he may harbor antipathy to regulating money in politics.").

166 *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 266 (2006) (Thomas, J., concurring in the judgment); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting); Colo. Republican Fed. Campaign Comm. v. FEC (*Colo. Republican I*), 518 U.S. 604, 640 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

167 The likelihood of such an extreme decision was admittedly small, though not nonexistent. *See* Weiner & Martin, *supra* note 16. Senator Mitch McConnell

Instead, while the Court did strike down Section 304, it did so under the traditional *Buckley* format of weighing First Amendment burdens against governmental interests; it did not hold any campaign finance laws unconstitutional per se. On top of this, all six conservative justices joined the majority, with no concurrences or dissents quarreling over the extent to which the Court should be applying *Buckley*.[168] Thus, former President Trump's three appointees seem to have no desire to completely turn the Court's campaign finance jurisprudence upside down. Furthermore, the lack of any concurrence suggests that Thomas may have given up on his crusade to repeal all campaign finance law, resigning himself instead to Roberts' doctrinally restrictive take on the *Buckley* framework.[169]

Based on this newfound consensus among the conservatives, it seems likely that the Court will—at least for the foreseeable future—continue to hold independent-expenditure limits as unconstitutional, hold contribution limits as (mostly) constitutional, and subject all other campaign finance regulations to a tremendously high, somewhat ill-defined standard of scrutiny. The Court will not overturn *Buckley*, but will instead carry on chipping away at federal, state, and local campaign finance regimes at their edges, leaving little room for creative policy solutions beyond contribution limits, disclosure requirements, and some forms of public financing of elections.

B. What to Ask (and What to Expect)

While *Cruz* imparted some clarity on the modern state of U.S. campaign finance jurisprudence, it has also left us with plenty of questions. Specifically, the Court's invalidation of the federal PLRL raises concerns over how a lack of regulation over congressional personal loan repayments will impact the behavior of federally elected officials. How will congresspeople's financing habits change? How will their governance change?

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even urged the Court to "strike down what remains of BCRA" in his *Cruz* amicus brief, clearly seeing an opportunity for such a move. Brief of Senator Mitch McConnell as *Amicus Curiae* in Support of Appellees at 26–32, FEC v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022), 2021 WL 6144107.

168 Such concurrences and dissents were a common phenomenon in earlier Rehnquist Court and Roberts Court campaign finance cases. *See, e.g.*, Martin, *supra* note 34, at 424, 426 n.73, 431–32 (overviewing the concurrences of various campaign finance cases).

169 Thomas had, in fact, also refrained from writing a concurrence in the 2019 case of *Thompson v. Hebdon*, which dealt with state contribution limits, despite having written an anti-*Buckley* one in *Randall*, which engaged with the same topic. *See* Thompson v. Hebdon, 140 S. Ct. 348, 349–52 (2019) (per curiam); *Randall*, 548 U.S. at 266 (Thomas, J., concurring in the judgment).

Additionally, questions abound about the future of state- and local-level PLRLs. Will they survive the likely challenges brought against them in the wake of *Cruz*? What standard of scrutiny should be applied? This section grapples with these questions and lays out what we might expect to see going forward.

1. *Changes in Self-Funding Methods*

To begin, Section 304's repeal will undoubtedly alter how some congressional candidates think when it comes to strategizing the financing of their campaigns. In particular, two phenomena may likely follow now that such candidates can use an unlimited amount of post-election contributions to repay personal loans. First, self-loaning candidates will dedicate more effort toward post-election fundraising. To be sure, many self-loaning candidates already engaged in such fundraising pre-*Cruz*.[170] But with the $250,000 limit out of the way, a congressional candidate who loaned their campaign more than $250,000 will have every incentive to aggressively raise funds to pay themselves back. Of course, all candidates have an incentive to continue soliciting money following an election, as they can legally transfer that money to their political party or future electoral campaigns.[171] Still, the lack of a PLRL now gives self-loaning candidates all the more reason to send out blast emails and throw events post-election asking for money from supporters.

Another shift in financing strategy may be that a higher percentage of self-funding candidates will rely on personal loans rather than personal contributions, i.e., money that a candidate personally contributes to their campaign without any expectation of it being paid back. Currently, about 77% of congressional self-funding consists of personal loans, with the other 23% being personal contributions.[172] The type of candi-

170 While not a congressional candidate, Trump was well-known for aggressively asking for post-election contributions to help retire his campaign debt. *See* Hasen, Trump Tweet, *supra* note 10 ("If you give money to Trump's recount/postelection litigation efforts, half of that money will go towards retiring his campaign debt instead, per the fine print.").

171 *See* 11 C.F.R. § 113.2 (2022). For example, Senator Bernie Sanders transferred over $12 million from his 2016 candidate committee to his 2020 candidate committee during the presidential election. *Sanders, Bernard*, FEC, https://www.fec.gov/data/candidate/P60007168 [https://perma.cc/Z56V-SRXA] (last visited June 22, 2022).

172 *See* Ovtchinnikov & Valta, *supra* note 88, at 8 (finding personal contributions accounting for $675 million of self-funding between 1983 and 2018 and personal loans accounting for $2.28 billion).

date to rely on personal contributions over personal loans is presumably the type so massively wealthy—imagine the Tom Steyers and Michael Bloombergs of the world[173]—that receiving $250,000 for repayments post-election would be near insignificant. For instance, Senator Rick Scott self-funded $63,569,753 to his 2018 U.S. Senate race, all of which came from contributions rather than personal loans[174]; $250,000 would have covered approximately 0.4% of that amount. Nevertheless, with Section 304 out of the way, what do such candidates have to lose from self-loaning their campaign money instead of self-contributing? At worst, the money becomes a sunk cost, which would already be the case if they had chosen to self-contribute. At best, they retrieve millions of dollars to transfer back into their personal bank accounts. Naturally, some candidates may still opt to self-contribute, since one of the biggest draws of a self-funded campaign is that the candidate is liberated from outside influence.[175] Then again, candidates could also just refrain from drawing attention to their intention to put post-election contributions toward personal loans.[176] At the very least, we can anticipate some drop in that 23% figure over time as various self-funded congressional candidates take advantage of the post-*Cruz* landscape.

2. *Changes in Governance*

There is also the question of how the invalidation of Section 304's PLRL will shape the behavior of our elected officials in Congress. It is no secret that campaign contributions affect how politicians govern.[177] Even the Court's conservative justices acknowledge this, recognizing that contributors often "in-

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[173] For a comprehensive overview of Tom Steyer's and Michael Bloomberg's respective 2020 presidential campaigns, see CAYCE MYERS, MONEY IN POLITICS: CAMPAIGN FUNDRAISING IN THE 2020 PRESIDENTIAL ELECTION 71–76 (2022). Collectively, the two candidates self-funded over $1 billion throughout their campaigns. *Id.*

[174] Data was retrieved from the FEC's database. *See Browse Data*, *supra* note 146; *see also Top Self-Funding Candidates—2018*, OPEN SECRETS, https://www.opensecrets.org/elections-overview/top-self-funders?cycle=2018 [https://perma.cc/FG5Q-PPZR] (last visited June 23, 2022).

[175] *See* MYERS, *supra* note 173, at 70–71 (detailing how Trump touted that being self-funded freed him from relying on corporate money).

[176] *See* Hasen, Trump Tweet, *supra* note 10.

[177] *See* Ovtchinnikov & Valta, *supra* note 88, at 5 ("[V]oting behavior is significantly influenced by campaign contributions."); Richard H. Pildes, *Participation and Polarization*, 22 U. PA. J. CONST. L. 341, 358–92 (2020) (detailing how small-donor contributions cause politicians to adopt more polarizing positions); Eleanor Neff Powell & Justin Grimmer, *Money in Exile: Campaign Contributions and Committee Access*, 78 J. POL. 974, 985–86 (2016) (finding that industry contributions can be used "to cultivate a short-term relationship with [elected officials] and to seek short-term influence over policy"); *see also Common Sense*, MERRIAM-WEB-

fluence" the politicians to whom they contribute.[178] And with Section 304 out of the way, many congressional candidates will solicit even more contributions following their election than they currently do. Emboldened by the potential of receiving contributions of up to $3,300 (as of 2023) by a limitless number of donors,[179] they will send out emails and make social media posts urging others to provide financial support. Bundlers—i.e., prominent persons or groups who help round up contributions for a candidate[180]—will have more motivation to raise funds post-election for candidates they support. All in all, self-loaning congressional candidates will have far greater opportunities to restore their personal funds (and even turn a profit if interest rates are involved) following *Cruz*. So, how exactly will this trend impact the official actions of those candidates who end up holding office?

While perfectly quantifying any such effect is a near impossible task,[181] scholars have been able to ascertain to some degree the effects of monetary contributions on elected officials. Perhaps most obviously, increased reliance on contributions leads to more quid pro quo exchanges. Indeed, many studies have demonstrated the existence of the "pay-to-play" phenomenon, under which individuals and companies contribute to an official's campaign and receive government contracts in return. For instance, when looking at the behavior of members of Congress, Christopher Witko found "a significant relationship between contributions and the receipt of future contracts."[182] Another study discovered that contractors can expect an approximate 150% return for every $100 spent on campaign contributions.[183] Furthermore, historians have documented a

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STER, https://www.merriam-webster.com/dictionary/common%20sense [https://perma.cc/6WPM-D2NC] (last visited June 23, 2022).

178 *See, e.g.*, FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1653 (2022).

179 Since *Cruz*, the FEC has increased the amount that individuals may contribute to candidate committees from $2,900 to $3,300 per election. This number will continue to increase every two years to track with inflation. *See Contribution Limits for 2023–2024 Federal Elections*, FEC, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits [https://perma.cc/CD6U-KXGE] (last visited Aug. 11, 2023).

180 Overby, *supra* note 3. Bundling is a common tactic used by candidates to raise large sums of money over a brief period. *See* Robertson, Winkelman, Bergstrand & Modzelewski, *supra* note 156, at 384–85.

181 *See* Ginsburg & Stephanopoulos, *supra* note 162, at 161 ("[S]ocial scientists have rarely been able to quantify corruption itself.").

182 Witko, *supra* note 33, 772–74; *cf.* Gulzar, Rueda & Ruiz, *supra* note 33, at 1–2 (observing that Colombian mayors award more contracts to donors when contribution limits are higher).

183 Bromberg, *supra* note 33, at 564. Real world examples abound, as well. *See, e.g.*, Perla Trevizo & Jeremy Schwartz, *Records Show Trump's Border Wall Is*

strong presence of quid pro quo throughout American political history.[184] Members of Congress are certainly no strangers to this conduct, and relying more heavily on post-election contributions should, according to the literature, only exacerbate the occurrence of such illicit exchanges among those members who issue personal loans.

Relatedly, dependence on contributions can lead to what Nick Stephanopoulos calls "misalignment," under which a "government's policy outputs" do not match up with "voters' policy preferences."[185] The concept is straightforward: people who contribute to campaigns tend to be wealthier, older, whiter, more male, and more ideologically extreme than the average voter.[186] At the same time, candidates have an interest in prioritizing policy positions that appeal to potential contributors rather than the general population, since doing so can increase fundraising. Thus, candidates who are or become officeholders often behave ideologically divergently from their overall constituency.[187] Misalignment may worsen following *Cruz*, as self-loaning congressional candidates—especially those who win or already hold a different elected seat—will have more incentive to signal extreme positions that appeal

Costing Taxpayers Billions More than Initial Contracts, TEX. TRIB. (Oct. 27, 2020), https://www.texastribune.org/2020/10/27/border-wall-texas-cost-rising-trump [https://perma.cc/8XXZ-FLKJ] (highlighting how construction firms whose executives had donated to Trump and other Republicans were awarded millions of dollars in contracts for construction of the U.S.–Mexico border wall); Craig Holman, *Chevron, the FEC, and Flouting Pay-to-Play Law*, THE HILL (Nov. 14, 2014), https://thehill.com/blogs/congress-blog/campaign/224059-chevron-the-fec-and-flouting-pay-to-play-law [https://perma.cc/TV35-Z7YK] ("[T]he Chevron Policy, Government & Public Affairs division doles out a million dollars in campaign contributions, while Chevron U.S.A. rakes in billions of dollars in government contracts."); *see also supra* notes 118–119 and accompanying text.

184 *See, e.g.*, UROFSKY, *supra* note 80, at 5–11 (discussing quid pro quo exchanges between politicians and donors shortly after the United States' founding, including the Jackson presidency); GUIDE TO THE PRESIDENCY AND THE EXECUTIVE BRANCH 289 (Michael Nelson ed., 5th ed. 2013) (discussing how Presidents Grant and McKinley would explicitly grant favors in exchange for donations); Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 612–13 (overviewing how President Nixon took millions of dollars from companies with promises of implementing pro-business regulation).

185 Stephanopoulos, *supra* note 46, at 1428.

186 *See* PETER L. FRANCIA, JOHN C. GREEN, PAUL S. HERRNSON, LYNDA W. POWELL & CLYDE WILCOX, THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES 16 (2003) ("[C]ontributors are indeed overwhelmingly wealthy, highly educated, male, and white. The pool of congressional contributors does not remotely look like America . . . ."); Pildes, *supra* note 177, at 364–71 ("[M]ost donors fall[ ] on either the very liberal or very conservative side of the ideological spectrum.").

187 *See* Stephanopoulos, *supra* note 46, at 1474–81.

mainly to communities that disproportionately contribute more money to campaigns. Why not, after all, claim that Joe Biden stole the 2020 presidential election if it means you can retire your personal loans more quickly?[188] Meanwhile, low-income communities, minority groups, and women—who are less likely to contribute to campaigns[189]—will have even less sway over such officials.[190] The invalidation of Section 304's PLRL may therefore amplify the antidemocratic consequences of misalignment.

Misalignment also indirectly causes legislative polarization. As Michael Kang notes, individual contributors are typically partisan and donate exclusively to candidates of one party.[191] In turn, many candidates conduct themselves in a hyperpartisan manner in order to amp up their donor base and raise more funds.[192] This leads to polarization within legislative bodies, which itself causes gridlock that prevents elected officials from implementing necessary social programs.[193] Hence, when candidates dedicate significant time and energy on soliciting contributions, they may ultimately fail to meet the needs of their constituents.

Again, it is difficult to say with certainty if (and to what extent) the *Cruz* decision will affect how our elected leaders govern. But if anything were to change now that congressional candidates are not subject to any PLRL, increases in illicit quid pro quo, misalignment, and polarization seem among the most

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188 Many Republican candidates have jumped on the "Stop the Steal" bandwagon, which has proven quite profitable. *See* Jeffrey M. Berry, *'Stop the Steal' Is About Trump. It's Also About Lots and Lots of Money*, WBUR (Jan. 11, 2022), https://www.wbur.org/cognoscenti/2022/01/11/trump-2020-election-big-lie-jeffrey-berry [https://perma.cc/G2SW-HS7Z].

189 *See* Laurent Bouton, Julia Cagé, Edgard Dewitte & Vincent Pons, Small Campaign Donors 14 (Dec. 8, 2021) (unpublished manuscript) (available at https://ssrn.com/abstract=3978318) [https://perma.cc/64KD-SVFP].

190 Unsurprisingly, legislation passed by elected officials often favors the white and the wealthy. *See* CHUCK COLLINS, DEDRICK ASANTE-MUHAMMED, JOSH HOXIE & SABRINA TERRY, INST. FOR POL'Y STUD., DREAMS DEFERRED: HOW ENRICHING THE 1% WIDENS THE RACIAL WEALTH DIVIDE 7–14 (2019), https://ips-dc.org/wp-content/uploads/2019/01/IPS_RWD-Report_FINAL-1.15.19.pdf [https://perma.cc/Y42S-HH6M]; Heather Stephenson, *Local Governments Favor the White and Wealthy*, TUFTSNOW (Oct. 16, 2020), https://now.tufts.edu/articles/local-governments-favor-white-and-wealthy [https://perma.cc/XFY2-SX9D].

191 Kang, *supra* note 47, at 1191; *see also* Pildes, *supra* note 177, at 364–71.

192 *See* Kang, *supra* note 47, at 1191; Pildes, *supra* note 177, at 364–71; Michael J. Ensley, *Individual Campaign Contributions and Candidate Ideology*, 138 PUB. CHOICE 221, 229 (2009).

193 *See* Elizabeth Rigby & Gerald C. Wright, *The Policy Consequences of Party Polarization: Evidence from the American States*, *in* AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION 236, 239–40, 245–47 (James A. Thurber & Antoine Yoshinaka eds., 2015).

likely possibilities. At the very least, *Cruz* does nothing to help mitigate these issues in our government.

3. *The Uncertain Future of State and Local PLRLs*

Perhaps the most immediate concern for campaign finance reform advocates is how *Cruz* will impact the legality of state and local PLRLs. Recall that Section 304 only applied to congressional candidates. And while *Cruz* invalidated the federal PLRL, at least five states currently have laws implemented within their respective campaign finance regimes that limit how much money raised through contributions candidates can use to repay personal loans—Alaska,[194] Rhode Island,[195] South Carolina,[196] Texas,[197] and Washington.[198] Similarly, Florida prohibits the use of post-election contributions for any purpose.[199] Meanwhile, three states straight up limit the dollar amount of personal loans a candidate may issue to their campaign—California,[200] Massachusetts,[201] and Nebraska.[202] (The map in Figure 1 provides an illustration of the various forms of state PLRLs.) PLRLs also exist within the election laws of the District of Columbia[203] and various city ordinances.[204] With *Cruz* now providing essentially the only guidance by the judiciary on the constitutionality of PLRLs, questions arise as

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194 ALASKA STAT. § 15.13.078(b)(1) (2022) (imposing limits on the usage of either pre-election or post-election contributions to repay personal loans, ranging from $5,000 to $25,000 depending on the office).

195 17 R.I. GEN. LAWS § 17-25-7.4 (2022) (imposing a $200,000 limit on the usage of either pre-election or post-election contributions to repay personal loans).

196 S.C. CODE ANN. § 8-13-1328(A) (2022) (prohibiting candidates from using more than $25,000 after an election to repay personal loans or loans given by family members).

197 TEX. ELEC. CODE ANN. § 253.042(a) (West 2021) (imposing limits on the usage of either pre-election or post-election contributions to repay personal loans, ranging from $250,000 to $500,000 depending on the office).

198 WASH. ADMIN. CODE § 390-05-400 (2023) (imposing a $7,500 limit on the usage of either pre-election or post-election contributions to repay personal loans).

199 FLA STAT. § 106.08(3)(b) (2022) (prohibiting the use of post-election contributions for any purpose).

200 CAL. GOV'T CODE § 85307(b) (West 2022) (imposing a $100,000 limit).

201 MASS. GEN. LAWS ch. 55, § 7 (2022) (imposing $30,000 to $200,000 limits depending on office).

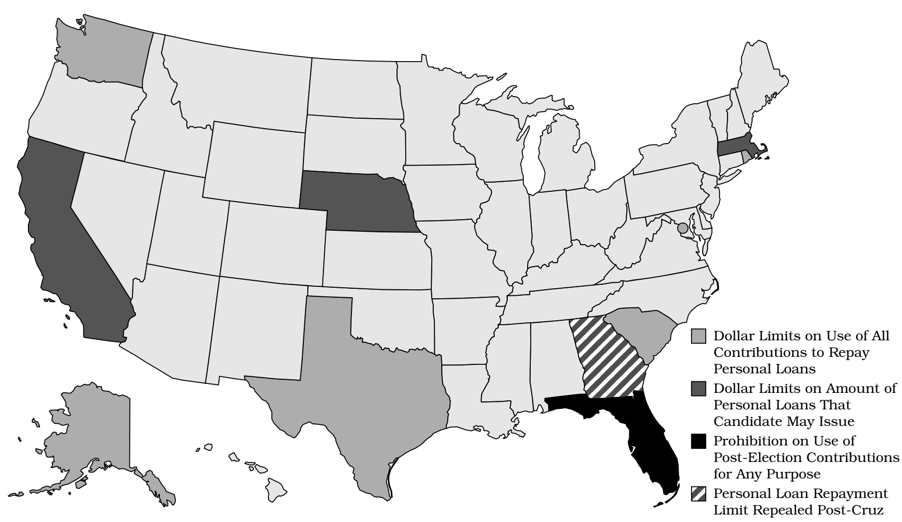
202 NEB. REV. STAT. § 49-1446.04(1)–(2) (2022) (imposing a $15,000 limit in first 30 days and limit equal to 50% of contributions received afterwards).

203 D.C. CODE § 1-1163.10a(a)(2)(B) (2022) (imposing a $25,000 limit on the usage of either pre-election or post-election contributions to repay personal loans).

204 *See, e.g.*, L.A., CAL., CAMPAIGN FIN. ORDINANCE § 49.7.9(E) (2022) (imposing limits on the repayment of personal loans by winners of elections, ranging from $31,100 to $124,500 depending on the office).

to whether the aforementioned state and local PLRLs are too under threat of invalidation. Indeed, one state—Georgia—has already repealed its PLRL in the wake of *FEC v. Cruz.*[205] More states and localities could follow, instituting preemptory legislative repeals in anticipation of judicial invalidations.[206]

FIGURE 1 – STATE PERSONAL LOAN REPAYMENT LIMITS (PLRLS) IN 2023



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Nevertheless, while these PLRLs are certainly at risk in the wake of *Cruz*, their demise is far from guaranteed. As one expert notes, "if you take the [C]ourt at its word, the opinion was concerned that the [government] had not shown any evidence that there were quid pro quo exchanges. . . . If [states] ha[ve] a better record or scandal to point to, they would be differently situated."[208] This seems right. If the six conservative justices had wished to rule all PLRLs unconstitutional per

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205 *See* H.B. 572, sec. 5, 157th Gen. Assemb., Reg. Sess. (2023) (repealing GA. CODE ANN. § 21-5-41(h) (2022)).

206 A similar phenomenon happened after *Randall v. Sorrell*, during which time numerous states raised their respective contribution limits. *See* Martin, *supra* note 34, at 452; Cole Schlabach, Comment, *Money Talks: Creating a "Workable Inquiry" from the Supreme Court's 1st Amendment Restrictions on Political Contribution Limitations in* Randall v. Sorrell, 40 ARIZ. ST. L.J. 351, 367 & n.126 (2008).

207 This figure does not include state regulations that apply solely to publicly funded candidates.

208 Martin Austermuhle, *Supreme Court Ruling Could Negate D.C. Law Limiting Repayment of Personal Loans to Political Campaigns*, DCIST (May 20, 2022), https://dcist.com/story/22/05/20/supreme-court-ruling-dc-money-law-polit-

se, they likely would have just done so.[209] Instead, the *Cruz* Court weighed the federal government's interest against the plaintiff's burden; courts handling future challenges against state and local PLRLs should thus follow the same formula rather than treat *Cruz* as an outright ban on PLRLs. Still, the existence of a risk is enough to raise fears. State and local campaign finance regimes are, after all, each uniquely crafted to serve the needs of their respective democracies. Some states, for instance, may have dealt with considerable corruption in the past, and consequently enacted stricter-than-average campaign finance laws.[210] Accordingly, how lower courts interpret *Cruz* will be absolutely crucial for states and localities seeking to preserve their PLRLs.

The first step—recognizing a burden—seems predictable at this point, in that courts will find First Amendment rights implicated by any PLRL.[211] This appears especially the case when considering that most state PLRLs are even stricter than Section 304's PLRL. For one, all five states that currently limit the amount of contributions that candidates can use to repay personal loans apply their limit to not only post-election contributions, but pre-election ones too (as does D.C.).[212] The remaining state PLRLs go even further in imposing self-loaning limits or complete prohibitions on post-election contributions.[213] It seems highly implausible that courts reviewing these PLRLs would not find a First Amendment burden.

PLRL challenges will thus turn on the standard of scrutiny applied by lower courts. Recall the *Cruz* Court left entirely unanswered the question of which standard of scrutiny to use—either strict scrutiny or the more intermediate "closely drawn" scrutiny—providing no guidance for future cases dealing with similar issues.[214] In some ways, this ambiguity will not matter, since either standard only permits one governmental interest: combatting the actuality or appearance of quid pro

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ics [https://perma.cc/H4SH-9MRP] (quoting Tara Malloy at Campaign Legal Center).

209 *Cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (overturning *Roe v. Wade* without reservation).

210 *See, e.g.*, Chad Flanders, *Alaskan Exceptionalism in Campaign Finance*, 37 ALASKA L. REV. 191, 197 (2020); *see also* Thompson v. Hebdon, 140 S. Ct. 348, 351–52 (2019) (statement of Ginsburg, J.).

211 *See supra* section II.A.1.

212 *See supra* section II.B.3, fig.1.

213 *Id.*

214 *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1652 (2022).

quo corruption.[215] This is why the Court felt no need to resolve the question.

If, however, a state or locality were to hypothetically demonstrate a valid anticorruption interest,[216] the applied standard would then be quite relevant to the likelihood of the challenged PLRL's survival. Take, for example, Texas's PLRL, which imposes limits ranging from $250,000 to $500,000 on the use of *any* contributions to repay personal loans.[217] One could imagine a lower court upholding the provision under "closely drawn" scrutiny, but not under strict scrutiny. Perhaps the limit applying to pre-election contributions would be fine under the intermediate standard but would fail to satisfy strict scrutiny's narrow tailoring and least restrictive means requirements. Plus, there is the matter of the varying dollar levels of these limits, which range from $5,000 to a theoretically unlimited amount.[218] A $25,000 PLRL for gubernatorial candidates may be deemed, for instance, overinclusive under strict scrutiny due to its low amount whereas a $200,000 PLRL may pass constitutional muster.[219] And lastly, certain types of restrictions, such as direct limits on how much a candidate can self-loan, may never survive strict scrutiny because they too closely resemble limits on self-funding.[220] Which standard of scrutiny to use when evaluating PLRLs is therefore an important question to solve.

This Article does not claim to have a clear answer. It will largely be up to the lower courts to figure this out. Nevertheless, there is a strong argument to be made in favor of "closely drawn" scrutiny. Remember that the *Buckley* Court originally applied such scrutiny to contribution limits because contribution limits' effects on First Amendment rights were not as burdensome as limits on independent expenditures, which effectively cap how much political speech a person or entity can engage in over media.[221] The same can be said about PLRLs. To be sure, PLRLs could lead to some candidates amassing less campaign funds, but the same can be said about contribution

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215 *See supra* notes 66–70 and accompanying text.

216 Or the federal government if it were to implement a variation of a PLRL to replace Section 304.

217 TEX. ELEC. CODE ANN. § 253.042(a) (West 2021).

218 *See supra* notes 194–204.

219 *Compare* ALASKA STAT. § 15.13.078(b)(1) (2022) ($25,000 limit), *with* 17 R.I. GEN. LAWS § 17-25-7.4 (2022) ($200,000 limit).

220 *See* Buckley v. Valeo, 424 U.S. 1, 51–54 (1976). *But see infra* section IV.A.2.

221 *See supra* notes 58–65 and accompanying text.

limits.[222] Neither, however, impose a direct limit on the use of money to engage in political speech.[223] Any such impact is incidental. Consequently, applying "closely drawn" scrutiny to PLRLs may be the more doctrinally consistent approach when reviewing them.

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States and localities with existing PLRLs have plenty of incentives to defend them.[224] But before they can concern themselves with complex legal matters like standards of scrutiny, they must surmount the initial barrier of constructing a robust record that demonstrates a solid anticorruption interest. The *Cruz* Court has made this a difficult task. Going forward, governments swept up in legal challenges against their PLRLs will have to supply themselves with reports, studies, and polls that account for the Court's concerns about prophylaxis-upon-prophylaxis and its narrow definition of corruption.[225] Likewise, other states, localities, and even the federal government may look to equip themselves with such materials in anticipation of a legal challenge should any's legislature seek to implement some variation of a PLRL in the future. Thus, the biggest question tackled by this Article arises: is there any quantitative support for the idea that governments have a unique anticorruption interest in regulating personal loan repayments?

The remainder of this Article dedicates itself to answering this question. Specifically, Part III overviews a comprehensive survey conducted by the author in the aftermath of *Cruz* designed to ascertain any distinct appearance of corruption that exists in candidates using contributions to repay personal loans.[226] Indeed, its results were quite telling. In brief, post-

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[222] *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1657 (2022) (Kagan, J., dissenting). The Court recognizes this about contribution limits but still applies intermediate scrutiny when reviewing them. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 247 (2006) (plurality opinion).

[223] One could argue that this is not the case when it comes to the three states that place direct limits on self-loaning. *See supra* notes 200–202. At the same time, these candidates can still self-contribute as much as they desire to their campaigns.

[224] *See supra* sections II.B.1–2.

[225] *See supra* section II.A.2.

[226] Recall that reducing the "appearance of corruption" is one half of the only valid interest governments have in implementing campaign finance laws, according to the Court. *See Cruz*, 142 S. Ct. at 1652. While courts and parties often focus mainly on the actuality of corruption, "the appearance of corruption is an equal second category under which campaign finance regulations may be justi-

election contributions to winning candidates generated a stronger appearance of corruption than pre-election contributions. More importantly, contributions provided to help repay personal loans—regardless of whether given to a winning or losing candidate—produced a much stronger appearance of corruption than contributions given to pay for campaign expenses. Part III discusses these results, as well as the background literature and survey's methodology, in much further detail. Part IV then covers the doctrinal and legislative implications of the survey's findings.

III
THE SURVEY

The appearance of corruption is detrimental to a democratic society. It erodes the public's trust in government and its elected officials, as well as voters' sense of political efficacy.[227] This in turn leads to less public participation in the democratic process (e.g., voting).[228] The *Buckley* Court was therefore correct to establish that government leaders have a profound interest in curbing not only the actuality of corruption, but its appearance.[229] It is crucial for legislators to craft campaign finance laws that combat the appearance of corruption and maintain public faith in governing institutions. Any showing of the appearance of corruption within certain political

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fied." Eugene D. Mazo, *The Disappearance of Corruption and the New Path Forward in Campaign Finance*, 9 DUKE J. CONST. L. & PUB. POL'Y 259, 275 (2014).

227 *See* Tom R. Tyler, *A Psychological Perspective on the Legitimacy of Institutions and Authorities*, *in* THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 416, 416 (John T. Jost & Brenda Major eds., 2001) (finding that the appearance of lawful conduct by public officials is important for establishing legitimacy); Mattias Agerberg, *The Curse of Knowledge? Education, Corruption, and Politics*, 41 POL. BEHAV. 369, 382–86 (2019) (documenting a negative relationship between corruption and faith in institutions); Ching-Hsing Wang, *Government Performance, Corruption, and Political Trust in East Asia*, SOC. SCI. Q. 211, 224–225 (2016) (displaying a negative correlation between perception of corruption and probability of political trust). *But see* Monica Escaleras, Peter T. Calcagno & William F. Shughart, II, *Corruption and Voter Participation: Evidence from the US States*, 40 PUB. FIN. REV. 789, 809–10 (2012) (finding that higher perceptions of corruption results in higher voter turnout in gubernatorial races).

228 *See* Agerberg, *supra* note 227, at 386–89; Stefan Dahlberg & Maria Solevid, *Does Corruption Suppress Voter Turnout?*, 26 J. ELECTIONS PUB. OP. & PARTIES 489, 491 (2016); Daniel Stockemer, Bernadette LaMontagne & Lyle Scruggs, *Bribes and Ballots: The Impact of Corruption on Voter Turnout in Democracies*, 34 INT'L POL. SCI. REV. 74, 82 (2013); Nicholas G. Bushelle, Note, *Appearance Is Everything: Why Imposing Expenditure Limits on Hybrid PACs Without Functional Separation Is Essential to Democracy*, 105 IOWA L. REV. 341, 357–58 (2019).

229 *See* Buckley v. Valeo, 424 U.S. 1, 27 (1976).

behaviors should thus support the constitutionality of campaign finance laws regulating said behaviors.

This Part provides such a showing by demonstrating a unique appearance of corruption within the use of contributions to repay personal loans. By comparatively surveying the public's perception of both pre-election contributions versus post-election contributions and contributions put toward campaign expenses versus contributions put toward personal loans, this Part establishes an appearance of corruption existing within the act of personal loan repayment that remains unaddressed by other campaign finance regulations (e.g., contribution limits). The implications of these findings could help shape both the treatment of PLRLs by courts going forward and the enactment of future PLRLs by federal, state, and local governments.

This Part proceeds as follows. Section III.A summarizes the current literature on the appearance of corruption, namely how it is measured and whether campaign finance law influences it. The next section overviews the methodology of the survey this Article employs. Finally, Section III.C discusses the survey results and conclusions that can be drawn from them.

A. Appearance of Corruption Literature

There is substantial literature on the topic of the appearance of corruption, much of which attempts to quantify the phenomenon and establish a significant relationship between campaign finance law and it. For example, in the wake of *Citizens United*, several scholars sought to examine the effects of independent expenditures on public sentiment.[230] Shaun Bowler and Todd Donovan presented random respondents with scenarios in which either an individual, corporation, or labor union spent $1 million on independent ads criticizing a congressional candidate and were asked to indicate if the scenario was honest, somewhat honest, somewhat corrupt, or corrupt.[231] About 62% of respondents answered with either corrupt or somewhat corrupt with regards to the corporation, compared to 63% for the labor union and only 49% for the

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230 The *Citizens United* Court had overturned BCRA's prohibitions on corporate and labor union independent expenditures in elections by applying the *Buckley* Court's reasoning that the government has no anticorruption interest in regulating such expenditures. *See* Citizens United v. FEC, 558 U.S. 310, 356 (2010). It is no shock that many scholars flocked to challenge this finding.

231 Shaun Bowler & Todd Donovan, *Campaign Money, Congress, and Perceptions of Corruption*, 44 AM. POL. RSCH. 272, 281 (2016).

individual.[232] In another study, the Brennan Center for Justice asked various *Citizens United*-related questions with answer options ranging from "strong agree" to "strongly disagree." The study found that 69% of participants either agreed or strongly agreed that "the new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption."[233] 68% also agreed or strongly agreed that spending $100,000 to help elect a member of Congress "could successfully pressure him or her to change a vote on a proposed law."[234] Both these studies suggest that unfettered independent expenditures do indeed create an appearance of corruption. A serious limitation in each, however, is that neither framed the corruption in question specifically as quid pro quo corruption; respondents were instead left to think about corruption as a more general concept. Consequently, neither would likely be persuasive in the Court's eyes.

Many scholars have also worked to link campaign contributions with the appearance of corruption. In their same study, Bowler and Donovan had about 59% of respondents state that a $50 contribution to a candidate was either corrupt or somewhat corrupt, the statistic rising to 66% for a $5,000 contribution.[235] Rebecca Brown and Andrew Martin took a different approach, providing survey respondents with a vignette involving either a nonprofit organization dedicated to auto safety or an automobile company providing a U.S. senator with either a $10,000 or $1 million contribution.[236] The survey then asked about both the likelihood of the senator subsequently voting for or against an auto safety bill and whether the nonprofit or company expected their respective contribution to influence the senator's vote.[237] The results indicated that respondents' "faith in democracy" decreased when the campaign contribution increased.[238] As a final example, Abby Blass et al. asked survey participants how frequently politicians vote to please their contributors, with possible responses varying from

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232 *Id.* at 282–83.

233 BRENNAN CTR. FOR JUST., SUPER PACS, CORRUPTION, AND DEMOCRACY 5 (2012), https://www.brennancenter.org/sites/default/files/legacy/Super_PAC_Poll_Appendix.pdf [https://perma.cc/7KZ2-7G3A].

234 *Id.*

235 Bowler & Donovan, *supra* note 231, at 285.

236 Rebecca L. Brown & Andrew D. Martin, *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U. L. REV. 1066, 1079–80 (2015).

237 *See id.* at 1080.

238 *Id.* at 1085–86.

"all the time" to "never."[239] Approximately 70% answered either "all the time" or "often," with only 1% saying "never."[240] These studies convincingly show how campaign contributions can produce an image of corruption for voters. But again, they too suffer by focusing on what the Court would call influence and access instead of illicit quid pro quo.

There has been some movement in the literature in light of the Court's jurisprudence to fixate more narrowly on the appearance of quid pro quo corruption. For instance, Doug Spencer and Alex Theodoridis have examined how Americans' perceptions of corruption shift based on the type of potentially corrupt activity.[241] To do this, Spencer and Theodoridis conducted a survey and presented respondents with various scenarios such as politicians "exchang[ing] votes for money," "meet[ing] more with lobbyists than with the general public," and "spend[ing their] own money to defeat a candidate."[242] Respondents were then asked to rate each scenario on a scale ranging from "[n]ot at all corruption" to "[e]xtremely corrupt."[243] Spencer and Theodoridis found that "[e]xchanges votes for money"—the scenario intended to best simulate pure quid pro quo—elicited by far the highest perceptions of corruption out of all the scenarios.[244] On the one hand, Spencer and Theodoridis's findings were "remarkably congruent with the Supreme Court's views" that quid pro quo generates the strongest governmental interest in regulating campaign finance.[245] At the same time, even the scenario that was seen as the least corrupt—"[c]andidate spends own money to defeat candidate"—still had a mean corruption rating of "[s]omewhat corrupt," suggesting that the appearance of corruption proliferates out of many forms of political activity, not just illicit quid pro quo exchanges of legislative votes for campaign contributions.[246]

More recently, Matthew DeBell and Shanto Iyengar have focused on how perceptions of quid pro quo corruption vary

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239 Abby Blass, Brian Roberts & Daron Shaw, *Corruption, Political Participation, and Appetite for Reform: Americans' Assessment of the Role of Money in Politics*, 11 ELECTION L.J. 380, 385 (2012).
240 *Id.*
241 *See* Douglas M. Spencer & Alexander G. Theodoridis, *"Appearance of Corruption": Linking Public Opinion and Campaign Finance Reform*, 19 ELECTION L.J. 510, 515–22 (2020).
242 *Id.* at 517.
243 *Id.*
244 *Id.*
245 *Id.*
246 *See id.* at 517–18.

depending on the dollar amount of a contribution. To do this, they used two American National Election Studies surveys whose questions were worded in a manner that suggested the occurrence of a quid pro quo exchange. For instance, the primary question on which DeBell and Iyengar relied reads, "When people give [$AMOUNT] each to the election campaigns of Members of Congress, how much does Congress respond by passing laws to benefit people who gave them money?"[247] Respondents were given randomly varied amounts of money in the question ranging from $50 to $5,000,[248] and had five answers from which they could choose—a great deal, a lot, a moderate amount, a little, and not at all.[249] To quantify the survey results, DeBell and Iyengar assigned numerical "corruption ratings" to each answer, with "not at all" equaling 0, "a little" equaling 0.25, "a moderate amount" equaling 0.5, "a lot" equaling 0.75, and "a great deal" equaling 1.[250] Their hypothesis was that the corruption rating for a given question would increase as the dollar amount within the question increased.

Unsurprisingly, DeBell and Iyengar's findings suggested that the appearance of quid pro quo corruption is tied to the dollar amount of a contribution. For $50 contributions, they measured a corruption rating of 0.34, with the rating boosting to 0.44 for $1,000 and 0.48 for $5,000.[251] DeBell and Iyengar also showed the percentage breakdown of each answer, which indicated similar results: 40.8% of respondents answered "a moderate amount" or above when given the $50 scenario.[252] That figure rose to 60.3% and 62.1% respectively for $1,000 and $5,000 contributions.[253] Based on these findings, DeBell and Iyengar calculated $274 to be the threshold at which the majority of Americans begin to perceive at least a moderate amount of quid pro quo corruption in a contribution.[254]

Naturally, there is no academic consensus on the notion that campaign finance laws can alleviate the appearance of

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247 DeBell & Iyengar, *supra* note 35, at 292.
248 *Id.*
249 *Id.* at 293.
250 *Id.*
251 *Id.* at 294.
252 *Id.* at 295.
253 *Id.*
254 *Id.* Two additional, important takeaways from DeBell and Iyengar are that (1) the correlation between contribution amount and appearance of corruption is not linear, and (2) the Supreme Court has underestimated the governmental interest in reducing the appearance of corruption, given the $274 threshold. *See id.* 296–99. These conclusions are not, however, relevant to the topic of this Article.

corruption. Nate Persily and Kelli Lammie have argued that perceptions of corruption are actually conflated with factors including societal position (e.g., race and income), opinions on incumbent job performance, attitudes concerning big government, and the propensity to trust others.[255] Likewise, John Coleman and Paul Manna have found in their work that "campaign spending neither increases nor decreases political trust efficacy, or interest in and attention to campaigns."[256] Most recently, David Primo and Jeffrey Milyo concluded in a study looking at nearly 60,000 individual-level observations that campaign finance laws in general have a negligible effect on trust in state government.[257] These studies challenge the practice of using of appearance-of-corruption metrics to justify campaign finance laws.

As DeBell and Iyengar have stated, though, "empirical literature denying that finance laws can affect public opinion has a number of limitations."[258] For one, many have focused on state laws, which can be less relevant to survey participants than federal law and national politics.[259] In addition, as noted earlier, many of these studies have not focused on quid pro quo corruption (likely because many were written before *McCutcheon*).[260] Lastly, several have ignored the possibilities of non-linearity and multi-causality, instead assuming that the relationship between campaign finance and appearance of corruption must be linear and that the existence of other variables influencing public perception negates the potential effects of campaign finance laws.[261] This Article therefore does not find the counter-literature persuasive enough to disregard assessing the appearance of corruption as a worthwhile endeavor.

While there is an abundance of literature looking into the effects of contributions and independent expenditures on the appearance of corruption, little (if anything) has been written on personal loan repayments. This is not too shocking, as the lack of PLRL litigation prior to *Cruz* provided little inspiration to

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255 Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 149–70 (2004).

256 John J. Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. POL. 757, 783 (2000) (finding though that "[s]pending does contribute to knowledge and affect").

257 DAVID M. PRIMO & JEFFREY D. MILYO, CAMPAIGN FINANCE AND AMERICAN DEMOCRACY: WHAT THE PUBLIC REALLY THINKS AND WHY IT MATTERS 143–47 (2020).

258 DeBell & Iyengar, *supra* note 35, at 291.

259 *Id.*

260 *See id.*; *see also supra* note 66 and accompanying text.

261 DeBell & Iyengar, *supra* note 35, at 291.

write on the subject. Indeed, the only empirical analysis of the relationship between personal loan repayments and the appearance of corruption seems to be the YouGov poll commissioned by the FEC for the *Cruz* case,[262] which, even ignoring the Court's criticisms, is limited in that it only framed its scenario temporally (i.e., making it about post-election contributions) rather than also gauging participants' reactions to the explicit use of contributions to repay personal loans.[263] Accordingly, this Article contributes to the academic literature by providing the first comprehensive look into whether, and to what extent, Americans perceive the possibility of quid pro quo corruption within the act of contributing to a candidate to help repay personal loans. The next section overviews the methodology employed to assess this potential relationship.

B. Methodology

To explore how personal loan repayments might interact with perceptions of corruption, the author administered an online survey consisting of six participant groups who were each prompted a different question.[264] The survey ran over the course of a week, sending out at various times of day to mitigate participation bias. The survey was sent exclusively to voting-age Americans (i.e., 18 or older) since they are the only group doctrinally relevant when considering the appearance of corruption in a campaign finance case.[265] The survey ended up with 2,428 unique respondents selected through non-probability sampling,[266] with respondents per question ranging

262 *See supra* notes 125–126 and accompanying text.

263 It is crucial to explore such scenarios from multiple angles because PLRLs vary greatly in how they are worded and which actions they regulate. *See supra* section II.B.3, fig.1. For example, a survey that only focuses on the pre- versus post-election question would provide no revelations on the constitutionality of a PLRL that limits the use of all contributions to repay personal loans.

264 The author used the service Attest to run this survey. Attest is a survey tool that has access to more than 1 million Americans, can administer a survey at any time of day, and can be used to target certain demographics. For more information, see *How It Works*, ATTEST, https://www.askattest.com/how-it-works [https://perma.cc/WB6R-MZGV] (last visited June 26, 2022).

265 *See, e.g.*, Shrink Mo. Gov't PAC v. Adams, 204 F.3d 838, 841 (8th Cir. 2000) ("The Court then examined whether there was sufficient evidence that unrestricted campaign contributions in Missouri have led to corrupt practices or an appearance of corruption to Missouri voters."); Homans v. City of Albuquerque, 160 F. Supp. 2d 1266, 1272 (D.N.M. 2001) ("The record shows that Albuquerque voters are concerned with the appearance of corruption.")

266 Non-probability sampling "is a method in which not all population members have an equal chance of participating in the study." *Non-Probability Sampling: Definition, Types, Examples, and Advantages*, QUESTIONPRO, https://www.questionpro.com/blog/non-probability-sampling [https://perma.cc/3Q47-

from 351 to 449. Demographically, the respondents generally reflected the overall U.S. population when it came to race,[267] but skewed somewhat female (58% versus 42% male) and younger than average (41 versus the average adult American age of 49[268]). Data on respondents' political ideologies was not provided. These slight demographic biases do not, however, raise too much cause for concern, since previous literature indicates that perceptions of corruption by and large remain similar regardless of race, gender, age, or political affiliation.[269]

The survey questions had to be designed to address a couple points of ambiguity that seem critical to ascertaining precisely how PLRLs may or may not reduce the appearance of corruption. For one, when looking at the type of conduct regulated by a PLRL such as Section 304—the use of post-election contributions to repay personal loans—it is unclear whether the potential appearance of corruption comes from the temporal nature of the contribution (i.e., given post-election) or if instead it comes from how the contribution is being used (i.e., repaying personal loans). It could also very well be that both characteristics play a part, to differing degrees. The six questions were thus divided into two subsets, three concerned with before versus after and three concerned with traditional campaign expenses versus personal loan repayments. Second, as

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4XP9] (last visited July 18, 2022). Services like Attest provide non-probability sampling being that they only have access to a large subset of the Americans (over 1 million) rather than the entire U.S. population. While some refer to this as "convenience sampling," courts have generally found this method of sampling to be reliable. *See, e.g.*, Counts v. Gen. Motors LLC, No. 16-cv-12541, 2022 WL 2078023, at *13 (E.D. Mich. June 9, 2022). It should be noted that there were some duplicate respondents in the original dataset, which were unavoidable given the staggered schedule of the survey. Duplicates were scrubbed from the dataset by the author, with only the first recorded answer of a respondent remaining (since any answer after the first one may have been influenced by the initial question given to them).

267 For instance, 15% of respondents were Hispanic or Latino, a group that makes up approximately 17% of the 2020 U.S. adult population. *See* Nicholas Jones, Rachel Marks, Roberto Ramirez, & Merarys Ríos-Vargas, *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html [https://perma.cc/FBR9-MUEE] (Figure 5). Similarly, 15% of respondents were Black, compared to 12% of the U.S. adult population. *See id.* The most underrepresented racial group was Asians, who comprise 6% of American adults but were only 3% of respondents. *See id.*

268 *See* Patricia Snell Herzog & Heather E. Price, AMERICAN GENEROSITY: WHO GIVES AND WHY 83 (2016).

269 *See, e.g.*, DeBell & Iyengar, *supra* note 35, at 293. The author isolated certain demographic groups among the respondents to test this notion and found it to be true for this survey.

suggested in *Cruz*, there are significant doubts over whether giving post-election contributions to a losing candidate to help them repay personal loans actually results in the appearance of quid pro quo.[270] To examine this theory, each subset contained one question specifying that that the candidate won an election and another question stating that the candidate lost.

The questions also had to take into account the *Cruz* Court's criticisms of the FEC's YouGov poll. To recall, the Court had three issues with the poll: (1) it did not ask about pre-election contributions and provide a comparison, (2) it did not mention applicable contribution limits and so did not address the concern of prophylaxis-upon-prophylaxis, and (3) it did not frame its scenario as a quid pro quo exchange, but rather as mere access and influence.[271] The survey's questions were designed to avoid repeating these three issues. First, as stated in the previous paragraph, the survey *did* ask about both pre-election and post-election contributions. Next, the survey evaded the prophylaxis-upon-prophylaxis problem by describing the hypothetical contribution as only being $275, an amount far lower than federal contribution limits and almost every state contribution limit[272]—in other words, it rendered contribution limits irrelevant. Lastly, the survey's questions were worded in a way that explicitly described a quid pro quo exchange (e.g., "When a person gives $275 to a political candidate . . . how likely is that candidate to grant political favors to said person **in return**?"). This survey consequently should not fall victim to the same disqualifying factors as did the FEC's YouGov poll.

With all this in mind, the survey's six questions were as follows, beginning with the temporal subset:

> When a person gives a $275 campaign contribution to a political candidate **before** an election occurs, how likely is that candidate to grant political favors to said person in return?
>
> When a person gives a $275 campaign contribution to the [winning/losing] candidate of an election AFTER the election occurs, how likely is that candidate to grant political favors to said person in return?

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270 *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1655–56 (2022).

271 *See id.* at 1654.

272 *See Contribution Limits for 2023–2024 Federal Elections*, *supra* note 179; Martin, *supra* note 34, at 451 (finding only two states—Colorado and Connecticut—as having any contribution limits falling below $275). The survey's inspiration for using the precise amount of $275 comes from DeBell and Iyengar. *See supra* note 254 and accompanying text.

The second subset focused on how the contribution is spent:

> When a person gives $275 to a political candidate to help the candidate pay for campaign expenses (e.g., advertising), how likely is that candidate to grant political favors to said person in return?
>
> When a person gives $275 to the [**winning/losing**] candidate of an election to help the candidate repay personal campaign loans, how likely is that candidate to grant political favors to said person in return?

Respondents were presented with five answers from which they could choose: Guaranteed, Very Likely, Moderately Likely, A Little Likely, or Not Likely At All.[273] Each question's group of respondents had zero overlap with the other respondent groups.[274]

To quantify the survey results, the author borrowed DeBell and Iyengar's "corruption rating" method of assigning a value between 0 and 1 to each answer.[275] Specifically, 0 was assigned to "Not Likely At All," 0.25 was assigned to "A Little Likely," 0.5 was assigned to "Moderately Likely," 0.75 was assigned to "Very Likely," and 1 was assigned to "Guaranteed." The answer values for each question were added up and divided by the number of respondents to produce a corruption rating, with values reflecting a higher appearance of corruption the closer to 1 they were.[276] These corruption ratings were chosen to illustrate whether and to what extent voting-age Americans perceive quid pro quo corruption in the six given scenarios, with a goal of gauging which scenarios look more or less corrupt than other ones. The next section presents the

273 The author chose to structure the questions and answers around likelihood instead of agree–disagree responses because the latter approach tends to be biased in favor of agreement. *See* Jon A. Krosnick, Melanie Revilla, Willem E. Saris, & Eric M. Shaeffer, *Comparing Questions with Agree/Disagree Response Options to Item-Specific Response Options*, 4 SURV. RSCH. METHODS 61, 74–76 (2010).

274 This method of having different groups answer questions with slightly altered scenarios is a common method of examining which factors influence the appearance of corruption. *See, e.g.*, DeBell & Iyengar, *supra* note 35, at 292; Brown & Martin, *supra* note 236, at 1079–81.

275 *See* DeBell & Iyengar, *supra* note 35, at 293; *see also* Spencer & Theodoridis, *supra* note 241, at 517 (assigning numerical values ranging from one to seven for survey response choices ranging from "[n]ot at all corrupt" to "[e]xtremely corrupt").

276 This approach provides much more revealing results than simply looking at what percentage of respondents answered "Moderately Likely" or higher, which would tell us nothing about the distribution of answers—e.g., whether many or few respondents answered with "Guaranteed."

final, mean corruption rating values that were derived from the survey results.

C. Results

Table 3 shows the mean corruption ratings for each of the six scenarios presented by the survey's questions. Table 4 displays the percentage distribution of the responses. This section interprets these findings, namely what they suggest about how Americans' perception of corruption varies between pre-election versus post-election contributions, spending on traditional campaign expenses versus repayment of personal loans, and contributing to a winning candidate versus a losing candidate. For the sake of brevity, the six scenarios are referenced as Candidates–Before, Winners–After, Losers–After, Campaign Expenses, Personal Loans–Winners, and Personal Loans–Losers.

1. *Pre-Election vs. Post-Election*

To begin, the mean corruption ratings indicate that post-election contributions may produce a higher appearance of corruption than pre-election contributions, though only when they are given to winning candidates. When comparing the two, Winners–After resulted in a mean corruption rating of 0.467 (*S.E.* = 0.016[277]), a difference of 0.029 from the lower Candidates–Before mean of 0.438 (*S.E.* = 0.015). This difference, however, was not enough to be statistically significant (t = 1.32, $p > .05$[278]).

[277] "*S.E.*" stands for "standard error," which represents the potential deviation in the mean corruption rating from that of the actual population. So, the 0.467 mean for Winners–After may actually be as low as 0.0451 and as high as 0.483 if we were to survey all voting-age Americans. *See* Will Kenton, *Standard Error (SE) Definition: Standard Deviation in Statistics Explained*, INVESTOPEDIA, https://www.investopedia.com/terms/s/standard-error.asp [https://perma.cc/V6J5-9ZF7] (last updated Sept. 6, 2022).

[278] For a difference to be statistically significant at a 95% confidence level, the value of t must exceed 1.96. When a t value is statistically significant, it is accompanied by "$p < .05$".

TABLE 3 – MEAN CORRUPTION RATINGS BY QUESTION SCENARIO

Scenario	*Mean*	*S.E.*	*n*
Candidates (Before)	0.438	0.015	449
Candidates (After)			
Winners	0.467	0.016	406
Losers	0.383	0.016	351
Campaign Expenses	0.402	0.016	409
Personal Loans			
Winners	0.511	0.015	403
Losers	0.460	0.016	410

TABLE 4 – PERCENTAGE DISTRIBUTION OF RESPONSES BY QUESTION SCENARIO

	Scenario		
Response	*Candidates (Before)*	*Winners (After)*	*Losers (After)*
Guaranteed	8.5%	8.9%	4.3%
Very Likely	24.5%	26.9%	20.2%
Moderately Likely	24.9%	28.1%	30.5%
A Little Likely	17.8%	14.8%	14.5%
Not Likely At All	24.3%	21.4%	30.5%
Moderately or more	57.9%	63.8%	55.0%

	Scenario		
Response	*Campaign Expenses*	*Personal Loans (Winners)*	*Personal Loans (Losers)*
Guaranteed	6.9%	10.2%	11.0%
Very Likely	24.7%	32.0%	22.4%
Moderately Likely	21.5%	26.3%	28.8%
A Little Likely	16.4%	15.1%	15.5%
Not Likely At All	30.6%	16.4%	22.4%
Moderately or more	53.1%	68.5%	62.2%

Meanwhile, the mean corrupting rating for Losers–After fell significantly lower than either of the other two means. Indeed, with a mean of 0.383 (*S.E.* = 0.016), it was 0.055 lower than Candidates–Before (t = 2.51, p < .05) and 0.084 lower than

Winners–After ($t = 3.71$, $p < .05$). In other words, the respondents did not perceive nearly as much potential for quid pro quo corruption when a contribution was given to a losing candidate post-election than they did if said contribution was instead given to the winning candidate post-election or any candidate pre-election.

The response distributions for these scenarios revealed a similar dynamic. Approximately 63.8% of Winners–After respondents found it at least moderately likely that a winning candidate would grant political favors to someone who gave them a $275 post-election contribution. This percentage dropped to 57.9% for Candidates–Before respondents and 55% for Losers–After respondents, implying again that when considering the timing and recipient of a campaign contribution, respondents were least concerned about post-election contributions given to losing candidates.

The primary takeaway here seems to be that the timing of a contribution is only somewhat relevant to the appearance of corruption. When combining the responses of both Winners–After and Losers–After, for instance, the mean corruption rating came out to 0.428, within 0.01 of the mean of Candidates–Before. Consequently, taking these results as reflective of the voting-age American population, unless a PLRL exclusively targets the post-election contributions of winning candidates, a government defending the provision should probably avoid framing its justifications for curbing the appearance of corruption from a purely temporal perspective, like the FEC did in *Cruz*.[279]

2. *Campaign Expenses vs. Personal Loans*

On the other hand, the intended purpose of a contribution had a statistically significant effect on the appearance of quid pro quo corruption. Campaign Expenses produced a mean corruption rating of only 0.402 (*S.E.* = 0.016). Conversely, unlike the temporal subset, both Personal Loans–Winners and Personal Loans–Losers had considerably higher mean corruption ratings, well outside the standard error range. Personal Loans–Winners yielded a mean of 0.511 (*S.E.* = 0.015), almost 0.11 higher than that of Campaign Expenses ($t = 4.97$, $p < .05$). And although lower, Personal Loans–Losers generated a mean of 0.460 (*S.E.* = 0.016), for a difference of 0.058 ($t = 2.56$, $p < .05$). Put differently, the respondents sensed to a far greater

279 *See supra* note 125 and accompanying text.

degree the existence of quid pro quo corruption between a contributor and a candidate when a given contribution was used to repay personal loans than they did when said contribution was used for more traditional campaign expenses, regardless of whether the self-loaning candidate won or lost the election.

Again, the response distributions paralleled the difference between the mean corruption ratings. About 53.1% of Campaign Expenses respondents considered it at least moderately likely that a candidate would grant political favors to a person who provided a $275 contribution to be put toward campaign expenses.[280] This fell well below the percentages for both Personal Loans–Winners and Personal Loans–Losers, which were respectively 68.5% and 62.2%. Indeed, if these results are reflective of the voting-age American population, then the percentage of voting-age Americans who perceive at least a moderate chance of quid pro quo corruption from a $275 campaign contribution grows by over 15% when the use of the contribution switches from campaign expenses to helping a winning candidate repay personal loans (and by over 9% for losing candidates).

Accordingly, *how* a candidate spends a contribution seems far more determinant of the appearance of corruption than *when* the candidate receives said contribution. Part IV spells out the doctrinal implications of this more thoroughly. Suffice to say, these findings suggest that governments in fact have a compelling interest in implementing PLRLs on top of other campaign finance regulations. The act of receiving a contribution to repay personal loans engenders a unique appearance of corruption beyond that of receiving contributions for campaign expenses. The best way to combat this appearance of corruption is hence to pass laws that limit the potential opportunities for contributors to help candidates repay personal loans in exchange for favors, i.e., PLRLs.

3. *Winners vs. Losers*

Finally, there is the question of losers. Are PLRLs that regulate losing candidates overbroad? The survey returned mixed results on the matter. On the one hand, the respondents of both subsets were clearly more concerned about the

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280 Interestingly enough, this figure is not too far off from DeBell and Iyengar's estimation that more than 50% of Americans would view a $274 contribution as corrupt. *See* DeBell & Iyengar, *supra* note 35, at 296. Of course, none of the survey questions in that paper specified how the contribution would be used by the recipient candidate.

corruption potential between contributors and winning candidates than they were for losing candidates, with Winners–After having a mean corruption rating 0.084 higher than Losers–After (t = 3.71, p < .05) and Personal Loans–Winners having one 0.051 higher than Personal Loans–Losers (t = 2.33, p < .05). Moreover, Losers–After had a lower mean corruption rating than Candidates–Before. These outcomes make sense, as winning candidates will more often be in a better position to offer political favors to contributors than losing candidates because they are slated to hold elected office. In turn, it is understandable why a court may conclude that a PLRL oversteps the government's anticorruption interest by applying to candidates who lose their election.

At the same time, when it came to how a contribution is used, respondents exhibited greater corruption concerns over contributions going toward personal loans, irrespective of whether the recipient candidate won or lost (recall that Personal Loans–Losers had a mean corruption rating 0.058 higher than Campaign Expenses). For reasons examined later in the Article, this too makes sense,[281] and should not be seen as logically inconsistent from the rest of the results. If anything, these findings directly challenge the *Cruz* Court's assumption that losing candidates fall outside the government's purview with regard to its anticorruption interest.[282] Indeed, it may be entirely reasonable, if not responsible, to subject losing candidates to the same PLRLs as winning candidates. Part IV covers this and more in greater detail.

IV
APPLYING THE RESULTS: WHERE DO WE GO?

To recap the takeaways of the survey results: (1) post-election contributions produce a slightly greater appearance of quid pro quo corruption than pre-election contributions, so long as the recipient is a winning candidate, (2) contributions given to help repay personal loans produce a significantly greater appearance of quid pro quo corruption than contributions given to cover campaign expenses, and (3) losing candidates are still capable of appearing more corrupt than they otherwise would when they receive contributions to repay their personal loans. The ultimate question then is how to apply these results to the world of campaign finance law.

281 *See infra* section IV.A.3.
282 *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1656 (2022) ("As for losing candidates, they are of course in no position to grant official favors . . . .").

This Part sets out to do that. Knowing how and to what extent the act of contributing to personal loan repayments impacts the appearance of corruption in American politics provides crucial, previously unknown insight into the constitutionality of PLRLs. The survey results suggest that the government's interest in regulating personal loan repayments may actually be much stronger than the *Cruz* Court could ascertain from the case's given record. This Article's findings could therefore have important implications for both the survivability of currently existing PLRLs and the implementation of future PLRL provisions in federal, state, and local campaign finance regimes. For these reasons, this Part discusses both what the Article's findings mean doctrinally—e.g., what they say about the constitutionality of existing PLRLs—as well as what kinds of legislative solutions may be best to adopt going forward to curb the appearance of corruption (and actual corruption) in personal loan repayments. The first section discusses the former and the second section the latter.

A. Doctrinal Implications

There are a number of doctrinal implications that one can draw from Part III. At the outset, the fact that the survey respondents perceived a stronger appearance of corruption in the act of using contributions to repay personal loans than in using them to cover traditional campaign expenses provides a convincing counterargument against the *Cruz* Court's concerns over prophylaxis-upon-prophylaxis.[283] Both types of contributions are typically covered by contribution limits in a given campaign finance regime, yet there are additional corruption concerns regarding contributions received to repay personal loans that are not addressed by such existing campaign finance laws. It seems then that PLRLs are not simply redundant provisions that serve no purpose in the domain of campaign finance.

With that in mind, this section focuses on further doctrinal implications that follow. First, the survey data indicates that many existing PLRLs may in fact be constitutional—at the very least, the government has a compelling anticorruption interest in maintaining them. Next, the fact that using contributions for personal loan repayments emanates a distinctive appearance of illicit quid pro quo undermines the long-held principle that candidates have an incontrovertible First Amendment

283 *See supra* notes 116–117 and accompanying text.

right to unlimited self-funding. Lastly, the results suggest that the government's anticorruption interest in regulating personal loan repayments extends to the actions of losing candidates.

1. *Existing State and Local PLRLs*

Based on the survey results, it appears that there may be a constitutionally sound justification for many existing PLRLs. To recall, nine states, as well as many localities, have PLRL provisions within their campaign finance laws.[284] And, at the risk of repeating this one too many times, the Court has continually held that governments have a compelling interest in enacting campaign finance laws to reduce the appearance of quid pro quo corruption.[285] Thus, because voting-age Americans seemingly perceive a unique risk of illicit quid pro quo when contributors help candidates repay personal loans,[286] there should be in turn a valid governmental interest in regulating these kinds of contributor–candidate interactions.

Take, for example, Rhode Island's PLRL, which reads as follows:

> Campaign contributions received . . . shall not be used to repay cumulative personal loans . . . to a campaign by a candidate in excess of two hundred thousand dollars ($200,000) during an election cycle.[287]

In other words, self-loaning candidates can only use up to $200,000 of funds raised through contributions to repay personal loans. Instinctively, a court reviewing this provision may lean toward invalidation in light of the *Cruz* decision. Nevertheless, as Part III shows, Rhode Island's PLRL directly tackles a demonstrable public concern about self-loaning candidates providing favors to individuals who help them repay their personal loans. The limit effectively restricts the quantity of large contributions that can be put toward personal loan repayments, hence reducing the potential for an appearance of corruption when a candidate solicits contributions following an election.

Some may wonder, however, whether this logic extends to PLRLs such as Rhode Island's that extend their coverage to pre-election contributions. The answer would appear to be yes,

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284 *See supra* section II.B.3.
285 *See Cruz*, 142 S. Ct. at 1652; McCutcheon v. FEC, 572 U.S. 185, 199, 227 (2014) (plurality opinion) (citing FEC v. Nat'l Conserv. Pol. Action Comm., 470 U.S. 480, 496–97 (1985)).
286 *See supra* section III.C.
287 17 R.I. GEN. LAWS § 17-25-7.4 (2022).

as the survey's findings do not imply that the government has no anticorruption interest in including pre-election contributions within a PLRL's reach. Quite the opposite, because voting-age Americans seem to exhibit much greater concern over how a contribution is spent than when it is received,[288] it seems wholly sensible for a government to limit the use of both pre- and post-election contributions to repay personal loans.

At the same time, provisions that flat-out prohibit any use of post-election contributions by candidates seem less defensible, at least from the angle of reducing the appearance of corruption. Again, only one state has such a prohibition on the books—Florida—which requires all candidates to return any contributions given to them after their withdrawal or after the election in which they are running concludes.[289] As the survey reveals, though, post-election contributions at best produce a marginally higher appearance of corruption than pre-election contributions, and that is only when the recipient won the election.[290] Consequently, a complete ban on post-election contributions might only survive constitutional scrutiny if tailored to exclusively target winning candidates. Of course, this conclusion rests on the assumption that there is no enhanced *actuality* of quid pro quo corruption among the giving and receiving of contributions after an election, which may very well be the case. It is admittedly difficult to discern Florida's justifications for its prohibition, as there has never been litigation brought to challenge it.[291] Still, if any future legislature seeks to regulate personal loan repayments, a total ban on post-election contributions is probably not the best course of action.

One caveat to all of this is that the standard of scrutiny applied by a court reviewing any of these PLRLs could be the deciding factor as to whether they survive judicial review. It will not be enough to prove even the most compelling of anticorruption interests if a court subjects the PLRL to strict scrutiny and finds it not narrowly tailored enough. As noted earlier, however, this Article does not seek to resolve this issue.[292] That is a question left for the courts or other scholars to resolve.

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288 *See supra* sections III.C.1–2.

289 *See* FLA STAT. § 106.08(3)(b) (2022).

290 *See supra* section III.C.1.

291 The provision overall seems underenforced, as the author could only find one instance of the Florida Elections Commission holding a hearing against a candidate for violating it. *See* Order of Probable Cause at 2, Fla. Elections Comm'n v. McCarty, No. FEC 11-016 (Fla. Election Comm'n Aug. 18, 2011).

292 *See supra* notes 221–23 and accompanying text.

2. *Rethinking Unlimited Self-Funding*

The survey results also challenge the long-held judicial belief that any limit on candidate self-funding is impermissible under the First Amendment. This doctrine stems back to *Buckley*, in which the Court struck down the Federal Election Campaign Act's limits on the dollar amount federal candidates could personally fund to their campaigns.[293] Naturally, the *Buckley* Court found such limits to implicate candidates' speech rights, employing the same logic it did to independent-expenditure limits[294]: when a candidate can only personally fund so much of their campaign, that in turn affects how much political speech they can engage in during said campaign.[295] More importantly though, the *Buckley* Court confidently asserted that the government had no anticorruption interest in limiting self-funding. In their words, "[T]he use of personal funds *reduces the candidate's dependence on outside contributions* and thereby counteracts the coercive pressures and attendant risks of abuse to which the . . . limitations are directed."[296] Put differently, because self-funded candidates supposedly do not rely on contributions from others, the chance of them engaging in corrupt behavior is diminished. Since *Buckley*, courts have struck down self-funding limits seemingly whenever they get challenged, citing this exact reasoning.[297]

The issue with this rationale, however, is that an overwhelming subset of self-funded candidates—namely self-loaning candidates[298]—often *do* rely on outside contributions, contrary to what the *Buckley* Court said. When a candidate issues personal loans to their campaign and then solicits contributions to help them restore their personal funds lost, how does one describe that other than "dependence on outside con-

293 *See* Buckley v. Valeo, 424 U.S. 1, 54 (1976); *see also* Emily C. Schuman, Davis v. Federal Election Commission*: Muddying the Clean Money Landscape*, 42 LOY. L.A. L. REV. 737, 741 (2009).

294 *See supra* notes 62–65 and accompanying text.

295 This line of reasoning is, of course, disputable. *See* Ben Goad, *John Paul Stevens: 'Money Is Not Speech'*, THE HILL (Apr. 30, 2014), https://thehill.com/regulation/204800-john-paul-stevens-money-is-not-speech [https://perma.cc/C8BB-AE5K].

296 *Buckley*, 424 U.S. at 53 (emphasis added).

297 *See, e.g.*, Gable v. Patton, 142 F.3d 940, 951 (6th Cir. 1998); Dann v. Blackwell, 83 F. Supp. 2d 906, 913 (S.D. Ohio 2000); Bang v. Chase, 442 F. Supp. 758, 770 (D. Minn. 1977).

298 Recall that 77% of federal candidate self-funding consists of personal loans. *See* Ovtchinnikov & Valta, *supra* note 88, at 8; *see also supra* note 172 and accompanying text.

tributions"?[299] After all, applying the *Cruz* Court's logic, such candidates purportedly *need* access to those contributions lest they feel deterred from issuing themselves an adequate amount of personal loans.[300] Self-funded candidates are therefore exposed to many potential opportunities to take part in a quid pro quo exchange with a contributor.

Perhaps this is why survey respondents perceived a significantly greater likelihood of quid pro quo between a contributor and a candidate when the former contributed to the latter's personal loan repayments as opposed to their campaign expenses.[301] It seems very reasonable to sense a heightened corruption risk when a contribution will be going directly into a candidate's personal bank account. Indeed, given the recent controversies surrounding Representative George Santos, voters nowadays may even fear that contributions given to allegedly self-loaning candidates will in actuality end up in the bank accounts of shadow donors who provided said candidates with their "personal loans."[302] The *Buckley* Court's assertion that a government's anticorruption interest cannot be served by self-funding limits thus appears erroneous, at least in the context of self-loaning.[303] As former Senator Domenici—a sponsor of Section 304—once aptly put it, self-loaning candidates "cannot have it both ways."[304] You cannot claim that your self-funding protects you from outside influence and then collect money from third parties to recover those personal funds. This rationale may make sense for personal contributions, which are

299 *See Buckley*, 424 U.S. at 53.

300 *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1651–52 (2022) ("That penalty . . . is the significant risk that a candidate will not be repaid if he chooses to loan his campaign more than $250,000. And that risk in turn may deter some candidates from loaning money to their campaigns when they otherwise would, reducing the amount of political speech.").

301 *See supra* section III.C.2.

302 *See* Soo Rin Kim, *George Santos Now Indicates $625K of Loans to His Campaign Might Not Be 'Personal,'* ABC NEWS (Jan. 25, 2023), https://abcnews.go.com/Politics/george-santos-now-625k-loans-campaign-personal/story?id=96659444 [https://perma.cc/R3EV-PRZU].

303 To be fair to the *Buckley* Court, it never explicitly referenced personal loans in particular, but rather spoke more broadly about a "candidate's expenditure of his own personal funds." *Buckley*, 424 U.S. at 53. Nevertheless, the act of issuing a personal loan is indeed an expenditure of personal funds, and the *Cruz* Court invoked *Buckley*'s section on self-funding limits when stating that a candidate "may borrow an unlimited amount . . . from the candidate himself." *Cruz*, 142 S. Ct. at 1645.

304 147 CONG. REC. 3882 (2001).

irrecoverable and hence truly independent, but for self-loaning it does not.[305]

This finding may prove pertinent for the three states that currently impose dollar limits on self-loaning: California, Massachusetts, and Nebraska.[306] While none have yet faced serious legal challenges, it would not be surprising if the *Cruz* decision inspires copycat litigation pursuing state and local regulations of personal loan repayments, with direct self-loaning limits being a particularly attractive target.[307] At least one court has previously invalidated a self-loaning limit, pointing to *Buckley*'s section on self-funding as its explanation.[308] In the court's words, "limitations on candidate loans are limitations on campaign expenditures, and limitations on campaign expenditures are prohibited by *Buckley*."[309] If, however, the survey results sincerely reflect the views of the voting-age American population, then these states have a valid anticor-

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305 The inevitable counterargument is that self-funding is still an expenditure, and thus should be afforded the same stringent protections that courts provide to groups that engage in independent political spending. *See supra* notes 62–65 and accompanying text; *see also* Citizens United v. FEC, 558 U.S. 310, 365–66 (2010) (overturning limits on independent spending for corporations and labor unions). And perhaps courts should apply strict scrutiny to both. Even if that were so, however, the key difference between the two is that groups that engage in independent spending—e.g., Super PACs—are theoretically in no position to grant official favors, whereas candidates are. *Compare* SpeechNow.org v. FEC, 599 F.3d 686, 694–95 (2010) ("[C]ontributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."), *with* *Buckley*, 424 U.S. at 26–27 ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."). The corruption risk is consequently much higher in the case of self-loaning when contrasted with other types of election-related expenditures.

306 *See* CAL. GOV'T CODE § 85307(b) (West 2022) ($100,000 limit); MASS. GEN. LAWS ch. 55, § 7 (2022) ($30,000 to $200,000 limits depending on office); NEB. REV. STAT. § 49-1446.04(1)–(2) (2022) ($15,000 limit in first 30 days and limit equal to 50% of contributions received afterwards).

307 This often happens following Supreme Court campaign finance decisions. For example, in the aftermath of *Citizens United*, there was an onslaught of litigation challenging additional regulations of independent expenditures on the federal and state levels. *See, e.g.*, Cath. Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 428 (5th Cir. 2014) (holding that Texas could not impose limits on donations to independent expenditure committees); N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 489 (2d Cir. 2013) (issuing preliminary injunction on state law that capped how much individuals could donate to independent expenditure committees); Sindicato Puertorriqueño de Trabajadores v. Fortuno, 699 F.3d 1, 16–17 (1st Cir. 2012) (overturning Puerto Rican procedures that corporations and unions were required to follow to make independent expenditures in elections); Minority Television Project, Inc. v. FCC, 676 F.3d 869, 889–90 (9th Cir. 2012) (overturning regulation that restricted the broadcasting of political and commercial advertisements), *rev'd en banc*, 736 F.3d 1192 (9th Cir. 2013).

308 *See* Anderson v. Spear, 356 F.3d 651, 672–73 (6th Cir. 2004).

309 *Id.* at 673.

ruption interest in capping the dollar amount that candidates may self-loan.[310] Such limits ensure that candidates will never become too dependent on contributions to recoup whatever personal funds they put toward their campaigns, meaning potential voters will perceive self-loaning as a far less corruption-inducing activity.

3. *Regulating Losing Candidates*

As Part III hints, the survey results dispute the assumption made by the *Cruz* Court—as well as other courts—that governments have no anticorruption interest in regulating the personal loan repayments of losing candidates.[311] Indeed, respondents felt an increased likelihood of quid pro quo corruption when a candidate received a contribution to help repay personal loans instead of to pay for campaign expenses, *regardless* of whether the candidate won or lost their election.[312] Perhaps some may find this perception unreasonable, and therefore irrelevant to the state's anticorruption interest.[313] The Court, after all, defines political favors as "the direct exchange of money for official acts,"[314] and those who lose elections cannot partake in official acts, right? Quite the contrary, actually. When observing the real world of politics, it is abundantly clear that election losers are often in just as good a place as election winners to hand out such political favors.

For instance, consider the fact that many candidates who run for office and lose are already elected officials in different positions. It is not unusual for, say, a mayor or state representative to run for Congress or a governorship—this is commonly referred to as "climbing the political ladder." Looking at one data point, Table 5 breaks down what percentage of major can-

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310 It should be noted that other studies have suggested the existence of such an anticorruption interest not only in the context of self-loaning, but self-funding in general. Spencer and Theodoridis, for example, have found that Americans on average view candidates spending their own money to defeat another candidate to be "[s]omewhat corrupt." *See* Spencer and Theodoridis, *supra* note 241, at 517. Moreover, when broken down by political leaning, Democrats view self-funding as *the most corrupt* source of campaign financing, even more so than dark money contributions. *See id.* at 521.

311 *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1656 (2022); *Anderson*, 356 F.3d at 673 ("[T]he risk of *quid pro quo* is virtually non-existent where the contribution is made to a losing candidate who seeks to recoup some of his debt.").

312 *See supra* section III.C.3.

313 *See, e.g.*, *Anderson*, 356 F.3d at 673 ("We note that while a state does have the ability to regulate in order to combat the appearance of corruption, that appearance must be reasonable.").

314 *Cruz*, 142 S. Ct. at 1654.

didates[315] who lost a primary or general election in the battleground states of the 2018–2022 U.S. Senate races held office either at the time of their loss or at some other point in their past.[316] As the numbers show, over one-fourth of the losing candidates in said elections held another elected office at the time of their loss, ranging from state legislators to state executive officials to U.S. congresspeople. These individuals were quite literally in the position to grant official political favors to those who helped them repay any personal loans they may have incurred, even though they ultimately lost their elections.

TABLE 5 – OFFICEHOLDING HISTORY OF MAJOR LOSING CANDIDATES IN 2018–2022 U.S. SENATE BATTLEGROUND RACES[317]

	Held Another Elected Office Upon Losing	**Held Elected Office at Some Point Before Election**	**Never Held Elected Office**	**Total**
No. of Losing Candidates	42	28	84	154
% of Losing Candidates	27.27%	18.18%	54.54%	100.00%

Beyond this, many losing candidates may wield institutional power even if they are not presently in office. Looking again at Table 5, another one-fifth of the losing candidates held elected office at some other point in their lives despite not holding office at the time of their respective U.S. Senate races. Such people do not suddenly lose ties with their former elected colleagues. An uncomfortable number of them go into lobbying

315 The term "major" is liberally construed to mean any major-party candidate who received more than 5% of the vote in a primary election or any candidate who received more than 5% of the vote in a general election.

316 The reason for the focus on battleground states is that campaign finance is typically most important and influential in competitive elections. *See* Charles Gardner Geyh, *Judicial Selection and the Search for Middle Ground*, 67 DEPAUL L. REV. 333, 338 (2018) ("Competitive elections are bankrolled by campaign contributions and independent expenditures from individuals and groups with a vested interest in the outcomes of cases that the candidates will decide as judges.").

317 Data was manually compiled by author. "Battleground" states were selected based on Ballotpedia's designation. *See U.S. Senate Battlegrounds, 2022*, BALLOTPEDIA, https://ballotpedia.org/U.S._Senate_battlegrounds,_2022 [https://perma.cc/BX83-4954] (last visited Mar. 20, 2023); *United States Senate Elections, 2020*, BALLOTPEDIA, https://ballotpedia.org/United_States_Senate_elections,_2020 [https://perma.cc/N35R-MWR8] (last updated Jan. 6, 2021); *U.S. Senate Battlegrounds, 2018*, BALLOTPEDIA, https://ballotpedia.org/U.S._Senate_battlegrounds,_2018 [https://perma.cc/6NJS-TWP3] (last updated Nov. 28, 2018).

and exert considerable influence over the legislative and executive decisions of the bodies in which they previously served.[318] Others may have simply maintained friendships with people still in power. These individuals are certainly capable of delivering political favors via their connections.

Moreover, even if a losing candidate has never held elected office, a good amount are still prominent within national, state, and local politics. Many hold high-ranking positions in their respective party committees,[319] for instance, and would be in a position to make party decisions or sway party platforms in exchange for contributions to repay personal loans, even if given after they lost their election. Others may hold or have held political appointments in executive and judicial branches on the federal, state, and local levels,[320] giving them the opportunity to grant regulatory or judiciary favors, or at the very least connect donors to current position-holders. Some may contend that such actions still fall outside the realm of "official acts" because no elected official is involved. Nevertheless, in upholding limits on contributions to political parties, courts have found that party committees—even minor parties that effectively have zero power in U.S. politics—are indeed capable of partaking in quid pro quo exchanges with contributors.[321] If this is so, then surely losing candidates who operate within these parties are capable of doing so as well.

All of this is to say that losing candidates are not nearly as incapable of granting political favors as courts have suggested. And it is precisely the desire to repay personal loans that could be the impetus for a losing candidate to offer such favors in

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318 *See* Timothy M. LaPira & Herschel F. Thomas, REVOLVING DOOR LOBBYING: PUBLIC SERVICE, PRIVATE INFLUENCE, AND THE UNEQUAL REPRESENTATION OF INTERESTS 8–9 (2017) (finding the percentage of former congressmembers becoming lobbyists increasing significantly over the decades, approaching nearly 50%); *Former Members*, OPEN SECRETS, https://www.opensecrets.org/revolving/top.php?display=Z [https://perma.cc/U2Q3-46YZ] (last visited June 28, 2022) (listing the former members of Congress who are now lobbyists).

319 For an extreme example, look at Jaime Harrison, who lost his 2020 bid against incumbent U.S. Senator Lindsay Graham and almost immediately became chair of the Democratic National Committee. *See* Dan Merica, *Jaime Harrison Officially Elected Democratic National Committee Chair*, CNN (Jan. 21, 2021), https://www.cnn.com/2021/01/21/politics/jaime-harrison-dnc-chair/index.html [https://perma.cc/GX8P-HD6N].

320 *See, e.g.*, *About Kelly*, KELLY FOR ALASKA, https://www.kellyforak.com/about [https://perma.cc/CB6B-LJ5L] (last visited Mar. 20, 2023) (noting how 2022 U.S. Senate candidate Kelly Tshibaka spent time in the governor-appointed position of Commissioner of the Department of Administration for the State of Alaska).

321 *See, e.g.*, Libertarian Nat'l Comm., Inc. v. FEC, 924 F.3d 533, 542 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 569 (2019).

exchange for contributions if they are in a position to do so. The Sixth Circuit was therefore mistaken in saying many years ago that the risk of quid pro quo "is virtually non-existent where the contribution is made to a losing candidate who seeks to recoup some of his debt."[322] The risk *is* there, and it is entirely rational for the public to perceive this, as is reflected in the survey results. As a consequence, governments may very well have a valid anticorruption interest in subjecting losing candidates to PLRLs.

B. Legislative Solutions

Needless to say, how courts will actually apply campaign finance doctrine to PLRLs following *Cruz* is far from certain. That being so, legislative bodies looking to regulate personal loan repayments may wish to enact policies that are more likely to withstand judicial review. This section offers a few such options. To begin, legislators should consider passing a prohibition on personal loan interest, which really only serves to personally enrich self-loaning candidates. Moreover, legislators should require a separate fund for money being put toward a candidate's personal loan repayments and implement lower dollar limits for contributions to said fund. Finally, states and localities without robust contribution limits should at least put in place some type of PLRL, given the anticorruption benefit and the fact that the provision would be immune from any prophylaxis-upon-prophylaxis concerns.

1. *Prohibition on Personal Loan Interest*

While personal loans provide some opportunity for quid pro quo, interests on said loans are basically a honeypot. When a self-loaning candidate attaches an interest rate to personal campaign loans, any contributions they receive to repay those loans are not simply "restor[ing] the candidate to status quo ante,"[323] but are also making the candidate wealthier than they were before the election. Personal loan interest rates effectively provide candidates a means of evading prohibitions on the personal use of contributions.[324] In one notable case, a congresswoman loaned her campaign $150,000 at 18% interest (that is

322 Anderson v. Spear, 356 F.3d 651, 673 (6th Cir. 2004).

323 FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1655–56 (2022).

324 *See, e.g.*, 52 U.S.C. 30114(b) (2018); N.Y. ELEC. LAW § 14-130(1) (2022); TEX. ELEC. CODE ANN. § 253.035(a) (2021).

not a typo).[325] Over the following decade, she was able to use contributions received through fundraising events to pay herself $221,780 in interest.[326] This elected official became over two-hundred grand richer on her donors' dime simply by setting an artificially high interest rate on her personal loans. The risk of illicit quid pro quo should be evident.

Accordingly, legislatures (including Congress) looking to curb quid pro quo in the realm of personal loan repayments should prohibit personal loans interest. Only two states—California and Nebraska[327]— have already explicitly done so, which is a remarkably low amount for what seems like a common-sense anticorruption measure. Indeed, it seems unlikely that a candidate could even claim a First Amendment burden in response to such a policy. What would the speech right be? The ability to collect interest on a personal loan seems wholly unnecessary for a candidate to loan themselves however much money they need to run a successful campaign. Even if one were to adopt the *Cruz* Court's position that PLRLs can deter candidates from doing so,[328] that logic only appears to work when the PLRL prevents candidates from recovering the principal of their personal loan, not the interest. If anything, it would be a massive red flag for any self-loaning candidate to claim that a prohibition on interest discouraged them from running, since that would raise questions about why the candidate felt so strongly about setting an interest rate.[329] Legislatures

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325 Andrew Zajac, *Interest on Campaign Loan Pays*, L.A. TIMES (Feb. 14, 2009), https://www.latimes.com/archives/la-xpm-2009-feb-14-me-napolitano14-story.html [https://perma.cc/W5P8-MD6U].

326 *Id.*

327 *See* CAL. GOV'T CODE § 85307(b) (West 2022) ("A candidate shall not charge interest on any loan the candidate made to the candidate's campaign."); NEB. REV. STAT. § 49-1446.04(3) (2022) ("A candidate committee shall not pay interest, fees, gratuities, or other sums in consideration of a loan, advance, or other extension of credit to the candidate committee by the candidate, a member of the candidate's immediate family, or any business with which the candidate is associated."). There appear to be at least some other states that implicitly prohibit the recovery of interest. For example, Texas law reads that the reimbursement of personal loans "may not exceed the amount reported as a loan," which would seemingly preclude the collection of interest through contributions. *See* TEX. ELEC. CODE ANN. § 253.0351(c) (West 2021).

328 *See Cruz*, 142 S. Ct. at 1651–52.

329 Perhaps the only decent justification would be concerns about inflation, though, notwithstanding the past couple years, inflation is typically low enough that the real-value depreciation of the personal loan principle would be small. *See Current US Inflation Rates: 2000–2023*, U.S. INFLATION CALCULATOR, https://www.usinflationcalculator.com/inflation/current-inflation-rates [https://perma.cc/K3N4-C76E] (showing that, from 2000 to 2020, the average annual inflation rate in the United States has never exceeded 4%); *see also*, MIKE KONCZAL, DIR., MACROECONOMIC ANALYSIS, ROOSEVELT INST., INFLATION IN 2023: CAUSES, PRO-

should therefore feel confident that any prohibition or limitation on personal loan interest they enact would withstand scrutiny.

2. *Separate Personal Loan Repayment Fund*

Another possible policy solution could be to require candidate committees to maintain a separate account for money intended for personal loan repayments. Simultaneously, contributions to this fund could be subject to lower dollar limits than contributions provided to the candidate's main fund for campaign expenses. Such a system is not unprecedented: federal campaign finance law permits national party committees to have separate accounts for a few dedicated purposes (e.g., money for headquarters buildings),[330] and contributions to these accounts are governed by different limits than general contributions to political parties.[331] This could be an innovative middle-ground approach that fulfills the government's anticorruption interest while refraining from limiting candidates to the great extent that other PLRLs do. The separate fund would enhance transparency by revealing exactly how much in campaign contributions a candidate intends to put toward personal loan repayments.[332] Furthermore, lower limits on contributions to this fund would reduce the likelihood of candidates granting political favors specifically in exchange for contributions to help repay personal loans because a candidate would have less to gain monetarily from such an arrangement.[333]

A separate-fund requirement would almost assuredly survive constitutional scrutiny. It addresses the corruption concerns that the public has over the use of contributions for personal loan repayments[334] without "burdening" candidates' supposed First Amendment rights in the manner that the *Cruz*

GRESS, AND SOLUTIONS 1–4 (2023), https://oversight.house.gov/wp-content/uploads/2023/03/inflation_testimony_mkonczal_current.pdf [https://perma.cc/YV8K-YEZC] (explaining four unique factors that drove inflation up post-2020). If a legislature wished to be safe, it could permit personal loan interest rates that are indexed to inflation.

330 *See* 52 U.S.C. § 30116(a)(9) (2018).

331 *See Contribution Limits for 2023–2024 Federal Elections*, *supra* note 179 (limiting such contributions to $123,900 per account per year as opposed to $41,300 for general contributions to parties).

332 *Cf. In re* City of Vallejo, 408 B.R. 280, 285 (B.A.P. 9th Cir. 2009) ("The segregation permits a transparent reporting process that reflects the financial activities of each fund and complies with restrictions placed on the funds.").

333 *See* Martin, *supra* note 34, at 465–68 (explaining the quid pro quo marketplace).

334 *See supra* section III.C.2.

Court claimed a PLRL like Section 304 did.[335] And while contribution limits can implicate candidates' speech rights as well,[336] courts are likely to keep in place any that are not critically low. The Supreme Court has upheld contribution limits as low as $488, when accounting for inflation (as of August 2023),[337] with other courts upholding even lower limits.[338] Mandating separate "personal loan repayment" funds could thus be a viable alternative for jurisdictions that wish to regulate the act without implementing stricter PLRLs.

3. *PLRLs in States with No Contribution Limits*

One final, perhaps all-too-obvious strategy for ensuring at least *some* regulation of self-loaning candidate activity could be focusing on enacting PLRLs in states and localities lacking robust contribution limits. This may seem counterintuitive, since jurisdictions without contribution limits appear unfriendly to campaign finance laws. There are, nevertheless, places that may be open to PLRLs in spite of their seemingly laissez-faire approach to campaign finance. Texas, for instance, has a PLRL but basically zero contribution limits.[339] Oregonians moreover appear eager to put in place contribution limits but keep running into barriers[340]; maybe a movement to pass a PLRL could gain more momentum. After all, while most campaign finance laws end up affecting a majority of candi-

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335 *See supra* notes 102–112 and accompanying text.

336 *See* Thompson v. Hebdon, 140 S. Ct. 348, 350–51 (2019) (per curiam); Randall v. Sorrell, 548 U.S. 230, 248 (2006) (plurality opinion); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397 (2000); Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 611 (2013).

337 The limits upheld in 2000 by the *Shrink Missouri* Court were $1,075 for statewide candidates, $525 for state senatorial candidates, and $275 for state representative candidates. Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519, 520 (8th Cir. 1998), *rev'd*, 528 U.S. 377 (2000). In August 2023 dollars, that equals approximately $1,908, $932, and $488, respectively. *See Inflation Calculator*, U.S. INFLATION CALCULATOR, https://www.usinflationcalculator.com [https://perma.cc/9NQX-8BP5] (last visited Aug. 11, 2023).

338 *See, e.g.*, Riddle v. Hickenlooper, 927 F. Supp. 2d 1092, 1093–94 (D. Colo. 2013) (upholding Colorado's $200 per election contribution limit), *rev'd on other grounds*, 742 F.3d 922 (10th Cir. 2014).

339 *See* TEX. ELEC. CODE ANN. § 253.042(a) (West 2021); NAT'L CONF. OF STATE LEGISLATURES, STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES: 2023–2024 ELECTION CYCLE 13 (2023), https://documents.ncsl.org/wwwncsl/Elections/Contribution-Limits-to-Candidates-2023-2024.pdf [https://perma.cc/7RKV-JHLW].

340 *See* Julia Shumway, *Oregon Supreme Court Won't Clear Way for Voters to Consider Campaign Finance Limits*, OR. CAP. CHRON. (Mar. 18, 2022), https://oregoncapitalchronicle.com/2022/03/18/oregon-supreme-court-wont-clear-way-for-voters-to-consider-campaign-finance-limits [https://perma.cc/4CHJ-GFSU].

dates, PLRLs only apply to the minority that issue exceptionally large personal loans to their campaigns.[341] It may then be easier to get legislators on board with voting in favor of a PLRL than it otherwise would be to get them to support other campaign finance restrictions.

The benefit of enacting PLRLs in such jurisdictions would of course be that the *Cruz* Court's concerns over regulatory redundancy would be irrelevant.[342] There would be no contribution limits to point at and argue that the government has exhausted its anticorruption interest.[343] The PLRL would not be prophylaxis-upon-prophylaxis—it would simply be prophylaxis.

Conclusion

The *Cruz* Court's decision will undoubtedly lead to legal challenges against other PLRLs. It may even deter future legislatures from implementing any regulations of personal loan repayments, out of fear of judicial invalidation.[344] By all accounts, the Court has thrown yet another monkey wrench into this nation's campaign finance jurisprudence.

As this Article illustrates, however, the fate of PLRLs is not set in stone. The conducted survey took into account many of the Roberts Courts' misgivings and particularities when it comes to campaign finance law. Moreover, its respondents generally mirrored the U.S. population. Accordingly, accepting the survey as a true reflection of popular sentiment, its results strongly suggest that voting-age Americans perceive a unique risk of quid pro quo corruption in the act of using outside contributions to repay personal loans, regardless of whether the self-loaning candidate won or lost their election. This Article therefore supports the notion that governments do in fact possess a valid anticorruption interest in regulating personal loan repayments via PLRLs.

Naturally, more research can be done in this area. While this Article is the first to quantify public perceptions of personal loan repayments, other scholars will hopefully provide further insight. Perhaps future surveys could target specific

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341 *See supra* section II.A.1, tbl.2 (detailing how less than 4% of congressional candidates loaned themselves above Section 304's $250,000 limit).

342 *See* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1652 (2022).

343 Even though, as this Article demonstrates, such an argument is refutable. *See supra* sections III.C, IV.A.1.

344 *Cf.* Schlabach, *supra* note 206, at 367 & n.126 (2008) (discussing how the *Randall* Court's invalidation of Vermont's contribution limits caused many states to raise their own limits).

geographic areas, especially states and localities with existing PLRLs. These surveys might also benefit from the use of random sampling instead of non-probability sampling to see whether the differing methodologies significantly alter the results. Others could more expressly define what terms like "political favor" or "personal campaign loan" mean or change the contribution amount and see if the sentiment shifts. Furthermore, on the doctrinal front, judges and litigants alike could benefit from pieces that tackle in greater detail the question of which standard of scrutiny to apply when reviewing PLRLs. Through such efforts, maybe the post-*Cruz* world of campaign finance can be one of nuance and respect for the government's anticorruption interest, as opposed to one that is hostile toward any attempt to moderate the onslaught of money in politics beyond the usual contribution limits and disclosure requirements.