No. 24-3051

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, ET AL.
Plaintiffs-Appellants,
v.
FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Certified Constitutional Question from the
United States District Court for the Southern District of Ohio

SECOND BRIEF
BRIEF OF THE FEDERAL ELECTION COMMISSION

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument before this en banc Court is scheduled for June 12, 2024 at 2:00 pm.

STATEMENT OF JURISDICTION

This Court has jurisdiction to decide the question certified by the U.S. District Court for the Southern District of Ohio pursuant to 52 U.S.C. § 30110. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 because this case is a constitutional challenge to the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45. Because 52 U.S.C. § 30110 only provides for this Court to "construe the constitutionality of any provision of [the Federal Election Campaign Act]," the Court lacks jurisdiction to review a regulation promulgated by the Federal Election Commission ("FEC" or "Commission") such as 11 C.F.R. § 109.37.

STATEMENT OF ISSUES PRESENTED

Do the limits on coordinated party expenditures in § 315 of the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. § 30116, violate the First Amendment, either on their face or as applied to party spending in connection with "party coordinated communications" as defined in 11 C.F.R. § 109.37?

STATEMENT OF THE CASE

More than two decades ago, the Supreme Court upheld the limits that Congress placed on expenditures made by national political party committees in coordination with their federal candidates, under a provision of the Federal Election Campaign Act ("FECA" or the "Act") now set forth in 52 U.S.C. § 30116(d) (hereinafter "section 30116(d)"). *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"). In upholding the provision Appellants now challenge, the *Colorado II* Court reaffirmed the longstanding distinction established in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), between coordinated and independent expenditures applied to spending by political parties. *See Colorado II*, 533 U.S. at 464. In sharp contrast to *independent* expenditures, a party's *coordinated* expenditures are as a matter of controlling law no different than "a direct party contribution to the candidate," and removing statutory limits on coordinated spending enables circumvention of

FECA's contribution limits and presents an intolerable risk of quid pro quo corruption, or at the minimum, the appearance of such corruption. *Id*. at 464-65.

Appellants seek to relitigate and overturn *Colorado II*. To the extent they acknowledge that their challenge before this Court is a necessary step in seeking Supreme Court relief and that this Court must "leav[e] to [the Supreme Court] the prerogative of overruling its own decisions," *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 814 (6th Cir. 2020) (citation omitted), *cert. denied*, 141 S. Ct. 2721 (2021), they are correct in acknowledging that this Court's "hands are tied" (App. Br. at 41). To the extent Appellants seek to have this en banc Court substitute its judgement for that of the Supreme Court and issue relief that is precluded by *Colorado II* — as to either the facial or as-applied challenges — such requests must be rejected.

Appellants' challenge is two pronged. First, Appellants challenge the constitutionality of section 30116(d) on its face. Second, Appellants assert an "as-applied" challenge to a subset of expenditures known as "party coordinated communications" defined in 11 C.F.R. § 109.37. This is no different from the activity considered in *Colorado II* and covered by section 30116(d), making it mostly or completely coterminous with their facial challenge. As such, it is equally foreclosed by *Colorado II*.

Even though *Colorado II* wholly forecloses this challenge before this en banc Court, Appellants' case also fails on the merits. Congress's inclusion of the party coordinated expenditure limit in section 30116(d) is constitutional because it serves the important interest of preventing the actuality and appearance of quid pro quo corruption and is closely drawn to serve those interests. As the Supreme Court bluntly laid out, when, under FECA, "a donor is limited to $[3,300] in contributions to one candidate in a given election cycle" and "[t]he same donor may give as much as another $[41,300] each year to a national party committee," what happens is "[w]hat a realist would expect to occur" and "has occurred": donors and candidates steer funds to the candidate's campaign through the party by availing themselves of the party's higher limits. *Colorado II*, 533 U.S. at 458. Section 30116(d) specifically and uniquely targets this known means of subverting FECA's important base limits by limiting the amount of party coordinated expenditures. This limit remains constitutional.

FACTUAL AND PROCEDURAL BACKGROUND

I. THE PARTIES

A. The Federal Election Commission

The FEC is an independent agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA, 52 U.S.C. §§ 30101-45. The Commission is empowered to formulate policy with respect to FECA, *id*. § 30106(b)(1)); make rules and regulations necessary to carry out the Act, *id*. §§ 30107(a)(8), 30111(a)(8), 30111(d)); issue advisory opinions concerning the application of FECA and Commission regulations to any proposed transaction or activity, *id*. §§ 30107(a)(7), 30108; and civilly enforce the Act and the Commission's regulations, *id*. §§ 30106(b)(1), 30109. All six Commissioners are defendants, sued in their official capacities. (Findings, R.49-1, ¶¶ 30-35, PageID##5500-01.)

B. Appellants

The National Republican Senatorial Committee ("NRSC") is a "national committee" of the Republican Party registered with the FEC, acting as the party's senatorial campaign committee. (Findings, R.49-1, ¶¶ 1-8, PageID##5496-97.) The National Republican Congressional Committee ("NRCC") is a "national committee" of the Republican Party registered with the FEC, acting as the party's congressional campaign committee. (*Id*. ¶¶ 9-19, PageID##5497-99.) Both the

NRSC and NRCC were established by, are comprised of, and are governed by, Republican Members of the United States Senate and House of Representatives, respectively. (*Id*. ¶¶ 1-19, PageID##5496-99.)

James David ("J.D.") Vance is a United States Senator for the State of Ohio and a member of the Republican Party. (*Id*. ¶¶ 20-24, PageID#5499.) Steven Chabot is a member of the Republican Party, a former United States Congressman who represented Ohio's First Congressional District in the House of Representatives and has indicated his intention to not run for federal office again. (*Id*. ¶¶ 25-28, PageID##5499-500.)

II. STATUTORY AND REGULATORY BACKGROUND

A. FECA's Contribution Limits to Candidates and Parties

This case centers on four key amount limitations that Congress established in FECA to work together to reduce the actuality and appearance of corruption in U.S. elections. The first limit is the amount that a person may give directly to a candidate's committee, currently $3,300 per election. 52 U.S.C. § 30116(a)(1)(A) (indexed to inflation). The second limit is the amount that a person can give to a national party committee for spending on all purposes, currently $41,300 per year. *Id.* § 30116(a)(1)(B) (indexed to inflation). While a person can give considerably more to a party committee recipient ($41,300) than to a candidate ($3,300), the third relevant limit is the amount a party committee can give to a candidate's

committee, $5,000. *Id.* § 30116(a)(2)(A). In the absence of that limit, a person might give $41,300 to a national party committee and the party could turn around and give some or all of that $41,300 to the candidate, undercutting the foregoing $3,300 base limit.

The fourth relevant limit is the provision challenged in this case, section 30116(d). Through this provision, FECA reduces the possibility of using a national party committee's higher base limit ($41,300) to undercut the lower base limit on direct candidate contributions ($3,300) by limiting the amount that party committees may spend on coordinated expenditures with their general election candidates, currently up to an amount ranging from $55,000 to $109,900 in races for the U.S. House of Representatives, and from $109,900 to $3,348,500 in U.S. Senate races, as illustrated below. 52 U.S.C. § 30116(d)(3); 11 C.F.R. § 109.33; *see* FEC, Coordinated Party Expenditure Limits, https://bit.ly/3DcUySP (last visited Apr. 6, 2024).

The following table summarizes these limits:

Limit	Amount	Citation
Individual to Candidate	$3,300 per election	52 U.S.C. § 30116(a)(1)(A)
Individual to National Party	$41,300 per year	52 U.S.C. § 30116(a)(1)(B)
National Party to Candidate	$5,000 (plus national party committee and senatorial campaign committee may contribute up to $57,800	52 U.S.C. § 30116(a)(2)(A); § 30116(h)

	combined per campaign to each Senate candidate)	
Party Coordinated Spending Limit as to 2024 House General Elections	$123,600 (Nominees in states with only one representative) $61,800 (Nominees in all other states)	52 U.S.C. § 30116(d)(3)(B)
Party Coordinated Spending Limit as to 2024 Senate General Election (Ohio)	$1,138,000	52 U.S.C. § 30116(d)(3)(A); 11 C.F.R. § 109.37; Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 89 Fed. Reg. 5534, 5535 (Jan. 29, 2024)

FECA not only establishes these contribution limits but also what constitutes a "contribution," which includes both direct contributions of money and "in-kind" contributions of goods or services. FECA thus provides that "expenditures made by any person in cooperation, consultation, or concert, with" a federal candidate or her agents "*shall be considered to be a contribution* to such candidate," because it benefits the campaign just as if the individual or entity had donated the good or service directly to the campaign. 52 U.S.C. § 30116(a)(7)(B)(i) (emphasis added). FECA defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." *Id.* § 30101(9)(A).

There are three types of national political party committees: national committees, House campaign committees, and Senate campaign committees. 11 C.F.R. § 110.1(c)(2); *see also* 52 U.S.C. § 30101(14) (defining "national committee"), (16) (defining "political party"). As with other political parties, the Republican Party maintains multiple national party committees: the Republican National Committee ("RNC"), the NRCC, and the NRSC. (Clark Decl., R.36-13, ¶ 13, PageID##1283-84.) These three committees are each considered separate national party committees with separate contribution limits. 11 C.F.R. § 110.1(c)(2)-(3); *see also* FEC Facts, R.43, ¶¶ 253-57, PageID##5210-12. An individual who desires to support a political party may not only contribute to the party's national committees, but also to state, district, and local committees up to certain limits. (*See* FEC Facts, R.43, ¶¶ 258-60, PageID##5212-13.)

B. Coordinated Expenditures

1. FECA's Provision for Party Coordinated Expenditures Beyond Otherwise Applicable Contribution Limits

Political parties are permitted to engage in expenditures coordinated with their candidates in excess of otherwise applicable contribution limits. 52 U.S.C. § 30116(d); 11 C.F.R. § 109.37. Party coordinated expenditures occur when the candidate and party cooperate or consult on the expenditures the party will make with the money the party receives. For example, the party committee may use its coordinated expenditure allowance to pay for broadcasts of a TV advertisement

that the candidate's committee conceived of and produced and requested that the party committee broadcast. If any person supporting a candidate wanted to do the same activity, it would be "republication" and treated as an in-kind contribution to the candidate. 52 U.S.C. § 30116(a)(7)(B)(iii); 11 C.F.R. §§ 109.21(d)(6), 109.37(a)(2)(i), (3). FECA further provides for certain exempt party activities, including voter drives and volunteer-distributed campaign materials. These activities are exempt from the definitions of "contribution" and "expenditure." *See* 52 U.S.C. § 30101(8)(B)(ix), (xi); (9)(B)(viii), (ix).

2. Coordinated Communications

Both facially and as-applied, Appellants' challenge focuses on a type of party coordinated expenditure known as a "party coordinated communication." 11 C.F.R. § 109.37. Party coordinated communications are, by definition, "paid for by a political party committee or its agent." *Id.* § 109.37(a)(1).

The foregoing republication example in which the party, in coordination with the candidate, pays for additional broadcasts of a candidate's TV advertisement would also be an example of a party coordinated communication. The Commission promulgated regulations defining whether a particular communication constitutes a coordinated communication, depending upon both its content and the coordinating conduct of those involved. *Id*. § 109.37(a). Party communications satisfy the content prong if, *inter alia*, they "disseminate[],

distribute[], or republish[] . . . campaign materials prepared by a candidate" or "expressly advocate[] the election or defeat of a clearly identified candidate" at any time of year, *e.g.*, an advertisement stating "Vote for Jane Smith" or "Defeat John Jones." *Id.* § 109.37(a)(2)(i)-(ii).

The conduct prong can be satisfied in several ways, including but not limited to the following: if "[t]he communication is created, produced, or distributed at the request or suggestion of a candidate"; if "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication . . . and the candidate"; or if the person paying for the communication hires a candidate's vendor or former employee "to create, produce, or distribute" it and in doing so that vendor/employee uses "material" information about "campaign plans, projects, activities, or needs" or shares such information with the payor. *Id.* § 109.21(d)(1)(i), (3)-(5).

A party can avoid having a communication be deemed a coordinated communication by implementing a written "firewall" policy prohibiting the flow of information between the individuals "providing services for the [party] paying for the communication" and the individuals "currently or previously providing services to the candidate who is clearly identified in the communication [or his or his opponent's committee]." *Id*. §§ 109.21(h), 109.37(a)(3); *see also* FEC Facts,

R.43, ¶¶ 325-327, PageID##5237-38 (describing NRCC's and NRSC's firewall policies). A political party engaging in independent issue speech without identifying federal candidates faces no restrictions under these regulations. Even during the pre-election time windows, party communications that are not coordinated with federal candidates or their campaigns are considered *independent*, and parties may generally engage in them without limit. *See Colorado II*, 533 U.S. at 465.

C. The Supreme Court's Decision in *Buckley v. Valeo*

1. The Supreme Court Distinguished Between Contributions and Independent Expenditures and Evaluated the First Amendment Interests at Stake

In *Buckley*, the Supreme Court held that limits on political campaign contributions are constitutional but limits on independent expenditures generally violated the First Amendment. 424 U.S. at 58-59. The *Buckley* Court "upheld base contribution limits [as to candidates] because they targeted 'the danger of actual *quid pro quo* arrangements' and 'the impact of the appearance of corruption stemming from public awareness' of such a system of unchecked direct contributions." *McCutcheon v. FEC*, 572 U.S. 185, 208 (2014) (plurality) (citing *Buckley*, 424 U.S. at 27)). Most recently, the Supreme Court has confirmed that the now-$3,300 limit for "[i]ndividual contributions to candidates for federal office

. . . are . . . regulated in order to prevent corruption or its appearance." *FEC v. Cruz*, 596 U.S. 289, 306 (2022).

The *Buckley* Court also held that the government has a *separate* interest in preventing the *appearance* of corruption — *i.e.*, the "disastrous" erosion of confidence "stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27. That Court explained that bribery laws reach "only the most blatant and specific attempts" to corrupt public officials with money, *id.* at 27-28, and that "disturbing examples" of "pernicious practices" in the 1972 presidential election demonstrated more subtle corruption arising from "large contributions," *id*. at 26-27. The *Buckley* Court "made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." *McConnell v. FEC*, 540 U.S. 93, 143 (2003).

Analyzing the First Amendment implications of contribution limits, the *Buckley* Court noted that they restrict "one aspect of the contributor's freedom of political association," but do not prevent contributors from speaking. 424 U.S. at 24. A contribution is not the contributor's direct speech, but rather a 'symbolic act' that provides 'a general expression of support for the candidate and his views.'" *Id*. at 21. Because a contribution does not "communicate the underlying basis for the support . . . [t]he quantity of communication by the contributor does

not increase perceptibly with the size of his contribution." *Id*. Thus, contribution limits leave contributors free to engage in the "symbolic act of contributing," while in no way inhibiting their ability to conduct other political activity. *Id*. at 21-22.

Recognizing the lack of any direct infringement on speech, the Court declined to apply strict scrutiny to FECA's contribution limits. Under that standard, "the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest." *McCutcheon*, 572 U.S. at 197. Instead, it held that limits are constitutional if the government meets the less stringent test of "demonstrat[ing] a sufficiently important interest and employ[ing] means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25.

2. Coordinated Expenditures Are Equivalent to Contributions

In addition to upholding limitations on political campaign contributions, *Buckley* recognized that paying for an expenditure made in cooperation with a campaign — a *coordinated* expenditure — was equivalent to contributing directly to that campaign. *Id.* at 46-47 & n.53. The Court therefore understood "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee . . . but also all expenditures

placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Id*. at 78.

Buckley's distinction between coordinated expenditures (or contributions) and independent expenditures was reaffirmed in *California Medical Association v. FEC*, 453 U.S. 182 (1981) (plurality opinion), when the Court explained that "[t]he type of expenditures that this Court in *Buckley* considered constitutionally protected were those made *independently* by a candidate, individual, or group in order to engage directly in political speech." *Id.* at 195 (describing expenditures that members may "independently expend in order to advocate political views") (citation omitted). Since *Buckley*, the Supreme Court has repeatedly explained the "fundamental constitutional difference" between contributions and independent expenditures. *FEC v. Nat'l Conservative Pol. Action Comm.* ("*NCPAC*"), 470 U.S. 480, 497 (1985) (noting the difference between "money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign"); *FEC v. Mass. Citizens for Life, Inc*., 479 U.S. 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.").

After *Buckley*, Congress decided to retain the limits on party expenditures now codified in section 30116(d), even though it repealed the Act's limits on independent expenditures. The legislative history of the post-*Buckley* amendments clearly states Congress's understanding, consistent with *Buckley*, that coordinated party expenditures function as in-kind contributions, with the effect that the higher coordinated expenditure limits available to political parties constitute a special exception from the contribution limits that place lower limits on coordinated expenditures by all other political committees:

> This limited permission allows the political parties to make contributions in kind by spending money for certain functions to aid the individual candidates who represent the party during the election process. Thus, but for this subsection, these expenditures would be covered by the contribution limitations stated in subsections (a)(1) and (a)(2) of this provision.

H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 59 (1976).

D. The Supreme Court Upheld the Coordinated Party Expenditure Limit in *Colorado II*

Prior to 1996, the Commission presumed that, due to the close connection between parties and candidates, "all party expenditures should be treated as if they had been coordinated as a matter of law." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 619 (1996) ("*Colorado I*"). But in *Colorado I*, the Supreme Court held that parties could make independent (*i.e.*, non-coordinated) expenditures, and when they did so, that spending could not constitutionally be

limited. *Id.* at 617 ("[T]he constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure." (citation omitted)). The Court remanded the case for consideration of whether limits on expenditures that were coordinated between parties and campaigns were constitutional. *Id*. at 623-24.

After remand, the case returned to the Supreme Court in *Colorado II*. Once again, the Court applied the "same scrutiny" it had previously "applied to limits on . . . cash contributions," — *i.e.*, whether the limit was "closely drawn to match a sufficiently important interest." 533 U.S. at 446 (citations and internal quotation marks omitted); *see id.* at 456. In accordance with *Buckley*, the Supreme Court facially upheld the party coordinated expenditure limits in section 30116(d), explaining that "[t]here is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate." *Colorado II*, 533 U.S. at 464.

Critically, the Court based its decision largely on an anti-circumvention rationale: because persons can make much larger contributions to political parties than to candidates, the latter limits could be more easily circumvented if the parties' ability to make coordinated expenditures were unlimited. As the Court put it, "[c]oordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." *Id.* at 464-65. It further reasoned that "[d]onors

give to the part[ies] with the tacit understanding that the favored candidate will benefit" and "use parties as conduits for contributions meant to place candidates under obligation." *Id.* at 452, 458.

Since *Colorado II*, the Fifth Circuit upheld section 30116(d) against a constitutional challenge, and the Supreme Court denied a petition for certiorari, reaffirming the continued vitality of *Colorado II*. *See In re Cao*, 619 F.3d 410, 429 (5th Cir. 2010) (en banc) ("[T]he *Colorado II* Court, as well as the Court's earlier cases, clearly held that coordinated expenditures may be restricted to prevent circumvention and corruption."), *cert. denied*, 562 U.S. 1286 (2011).

E. The 2015 Appropriations Act

In 2014, Congress amended FECA to increase the amount national political party committees could raise into three types of "separate, segregated account[s]" which could be "used solely to defray expenses incurred with respect to" three categories of activities. 52 U.S.C. § 30116(a)(9)(A)-(C); *see* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772-73 (Dec. 16, 2014) (codified at 52 U.S.C. § 30116(a)-(d)). The national committees are now permitted to raise money for these accounts to defray expenses incurred with respect to three specific purposes: (1) "a presidential nominating convention"; (2) "the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party"; and (3) "the

preparation for and the conduct of election recounts and contests and other legal proceedings." 52 U.S.C. § 30116(a)(9). For contributions to each of these accounts, the relevant limits are substantially higher: "300 percent of the amount otherwise applicable" to contributions to national political party committees. *Id.* § 30116(a)(1)(B). Under these new provisions, for example, a person can give the NRSC up to $123,900 to be used on renovating its headquarters building; this money cannot be used on TV advertisements exhorting the election or defeat of a candidate. It made no other changes to the limitations imposed by FECA.

III. PROCEDURAL HISTORY IN THE DISTRICT COURT

Appellants filed their complaint in the United States District Court for the Southern District of Ohio, challenging section 30116(d)'s coordinated party expenditure limits as unconstitutional under the First Amendment and invoking FECA's provision for en banc judicial review under 52 U.S.C. § 30110. Appellants moved the District Court to certify the constitutional question to the en banc Court of Appeals for the Sixth Circuit. Following a three-month discovery period and briefing, the District Court issued its Opinion and Order, as well as Findings of Adjudicative Fact, and certified the question presented above to this Court.

In its opinion, the District Court limited its findings of fact to adjudicative facts pertaining to the instant action, declining to certify any legislative facts

implicated by the merits of the certified question. (*See* Opinion & Order, R.49, at 29-35, PageID##5482-88.) It did not reject such legislative facts, but instead found that this Court would independently review them in its merits evaluation under section 30110. (*Id*. at 34-35, PageID##5487-88 ("[D]eclin[ing] to certify any legislative facts does not prejudice the FEC's (or Plaintiffs') ability to cite such sources . . . they have in their proposed findings of fact."); *id*. at 35, n. 10, PageID#5488 ("[T]he sources the parties have cited may potentially (and validly) be reviewed on appeal by the Sixth Circuit to establish legislative facts necessary to resolve the certified question.").) "[A]ny so-called findings of legislative facts that the [District] Court could make would be reviewed de novo by the en banc court of appeals because it is integral to the legal analysis of the constitutional issues raised." (*Id*. at 30, PageID#5483 (citing *United States v. Miller*, 982 F.3d 412, 430 (6th Cir. 2020)); *id.* at 34-35, n.9, PageID##5487-88.)

This determination is consistent with how appellate courts routinely evaluated such facts in campaign finance constitutional challenges. *See, e.g.*, *Buckley v. Valeo*, 519 F.2d 817, 836-40 (D.C. Cir. 1975) (per curiam) (relying on legislative facts such as polling data, a report concerning illegal contributions by the dairy industry, congressional floor statements, and a Senate committee report); *Buckley*, 424 U.S. at 27 n.28 (1976) (explicitly relying on the D.C. Circuit's discussion of legislative facts); *Colorado II*, 533 U.S. at 451-52 & nn.12-13

(relying on a political scientist's statement, a former Senator's anecdote, a political science book, and FEC disclosure reports); *McConnell*, 540 U.S. at 129-32, 145-52, 169-70 (relying extensively on legislative facts, including congressional reports, detailing how national party committees solicited soft money contributions); *FEC v. Wisc. Right to Life, Inc*, 551 U.S.449, 470 n.6 (2007) (relying on a national survey for the legislative fact that most citizens could not name their congressional candidate and to dispute legislative facts put forth by dissent).

SUMMARY OF ARGUMENT

This suit raises yet another challenge to the longstanding constitutionality of the party coordinated expenditure limits enacted by Congress in the 1970s, upheld by the Supreme Court in *Colorado II*, and declined to be revisited by the Supreme Court in *Cao*. Accepting Appellants' request to override Congress's decision to limit contributions would undermine the critical anticorruption purposes these limits advance. The Court should reject this challenge.

Initially, it is foreclosed by decades of precedent. Appellants' notion that the Court might be free to ignore *Colorado II* contravenes the foundational principle that courts must follow applicable precedents and would strip the Supreme Court of its exclusive prerogative to revisit its own decisions. Even if this Court were to cast aside legal tradition to exercise prerogatives belonging to the Supreme Court,

Appellants offer no compelling factual evidence or legal argument, and certainly nothing remotely commensurate to justify such a seismic shift in the judicial order. There have been no intervening developments sufficient to undermine the Supreme Court's rationale in *Colorado II*. Notwithstanding Appellants' claims otherwise, there remain inherent and ongoing risks of actual and apparent corruption should the limits be stricken, as shown by the robust record of corruption that exists even with applicable limits in force. Parties have been and remain inextricably intertwined with candidates, and their inherently close relationships is what makes them susceptible to use in actual or apparent instances of corruption between contributors and candidates.

Even if this Court could consider the merits of Appellants' challenge, section 30116(d) remains straightforwardly constitutional in today's legal and factual context. The party coordinated expenditure limit is closely drawn to the government's important interests in curbing the risk of quid pro quo corruption and its appearance. Limiting the paths for actual or apparent corruption of elected representatives advances the critical purpose of fostering integrity in our government and uses means finely balanced to avoid intrusions upon First Amendment freedoms beyond those necessary to achieve these important aims. Appellants' policy arguments about the asserted weakness of parties are both factually overstated and do not impact the certified constitutional legal question.

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to 52 U.S.C. § 30110, this Court answers the certified question in the first instance. The challenged limits are valid if they are "closely drawn to match a sufficiently important [governmental] interest." *Colorado II*, 533 U.S. at 446. The Court in *McCutcheon* confirmed the standard of review for contribution limits is the "closely drawn" standard applied in *Colorado II* and originally set forth in *Buckley*. *McCutcheon*, 572 U.S. at 199 ("[W]e see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review."); *Buckley*, 424 U.S. at 25; *see also Cao*, 619 F.3d at 427 (same).

Appellants at various points appear to equate the closely drawn standard with the "narrowly tailored" standard of strict scrutiny, citing to language in *McCutcheon* in which the Court stated that limits on contributions should be "'narrowly tailored to achieve the desired object.'" *McCutcheon*, 572 U.S. at 218; App. Br. 3, 5. Yet the closely drawn standard outlined in *Buckley* remains the law, as Appellants rightfully concede (App. Br. at 28). The Court "must assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon*, 572 U.S. at 199. The fit need not be "'perfect,'" the

"'least restrictive[,]'" or "'the single best disposition[,]'" but it must be "reasonable." *Id.* at 218.

II. THE PARTY COORDINATED EXPENDITURE LIMIT IS CONSTITUTIONAL UNLESS THE SUPREME COURT RECONSIDERS *COLORADO II*

A. *Colorado II* Fully Controls This Case

This Circuit recognizes that it may not disregard Supreme Court precedent. *Thompson*, 972 F.3d at 813. Indeed, "[e]ven where intervening Supreme Court decisions have undermined the reasoning of an earlier decision, we must continue to follow the earlier case if it 'directly controls' until the Court has overruled it." *Taylor v. Buchanan*, 4 F.4th 406, 408 (6th Cir. 2021), *cert. denied*, 142 S.Ct. 1441 (2022); *Thompson*, 972 F.3d at 814 ("[W]hen an earlier Supreme Court decision 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'") (citation omitted); *Miller*, 982 F.3d at 433 (same).

The precedent must control "even if the lower court thinks the precedent is in tension with some other line of decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

This Court has explicitly acknowledged that, within the federal judiciary, "it is for the Supreme Court to tell the courts of appeals when the Court has overruled

one of its decisions, not for the courts of appeals to tell the Court when it has done so implicitly." *Taylor*, 4 F.4th at 408-09. This includes not only the result, but also the "rationale upon which the Court based the results of its earlier decisions." *Seminole Tribe of Florida*, 517 U.S. 44, 66-67 (1996). Thus, "[a] holding . . . can extend through its logic beyond the specific facts of the particular case." *Los Angeles Cnty v. Humpries*, 562 U.S. 29, 38 (2010). This "vertical" form of "stare decisis is absolute, as it must be in a hierarchical system with 'one supreme Court.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) (quoting U.S. Const., Art III, § 1).

The Supreme Court has yet to revisit *Colorado II*, which explicitly upheld section 30116(d) as constitutional. 533 U.S. at 464-65. If that were not enough, the Court declined to overrule *Colorado II* when it declined to review *Cao*. 619 F.3d at 429, *cert. denied*, 562 U.S. 1286. This Court is bound by *Colorado II* and "must continue to follow" it. *Taylor*, 4 F.4th at 408-09.[1]

B. *Colorado II* Has Not Been Legally or Factually Undermined

Recognizing the foregoing constraints, Appellants rely primarily on *dissenting* opinions to assert that this case involves a "distinct" legal backdrop,

[1] For its part, the district court below recognized that "[p]laintiffs' attempt to get around *Colorado II* faces a significant uphill battle." (Opinion & Order, R.49, PageID##5468-69.)

"changed" facts, and an "as-applied challenge" that the *Colorado II* Court did not consider. (*See* App. Br. at 41.) These contentions are unavailing.

First, the Supreme Court has repeatedly rejected the suggestion that a contribution limit is unconstitutional merely because another means of preventing corruption is theoretically possible. It has refused to replace Congress's own conclusions that alternative measures, such as anti-bribery laws, fail to prevent corruption and circumvention of expenditure limits. *See Colorado II*, 533 U.S. at 462-463 & n.26; *Cal. Med. Ass'n*, 453 U.S. at 199 n.20; *Buckley*, 424 U.S. at 27-28.

Appellants assert that FECA "prevents a donor from using parties to circumvent the base limits through an earmarking rule" and such a rule limits corruption (App. Br. at 3), yet this is nothing new. In *Colorado II*, the challengers also argued that better enforcement of the earmarking rule, rather than limitations on coordinated expenditures, constituted a more appropriate means of addressing corruption. The Court rejected this argument, stating the earmarking rule failed to expose such informal agreements made between parties and candidates. 533 U.S. at 463. Reliance upon the earmarking rule alone, it said, would fail to address these so called "'understandings' regarding which donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote." *Id*.

Second, despite Appellants' protests, and as explained in further detail *infra* Part III.A, the risk of circumvention of base limits and the dangers of quid pro quo corruption remain present. *Colorado II* rested on a concern that contributions to one entity (a political party) could be used to circumvent the base limits on contributions to another (an individual candidate). *Colorado II* explicitly stated that an anti-circumvention measure such as the challenged provision combats corruption. *Colorado II*, 533 U.S. at 456 & n.18 ("[T]he evidence supports the long-recognized rationale of combating circumvention of contribution limits designed to combat the corrupting influence of large contributions to candidates from individuals and nonparty groups.").

Third, existing law has not changed in a way that undermines *Colorado II*. The 2015 Appropriations Act approved special accounts that may not be used in any manner that would constitute a contribution or expenditure, and indeed with much higher limits than the base contribution limits. As of 2015, individuals may donate up to $123,900 per year to segregated party national committee accounts for specifically identified categories of expenditures such as "presidential nominating convention[s]," party "headquarters buildings," and "election recounts and contests and other legal proceedings." 52 U.S.C. § 30116(a)(9); *see also* FEC Facts, R.43, ¶¶ 199, 255, PageID##5191-92, 5211.

Statements by House and Senate leaders made during the passage of the Appropriations Act explained that "Commission precedent" — specifically, the Commission's advisory opinions in AO 2006-24, (https://www.fec.gov/files/legal/aos/2006-24/2006-24.pdf), and AO 2009-04, (https://www.fec.gov/files/legal/aos/2009-04/AO-2009-04-final.pdf) — permitting the raising and spending of recount funds would continue to apply to national party committee accounts established under 52 U.S.C. § 30116(a)(9)(C).[2] Consistent with that precedent, the Commission has more recently explained in Advisory Opinion 2019-02 (Bill Nelson for Senate) (https://www.fec.gov/files/legal/aos/2019-02/2019-02.pdf), that funds in the Democratic Senatorial Campaign Committee's ("DSCC") legal proceedings account "could not be used for the purpose of influencing a federal election." AO 2019-02 at 4 (Bill Nelson for Senate).

Because the Appropriations Act specified limited uses of funds and did so in a context in which such spending is not for influencing federal elections, they are *inapposite* to the funds at issue in this case, which can be used to *influence federal elections*. Appellants NRSC and NRCC themselves have elsewhere

[2] 160 CONG. REC. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner); 160 CONG. REC. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid).

acknowledged that "[t]he Appropriations Act did not introduce any new concepts to the law."[3] Congress's decision to permit a raised level of contributions for certain specific purposes does not bear on the coordinated party expenditure limit and thus does not undermine the existing legal landscape.[4]

Nor do the D.C. Circuit decisions in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), and *Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533 (D.C. Cir. 2019) ("*LNC*"), both cited by Appellants (App. Br. at 44, 49), suggest a different result. *SpeechNow.org* predated the 2015 Appropriations Act and the Supreme Court's denial of certiorari in *Cao*. In *LNC*, that challenger "insist[ed] that [the] case differs meaningfully from *Buckley* and *McConnell*" in light of the Appropriations Act, but the full D.C. Circuit court "disagree[d]." 924 F.3d at 547.

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[3] Comment of NRCC and NRSC (Jan. 30, 2017), Notice 2016-10 (Rulemaking Petition: Implementing the Consolidated and Further Continuing Appropriations Act, 2015), FEC REG 2014-10, (https://sers.fec.gov/fosers/showpdf.htm?docid=354658). In arguing against the FEC implementing any new regulations after the Appropriations Act, NRSC itself stated it saw "little reason to undertake a comprehensive, time- and resource-consuming rulemaking" because of the lack of novelty, stating that "the national party committees have extensive experience with convention funding, building and legal funds." *Id.*

[4] Appellants' contention that "it has become common for national committees to use their legal-proceedings accounts to pay for a wide array of candidate and campaign legal costs" (App. Br. at 14) ignores the key point that these accounts are limited to specific purposes.

And while the LNC contended that the amendments "transformed" FECA's limits on contributions, the en banc court found that "*McConnell* forecloses this argument." *Id.* This Court should likewise reject Appellants' efforts to conjure up a changed legal landscape resulting from the Appropriations Act.

Lastly, Appellants challenge section 30116(d) facially and "as applied" to "party coordinated communications" as defined in 11 C.F.R. § 109.37. Regardless of how Appellants frame the issue, the Supreme Court has facially upheld section 30116(d) and their "as-applied" challenge is so encompassing that judgment in their favor on any claim would be equivalent to this Court overturning *Colorado II* and the relevant portion of *Buckley*. Indeed, Appellants' argument rests "on the same general principles rejected by the Court in *Colorado II*, namely the broad position that coordinated expenditures may not be regulated." *Cao*, 619 F.3d at 430. Their "as-applied" argument is not meaningfully different from the facial challenge that the Supreme Court rejected in *Colorado II*. 533 U.S. at 456 n.17; *infra* Part III.A.4. Accordingly, it must be rejected, because "[o]nly the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions until such time as the Court informs [us] that [we] are not." *DeBoer v. Snyder*, 772 F.3d 388, 400 (6th Cir. 2014), *rev'd sub nom. on other grounds Obergefell v. Hodges*, 576 U.S. 644 (2015) (citing *Hicks v. Miranda*, 422 U.S. 332, 345 (1975)).

III. FECA'S COORDINATED PARTY EXPENDITURE LIMITS ARE CONSTITUTIONAL BECAUSE THEY REMAIN CLOSELY DRAWN TO SERVE A SUFFICIENTLY IMPORTANT INTEREST

Not only is *Colorado II* binding precedent, but section 30116(d) remains constitutional. Unlimited coordinated spending presents a substantial and foreseeable risk of quid pro quo corruption, because donors can make national party committee contributions in much larger amounts than they can contribute directly to candidates. Donors may structure contributions to parties knowing that every dollar can be spent in support of a candidate with candidate input over the expenditure. Candidate input on party spending — the hallmark of coordinated, versus independent, expenditures — poses a specific danger of corruption. FECA's coordinated party expenditure limits guard against this risk by ensuring only a small percentage of donors' contributions to parties functionally can be allocated to coordinated spending while allowing parties high overall levels of coordinated spending. Congress's solution therefore is a closely drawn means of achieving the government's compelling anticorruption interest.

A. Permitting Unlimited Coordinated Party Expenditures Poses an Intolerable Risk of Quid Pro Quo Corruption and its Appearance

Through FECA, Congress set out to reduce corruption arising through direct contributions to candidates *and* the functional equivalent of contributions — coordinated expenditures. As Congress foresaw, financing campaigns without

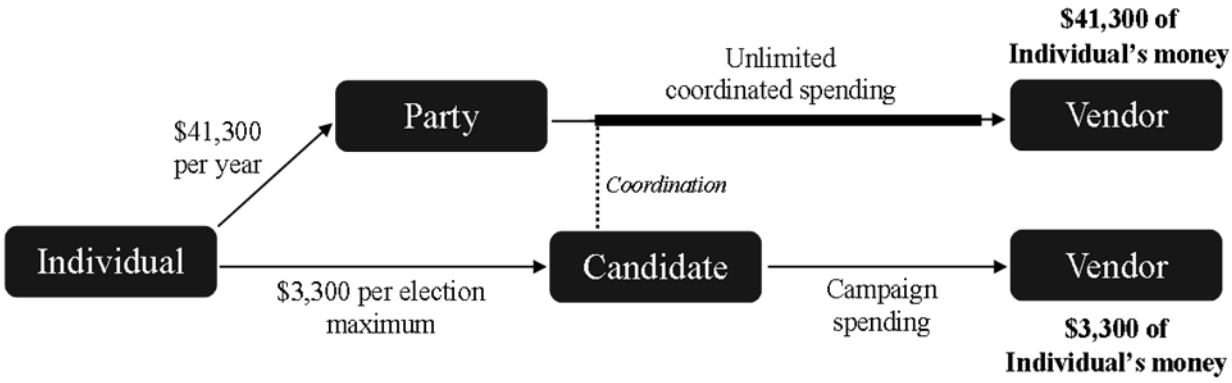
limiting party coordinated expenditures prompts unchecked opportunities for donor-candidate quid pro quos.

1. Unlimited Coordinated Party Expenditures Undermine Candidate Base Contribution Limits

Political actors can use party coordinated expenditures to circumvent FECA contribution limits. An individual or political committee, barred from contributing to candidates beyond $3,300 or $5,000, respectively, is permitted to contribute substantially higher sums to party committees. Unlimited coordinated expenditures enable larger contributions to parties for spending in coordination with candidates, making them indistinguishable from contributions made directly to the candidate.

An individual maximizing contributions to a candidate ($3,300) and maximizing contributions to a party committee such as the NRSC ($41,300), then spent in coordination with that candidate, functionally raises the base limit for what the donor can directly contribute for the candidate's use by *more than 12 times*. Over a two-year House or six-year Senate election cycle, individual donors' contributions to parties can total $82,600 or $247,800, respectively, while remaining capped at $3,300 *per election* to candidates (or $6,600 if contributing in primary and general elections). This arrangement raises all the quid pro quo corruption risks stemming from any excessive contribution to candidates. *Buckley*, 424 U.S. at 26-27 (noting that "[t]o 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 following figure depicts the Supreme Court's insight in *Colorado II* that "[c]oordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." 533 U.S. at 464.



This illustrated circumvention of the base limits is not "mere conjecture," *McCutcheon*, 572 U.S. at 210, but in fact exactly what occurred in the "tallying" system one party used as discussed in *Colorado II*, 533 U.S. at 459-60. Because the Democratic party tacitly passed through contributions from donors into coordinated spending for particular candidates without donors designating those funds for candidates expressly, "a candidate could be assured that donations through a party could result in funds passed through to him for spending on virtually identical items as his own campaign funds." *Id*. at 460.

Funds raised by candidates from individual donors exceeding base contribution limits foster impermissible risks of quid pro quo corruption and its

appearance; the constitutionality of base limits has been repeatedly reaffirmed since *Buckley*. *See McCutcheon*, 572 U.S. at 208 ("The Court in [*Buckley*] upheld base contribution limits [as to candidates] because they targeted 'the danger of actual *quid pro quo* arrangements' and 'the impact of the appearance of corruption stemming from public awareness' of such a system of unchecked direct contributions."); *Cruz*, 596 U.S. at 306 ("Individual contributions to candidates for federal office . . . are . . . regulated in order to prevent corruption or its appearance."). Critically, coordinated expenditures are tantamount to, or "virtually indistinguishable from simple contributions [to candidates]." *Colorado II*, 533 U.S. at 444-45 (citing *Colorado I*, 518 U.S. at 624). "In *Buckley,* the Court acknowledged Congress's functional classification and observed that treating coordinated expenditures as contributions 'prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.'" *Id*. at 443 (internal citations omitted).

Coordinated expenditures are distinct from independent expenditures. Appellants gloss over the critical distinctions between the two types of spending. (App. Br. at 52 (many coordinated party expenditures "largely resemble" independent expenditures).) The Court must reject these comparisons; failing to do so risks legal error. The *defining feature* of party independent expenditures — what makes limiting them unconstitutional — is "[t]he absence of prearrangement

and coordination of an [independent] expenditure with the candidate or his agent," which "not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as quid pro quo for improper commitments from the candidate period." *Colorado I*, 518 U.S. at 615; *see also Buckley*, 424 U.S. at 47. Coordinated expenditures can be limited because their very nature makes them equivalent to contributions.

The record captures these distinctions concretely. Candidates and parties recognize, as Senator Vance, the NRSC, and NRCC acknowledged in discovery, that coordinated expenditures constitute the *same benefit* to a candidate as spending funds directly raised by the candidate. (*See* Findings, R.49-1, ¶¶ 54-55, 86, 101, PageID##5506, 5515, 5520 (written discovery responses reflect Senator Vance's, the NRSC's, and NRCC's understanding that parties and candidates aim to work in consultation to create a unified message where nominees suggest or recommend how the party committee spend money to best support the candidates' campaigns).) Political scientists agree and in studies treat coordinated spending as candidate spending. (*See* FEC Facts, R.43, ¶ 207, PageID##5194-95 (citing Krasno Rept., R.36-1, at 9, PageID#407).) For a candidate using a TV ad campaign to win an election, receiving money from a supporter to pay for the ads is the same as having the ad costs paid for directly by the supporter.

Coordinated party expenditures thus raise the identical risk of quid pro quo corruption that concerned the Court in *Buckley* and its progeny: candidates coordinating the disposition of funds spent supporting their campaigns raised in amounts exceeding candidate contribution limits. *See McCutcheon*, 572 U.S. at 225-26 (describing candidate contribution limits as on the right side of a "clear, administrable line" preventing "money beyond the base limits funneled in an identifiable way to a candidate — for which the candidate feels obligated," raising the specter of quid pro quo corruption). For, "[i]f suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent would almost certainly intensify." *Colorado II*, 533 U.S. at 460. Congress identified this danger of corruption and constructed FECA to address it, deploying coordinated party expenditure limits in tandem with candidate contribution limits to ensure the effectiveness of the latter.

2. National Party Committees' Structures and Objectives Pose Risks of Quid Pro Quo Corruption That Congress Perceived

Political party operations demonstrate the risk of corruption Congress identified and targeted through coordinated party expenditure limits. National parties are "inextricably intertwined with federal officeholders and candidates," including "in the conduct of an election." *McConnell*, 540 U.S. at 155 (quoting 148 Cong. Rec. H409 (Feb. 13, 2002)); *see also Colorado II*, 533 U.S. at 469.

"The national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates." *McConnell*, 540 U.S. at 155. The NRSC and NRCC (and Democratic counterparts), were founded by sitting members of Congress, their members and officers continue to be sitting members of Congress, are closely situated to party leadership, and support candidates with organizational capacity needed to win campaigns. (FEC Facts, R.43, ¶¶ 140-59, PageID##5171-79.) Consequently, "there is no meaningful separation between the national party committees and the public officials who control them." *McConnell*, 540 U.S. at 155.

The mechanics of party fundraising enable donors to leverage party contributions over officeholders to extract improper quos. "Officeholders and candidates know who the major donors to their parties are." *Cao v. FEC*, 688 F. Supp. 2d 498, 524-25 (E.D. La. 2010) (quoting Meehan Decl., R.38-5, ¶ 8, PageID#2568). Indeed, "[f]or a member not to know the identities of [large party] donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves." *Id*. at 525 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 487-88 (D.D.C. 2003) (Kollar-Kotelly, J.)); *id*. at 853-55 (Leon, J.). "National party committees would distribute lists of potential or actual donors, or donors themselves would report their generosity to officeholders." *McConnell*, 540 U.S. at 147. "When solicit[ing] contributions for

the party," candidates "in effect solicit funds for [their] election campaign[s]." (Wirth *Colorado II* Decl. ¶ 5, R.38-36, PageID#3218; *see also* Meehan Decl. ¶ 14, R.38-5, PageID#2569.) The Supreme Court described the Democratic Party's tallying technique as an "informal agreement between the DSCC and the candidates' campaigns that if you help the DSCC raise contributions, we will turn around and help your campaign." *Colorado II*, 533 U.S. at 459 (citing Hickmott Decl., R.36-11, ¶ 8, PageID##1179-80); *see also* FEC Facts, R.43, ¶¶ 108-09, 185, PageID##5154-55, 5186.

Party committees continue today to enlist candidates to help secure party contributions from donors used to support candidates. (*See* Krasno Rept., R.36-1, at 5-6, PageID##403-04.) Joint fundraising likewise positions donors to leverage contributions over those candidates. (*See* FEC Facts, R.43, ¶¶ 184-89, PageID##5186-88 (describing candidates' prominent roles in raising funds to distribute to their parties and colleagues).) Campaign spending has become highly concentrated in a limited number of decisive races, posing a concern of donors seeking to extract official action from various candidates for party contributions supporting candidates in competitive races that determine Congress's balance of power. (*See* Findings, R.49-1, ¶¶ 64-65, 68-69, 79-80, 83-84, 104-05, 114, 116, 124-25, 127-28, PageID##5509, 5509-10, 5513-14, 5521-22, 5524, 5525-26; FEC

Facts, R.43, ¶¶ 162-78, PageID##5179-85 (illustrating substantial party spending in a handful of key races and its value to all party affiliates).)

The upshot is this: with fewer competitive races, parties invest resources into only a few decisive races; if permitted unlimited coordinated expenditures, especially large contributions will flow to candidates running in those decisive races enabling donors to leverage contributions for quid pro quo exchanges with those candidates in addition to candidates and officeholders unaffiliated with any close election, but who value winning those races to cement a majority. No entities apart from parties are so closely connected to candidates. Super PACs, by contrast, are defined by their independence from candidates. Inevitably, "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits." *Cao*, 619 F.3d at 421 (quoting *Colorado II*, 533 U.S. at 455). Coordinated party expenditures limits help insulate officeholders from immense pressure to exchange official action to secure party funds for highly valued spending in coordination with them or their colleagues' campaigns.

3. Decades of Evidence Confirms that Unlimited Coordinated Expenditures Will Lead to Actual and Apparent Quid Pro Quo Corruption

The Supreme Court has consistently recognized the difficulty of providing evidence from "the counterfactual world in which" the existing campaign finance

restrictions plaintiffs challenge "do not exist." *McCutcheon*, 572 U.S. at 219; *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality); *Colorado II*, 533 U.S. at 457 (noting the "difficulty of mustering evidence to support long-enforced statutes" because "there is no recent experience" without them). Nevertheless, political parties have demonstrated a "unique susceptibility to corruption." *Cao*, 619 F.3d at 422; FEC Facts, R.43, ¶¶ 68-73, PageID##5138-40. Reporting and records from criminal proceedings, both historical and recent, belie Appellants' oft-repeated claim that there is "no evidence" of corruption supporting party coordinated spending limits. (App. Br. at 2, 19, 21-22, 30, 34, 35 n.4.)

There have been numerous disconcerting examples of actual or apparent quid pro quos involving political parties at the federal level (*see* FEC Facts, R.43, ¶¶ 67-139, 217-35, PageID##5138-71, 5197-204), including interference with the normal functioning of U.S. agencies and legislative action or inaction such as the following instances:

- President Nixon's reversal of the Department of Agriculture on behalf of the dairy industry with a price support decision that cost the public about $100 million due to contributions made by the dairy industry to Nixon's re-election campaign, including funds funneled through the RNC to the campaign. (FEC Facts, R.43, ¶¶ 80-83, PageID##5141-71.)

- Decisions by the Department of Interior concerning tribal casino applications apparently granted or denied based on contributions to Democratic Party committees (*id*. ¶¶ 86-88, PageID##5143-45), and decisions of the National Security Council concerning energy policies

favored by Roger Tamraz prompted by his donations to Democratic Party committees, (*id.* ¶ 91, PageID##5146-47.)

- A "series of quid pro quos" made by the former lobbyist Jack Abramoff, *e.g.*, former Ohio Representative Bob Ney's agreement to slip a sentence into an Act of Congress to help one of Abramoff's clients open a casino in Texas (*id.* ¶¶ 113b, 114, PageID##5157-58), Ney's agreement to insert statements into the *Congressional Record* that Abramoff could use to his business advantage in a Florida-based deal (*id.* ¶ 113a, PageID#5157), and other party contributions in exchange for political action that Abramoff characterized as "so perfunctory it actually seemed natural," (*id.* ¶ 112, PageID##5156-57.)

- An apparent pay-for-play ambassadorship nomination by George Tsunis, who contributed to President Obama's presidential campaign and the Illinois Democratic Party. (*Id.* ¶ 123, PageID#5163.)

- Criminal prosecutions of Senator Bob Menendez in 2015 and 2023, whose alleged bribers contributed to New Jersey Democratic party accounts. (*Id.* ¶¶ 124-25, 137-38, PageID##5163-64, 5169-70.)

- Reporting surrounding the 2017 Tax Bill indicated the bill was a direct request of many Republican party donors who indicated the "piggy bank was closed" until the tax cuts were passed. (*Id.* ¶¶ 126-32, PageID##5164-67.)

- Samuel Bankman-Fried's alleged attempts to obtain a favorable regulatory environment using donations made to the DNC, DSCC, and DCCC. (*Id.* ¶ 139, PageID##5170-71.)[5]

At the state level, recent examples of candidates and donors using state and local parties to circumvent state campaign contribution limits appear where state

[5] The record also reflects numerous pre-FECA quid pro quo corruption scandals also involving political parties and corrupt political organizations. (*See* FEC Facts, R.43, ¶¶ 67-84, PageID##5138-43).)

campaign finance laws entail fewer constraints on political party coordination than FECA. (*Contra* App. Br. at 35 n.4.) Notable examples include:

- In Wisconsin, Senate Majority Leader Charles Chvala pled guilty in 2005 to a scheme that included shakedowns of lobbyists and interest groups to contribute to state legislative campaign committees, which he leveraged to entice legislators to provide favors to those donors. (FEC Facts, R.43, ¶¶ 117-18, PageID##5159-60.)

- In Ohio, Steven Pumper, the CEO of DAS Construction, was sentenced in 2013 to more than eight years in prison for a scheme including, *inter alia*, a donation to the Cuyahoga County Democratic Party to be used by the campaign of Parma School Board Member J. Kevin Kelley, who helped Pumper obtain a construction contract. USAO N.D. Ohio, *Construction Executive Steven Pumper Sentenced To Eight Years In Prison For Paying Bribes To Public Officials* (Dec. 4, 2013), https://www.justice.gov/usao-ndoh/pr/construction-executive-steven-pumper-sentenced-eight-years-prison-paying-bribes-public.

- In Connecticut, the State Elections Enforcement Commission launched a grand jury investigation into whether Governor Malloy's 2014 campaign illegally used contributions from state contractors made into the party's account to make the expenditures on behalf of the campaign. Jon Lender, Feds Collect SEEC Files, HARTFORD COURANT, (Jul. 30, 2016), https://www.courant.com/2016/07/30/feds-mining-state-enforcers-files-in-criminal-probe-of-2014-malloy-campaign-funding/.

- In New York, Mayor Bill de Blasio reportedly worked with donors and candidates for the state Senate to circumvent campaign donation limits by having excessive candidate contributions routed through county committees and the State Democratic Campaign Committee. Kenneth Lovett, *EXCLUSIVE: De Blasio team skirted campaign donation limits; investigators found 'willful and flagrant' violations 'warranting prosecution'*, NEW YORK DAILY NEWS (Apr. 22, 2016), https://www.nydailynews.com/2016/04/22/exclusive-de-

blasio-team-skirted-campaign-donation-limits-investigators-found-willful-and-flagrant-violations-warranting-prosecution/.

- In Louisiana, state Democratic Party leaders were accused of funneling money from utility companies to the campaign of a fossil fuel-friendly candidate running for the state's utility regulatory committee. Sara Sneath, *Louisiana Democratic Party 'funneled' utility donations to climate candidate's challenger*, LOUISIANA ILLUMINATOR (Jan. 25, 2023), https://lailluminator.com/2023/01/25/louisiana-democratic-party-funneled-utility-donations-to-climate-candidates-challenger/.

- In Massachusetts, state Senator Ryan Fattman funneled $137,000 through the Republican State Committee for in-kind contributions to Stephanie Fattman's 2020 campaign for Register of Probate, which far exceeded the legal limit of $100 on contributions from one candidate to another. Mass. A.G., *Attorney General's Office Reaches Settlements With Senator Ryan Fattman, Worcester County Register Of Probate Stephanie Fattman, And The Sutton Town Republican Committee For Illegal Campaign Contributions*, (Oct. 24, 2023), https://www.mass.gov/news/attorney-generals-office-reaches-settlements-with-senator-ryan-fattman-worcester-county-register-of-probate-stephanie-fattman-and-the-sutton-town-republican-committee-for-illegal-campaign-contributions.

- In Wisconsin, the state Ethics Commission recently found that Wisconsin Assembly candidate Adam Steen, his campaign, and several county party committees arranged for donors to circumvent the $1,000 state limit on individual contributions to Steen by having donors make larger contributions to county party committees, which can make unlimited contributions to candidates, and which forwarded those funds to or used them for in-kind contributions to Steen. Emilee Fannon, *State oversight panel recommends felony charges against Trump committee, GOP lawmaker*, CBS 58 (Feb. 23, 2024), https://cbs58.com/news/state-oversight-panel-recommends-felony-charges-against-trump-committee-gop-lawmaker (providing copies of commission findings).

Such examples are illustrative, not exhaustive. They demonstrate the actual and apparent corruption that may result if Appellants succeed in removing barriers to unlimited coordinated expenditures — "[m]oney, like water, will always find an outlet." *McConnell*, 540 U.S. at 224. Such examples underscore FEC's expert's conclusion that "[t]he existing limits on parties' coordinated expenditures is the only piece in place which keeps the system [preventing party donors' funds from corrupting officeholders] somewhat in check." (Krasno Rept., R.36-1, at 6 PageID#404.)

4. Permitting Unlimited Spending on Party Coordinated Communications Presents the Same Danger of Corruption as Permitting All Coordinated Party Expenditures

Appellants' as-applied challenge is nearly coterminous with their facial challenge. As-applied challenges posit that limits are unconstitutional as to one type of disposition of funds, but not that the limits are unconstitutional in every circumstance. *See, e.g.*, *Colorado I*, 518 U.S. 623-24. Here, Appellants' claim that if coordinated party expenditure limits are not unconstitutional in all applications, they do unconstitutionally limit party coordinated communications. "[P]arty coordinated communication[s]" are one variant of coordinated party expenditures, defined by FEC regulations. 11 C.F.R. § 109.37. Appellants' as-applied challenge is exceedingly broad because the challenged subset of expenditures (party coordinated communications) constitutes the overwhelming majority of party

spending in support of their candidates, whether coordinated or independent. (FEC Facts, R.43, ¶¶ 236-45 PageID##5204-08.)

As reflected in FEC self-reporting, in five election cycles between 2013 and 2022, the NRSC has spent $55,022,699 total on coordinated expenditures; it categorized 94.99% ($52,267,916) of those expenses as "media," "media placement," or "media production." *See* FEC, Coordinated Party Expenditures Data, https://www.fec.gov/data/party-coordinated-expenditures/?two_year_transaction_period=2024&committee_id=C00027466&committee_id=C00075820&cycle=2014&cycle=2016&cycle=2018&cycle=2020&cycle=2022. The NRCC spent $26,510,343 in coordinated expenditures between 2013-2022, categorizing 98.65% ($26,151,772) as "media." *Id*. In multiple individual cycles, either the NRSC or NRCC spent greater than 99% of its coordinated expenditures on coordinated party communications. *Id*.

Party independent spending mirrors this trend. Over this timeframe, the NRSC devoted between 99.7% and 100% of its independent expenditures to "media" or "media buy"; Appellant NRCC devoted between 96.5% and 100% of its independent expenditures on the same. (Findings, R.49-1, ¶¶ 78, 82, PageID##5513-14.) The DSCC's and DCCC's similarly spent large proportions of overall independent expenditures on communications. (*Id*. ¶¶ 126, 129, PageID#5526.) These existing spending patterns establish that, if permitted,

parties would expand coordinated spending operations almost exclusively on party coordinated communications. Appellants agree. (*See* Compl., R.1, ¶ 65, PageID#16 (coordinated party expenditures consist primarily of communications); App. Br. at 27 (Appellants "have spent virtually all of their funds on media"); Findings, R.49-1, ¶¶ 102, 103, PageID##5520-21 (plaintiffs Vance and Chabot intend to "work [on] . . . a greater number of coordinated public communication[s]").)

Appellants present this as-applied challenge as a narrower alternative to a facial challenge, but its effect would be no less dramatic. (*See* FEC Facts, R.43, ¶ 246, PageID#5208) (citing Krasno *Cao* Rept., R.36-3, at 11, PageID#490) ("allow[ing] parties and candidates to coordinate on media" would "effectively destroy any remaining limits on coordinated expenditures"); *compare LNC*, 924 F.3d at 533 (challenging party contribution limits as-applied to the specific context of donor bequests, a limited and particularized subset of all contributions, suggesting distinguishable corruption risks from deceased donors). In *Cao*, the Fifth Circuit rejected a similar as-applied challenge centering on parties' "own speech" — that would have encompassed all communications the party adopts, even if extensively coordinated with candidates — because accepting that argument "would effectively eviscerate the Supreme Court's holding in *Colorado II*," "effectually overrul[ing] all restrictions on coordinated expenditures." 619

F.3d at 428-30. Here, the risk of corruption and circumvention is nearly identical when permitting *all* coordinated party expenditures or only a greater-than-95% subset of those expenditures.[6] Because "simply characterizing the challenge as an as-applied challenge does not make it one," *id*. at 430, this Court should analyze Appellants' as-applied challenge no differently than the facial challenge it renews from *Colorado II*, both posing indistinguishable corruption risks.

B. Preventing Party-Related Quid Pro Quo Corruption Is a Compelling Governmental Interest

Recognizing the danger of actual and apparent corruption in party fundraising in the hypothetical absence of limits, Congress enacted section 30116(d)'s coordinated party expenditure limits to reduce the potential for corruption outlined above. The Supreme Court has repeatedly recognized the government's compelling interest in combatting quid pro quo corruption and

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[6] Appellants' claims of under-inclusiveness seek to conflate spending on "campaign advertisements" with "certain get-out-the-vote efforts and campaign mailers disseminated using volunteers." (*E.g.*, App. Br. at 36.) These arguments overlook distinctions that Congress and the Supreme Court have recognized between these types of spending and are belied by parties' demonstrated spending history. It was not volunteer-disseminated "'pins, bumper stickers, . . . and yard signs'" (*McConnell*, 540 at 13 (quoting 52 U.S.C. § 30101(8))) that Congress determined had "virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble," *Id*. at 170 (cleaned up). It was "public communications" like those Appellants seek to fund with unlimited coordination. As to these communications, the Supreme Court assessed that "[t]he record on this score could scarcely be more abundant" in upholding Congress's chosen means of preventing corruption as closely drawn. *Id*. at 170.

avoiding its appearance. *Buckley*, 424 U.S. at 26-27; *McCutcheon*, 572 U.S. at 192 (plurality opinion). That interest "has never been doubted." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000).

The *Buckley* Court determined that of "equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27. Avoiding that perception "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id*.

While *Buckley* articulated that the government's anti-quid pro quo corruption interest was "sufficiently important," *id*. at 26-27, the Supreme Court has since said that it may be properly classified as "compelling." *McCutcheon*, 572 U.S. at 199; *see also Cruz*, 596 U.S. at 305 (the prevention of quid pro quo corruption and its appearance remains a "permissible ground for restricting political speech").

In *Colorado II*, the Supreme Court validated Congress's assessment that political parties entail potential for corruption, explaining that "[parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452. In *McConnell*, the Court observed that "[t]he idea that large contributions to a national party can corrupt or, at the very least, create

the appearance of corruption of federal candidates and officeholders is neither novel nor implausible." 540 U.S. at 144.

This compelling interest is well-rooted in history and tradition, (*see* FEC Facts, R.43, ¶¶ 8-66, PageID##5118-38) (presenting a breadth of founding-era sources reflecting: an anticorruption ethic animating the founding; the Founders' concerns of faction- or party-related corruption in the political process, including contemporary accounts implicating possible corruption as understood; the Constitution's text and structure addressing corruption; and the Framers' understanding of the First Amendment as permitting Congress to enact reasonable speech regulation to reduce corruption); *see Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535-36 (2022) (explaining the relevance of "historical practices and understandings" in First Amendment interpretation). Notable Founding Fathers like George Washington, Alexander Hamilton, Charles Pinckney, and others warned of corruption if political actors, including would-be parties, were unchecked. (FEC Facts, R.43, ¶¶ 8-23, PageID##5118-24.) Further, James Madison described regulating speech to curb faction and its attendant corruption as an essential legislative function, writing that "[t]he regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government." (*Id.* ¶ 23, PageID##5123-24 (citing *The Federalist No. 10*, at 56).) Legislative

efforts to address party-related quid pro quo corruption are thus consistent with the founding-era understanding of the First Amendment where Congressional action carefully balances the weighty interests of political party speech with reducing corruption in the political process, as it does through coordinated party expenditure limits.

C. The Coordinated Party Expenditure Limit Provision Is Closely Drawn

Limits on campaign contributions must be "closely drawn to avoid the unnecessary abridgment of First Amendment associational freedoms." *McCutcheon*, 572 U.S. at 218. Though Appellants contend that the limits must be "narrowly tailored" (App. Br. at 3, 5, 21-23, 38-40, 49), courts have avoided conflating the closely drawn standard from *Buckley* with exacting or strict scrutiny. *See McCutcheon*, 572 at 196-99; *Wagner v. FEC*, 793 F.3d 1, 5-6 (D.C. Cir. 2015); *Holmes v. FEC*, 875 F.3d 1153, 1158 (D.C. Cir. 2017).

To determine whether limits are "closely drawn," the Court "must assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon*, 572 U.S. at 199. Under this well-established test, coordinated party expenditure limits are appropriately tailored means of reducing the risk of quid pro quo corruption arising from unlimited party expenditures coordinated with candidates.

1. Coordinated Party Expenditure Limits Reduce Quid Pro Quo Corruption in Ways Other Means Do Not

Coordinated party expenditure limits "target[] and eliminate[] no more than the exact source of the 'evil' [they] seek[] to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The limits reasonably protect against the specific risk of corruption posed by unlimited coordinated party expenditures — candidates coordinating the disposition of funds raised in amounts exceeding candidate base contribution limits. They ensure that, functionally, only small percentages of donors' party contributions can be allocated to coordinated spending. No alternatives effectively accomplish that aim.

Initially, candidate contribution limits work in tandem with coordinated party expenditure limits, and therefore, alone, do not reduce the risk of quid pro quo corruption coordinated party expenditures entail. Legislative history reflects congressional concern about corruptive effects of campaign spending by parties through large party contributions directed to candidates exceeding candidate base contributions. In 1973, in debate over a proposed provision regulating contributions to parties in a predecessor bill to FECA, Senator Matthias outlined this concern in compelling fashion:

> But what this amendment really goes to is one of the areas which is not controlled, and that is from the party to the candidate. That, of course, is a wide-open avenue. An [individual] who could contribute $100,000 to a party could well envision that that money, by some

> arrangement, would be directed to a candidate. Such arrangements are not unknown.
>
> This amendment would prevent that kind of indirect contribution of $100,000 to a single candidate by a single contributor. I think it is a loophole which needs to be looked at very carefully.

119 Cong. Rec. 26,321 (1973).[7] Senators Kennedy and Pastore invoked their experiences as legislators to note the possibility for donors to use parties as conduits for corrupting contributions. *See id.* at 26,323-26,324.

Limits on contributions to political parties, alone, do not suffice. Party contribution limits primarily guard against the risk that party donors will corrupt the party apparatus in toto. *LNC*, 924 F.3d at 543 (upholding base contribution limits as to donor bequests, finding "[p]olitical committees 'could feel pressure to . . . ensure that a (potential) donor is happy with the committee's actions . . . [that could] cause a national party committee, its candidates, or officeholders . . . [to] grant that individual political favors") (citing district court findings)). These

[7] The amendment to which Senator Mathias referred was raised by Senator Stevenson, *see* 119 Cong. Rec. at 26,320, and would have subjected party committees to the same spending limits as other political committees. *See id.* at 26,321 (Senator Stevenson states that the amendment would "have the effect of equalizing the amount to party political committees and all other political committees"). The version of FECA ultimately enacted in 1974 permits political parties to make substantially larger coordinated expenditures in support of federal candidates than under this proposal, *see* 52 U.S.C. § 30116(d), with lower limits on individual contributions to candidates and political parties than the predecessor bill. *See* 52 U.S.C. § 30116(a)(1).

higher limits on party contributions are predicated on the parallel existence of coordinated party expenditure limits to prevent allocating all party receipts for coordinated spending with candidates.

It is for these reasons that limiting coordinated party expenditures is not the sort of "prophylaxis-upon-prophylaxis" approach of which the Court has previously been skeptical. *See FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (opinion of Roberts, C.J.); *McCutcheon*, 572 U.S. at 221; *Cruz*, 596 U.S. at 306-07. Rather, these limits are a corollary of candidate contribution limits that are constitutionally valid; only taken together do they create a coherent and functional system. A prophylaxis-upon-prophylaxis critique contemplates that another limit, apart from the one being challenged, already operates to temper the exact strain of corruption for funds subject to the challenged limit. But as to coordinated party expenditure limits, neither candidate nor party base contribution limits address the "line" Senator Mathias identified between a party committee and candidate. A $3,300 base limit on contributions to a candidate does little to stem corruption when an alternative avenue to spend $41,300 in coordination with the candidate is available through the means of party committee contributions coupled with unlimited coordinated spending.

Invalidating coordinated party expenditure limits poses a concern that is materially different than the challenges in *McCutcheon* and *Cruz* — that is,

effectively nullifying candidate base contribution limits. Central to the *McCutcheon* Court's holding invalidating aggregate limits was the notion that funds contributed to candidates by a donor (even if the donor made total contributions exceeding the aggregate limit) could never exceed the then per-election limit of $2,600 (now, $3,300) that flowed to the candidate. 572 U.S. at 209 ("[W]e leave the [candidate] base limits undisturbed . . . remain[ing] [as] the primary means of regulating campaign contributions."); *id.* at 221 ("It is worth keeping in mind that the *base limits* themselves are a prophylactic measure.").

Likewise, the *Cruz* Court invalidated the post-election loan repayment limit because funds raised by a candidate after the election remained subject to base limits. 596 U.S. at 306-07 ("[T]he contributions at issue remain subject to [the candidate base contribution limit] requirements."). There too, the Court found the additional layer of limits on post-election loan repayments did not further reduce the corruptive potential of the contributions because they were "already regulated in order to prevent corruption or its appearance" between donors and candidates. *Id*. at 306. Not so with the coordinated expenditure limits. Without party coordinated expenditure limits, base limits would be entirely "undermined." *Colorado II*, 533 U.S. at 464.

Congress could theoretically have "lower[ed] the cap" of permissible contributions to parties to reduce corruption from donors circumventing candidate

contribution limits. *Colorado II*, 533 U.S. at 482 (Thomas, J., dissenting); *see* FEC Facts, R.43, ¶ 235, PageID##5203-04 (citing Krasno Rept., R.36-1, at 16, PageID#414) (explaining that party contribution limits of $3,300 would temper corruption concerns). But that approach risks harming parties much more dramatically than Appellants allege of the challenged limits, that is, by drastically limiting what they may raise in the first instance. Congress thought better. It instead crafted coordinated expenditure limits to prevent party funds' contribution-like use with candidates as an avenue likely to foster quid pro quo arrangements, while permitting parties to still raise money in large increments for other purposes. Appellants' approach to "tighten" other measures, like party base limits (App. Br. at 39-40), would be less closely drawn than the current regime.

Finally, the anti-earmarking provision of section 30116(a)(8) also does not provide a complete response to the danger of exceeding base contributions limits through coordinated party expenditures. Not only does earmarking fail to reach beyond formal and obvious circumvention, failing to capture understandings like "tally" schemes and other latent arrangements, but the Supreme Court expressly rejected the rationale underlying this argument in *Colorado II*. There, the Court explained that "[t]he earmarking provision, even if it dealt directly with tallying, would reach only the most clumsy attempts to pass contributions through to candidates." 533 U.S. at 462. Appellants' contention that FECA's earmarking

adequately reduce corruption risk (App. Br. at 39-40), is foreclosed by the holding of *Colorado II.*

2. Coordinated Party Expenditure Limits Reflect Congress's Deft Tailoring

Congress's inclusion of coordinated party expenditure limits in FECA strikes a careful balance between reducing corruption while respecting parties' important role of supporting their candidates. Importantly, "a party is better off [than individuals and other political committees], for it has the special privilege the others do not enjoy, of making coordinated expenditures up to the limit of the Party Expenditure Provision." *Colorado II*, 533 U.S. at 455. Neither political committees nor individuals can engage in coordinated expenditures in excess of limits on their direct contributions to candidates, as they are considered in-kind contributions to candidates. *See* FEC Facts, R.43, ¶¶ 290-94, 307, PageID##5224-25, 5230; 11 C.F.R. § 109.20; H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 59 (1976) ("but for [Section 30116(d)], these expenditures would be covered by [base] contribution limitations"). Additionally, super PACs, whose defining feature is strict independence from candidates or parties, cannot make contributions to or coordinate with candidates. *Citizens United v. FEC*, 558 U.S. at 310, 357-60 (2010); *supra*, Part III.A.2. (explaining parties' close connection to candidates unmatched by other political actors).

FECA's limits on parties are well tailored considering its compelling anticorruption aim. Nothing in this litigation affects the uncontroverted backdrop to Appellants' claims that party committees may generally engage in unlimited independent expenditures, *Colorado I*, 518 U.S. at 618; *Colorado II*, 533 U.S. at 465, consistently deemed highly valuable in *Buckley*, *Colorado I*, *Citizens United*, *SpeechNow.org*, and beyond. (FEC Facts, R.43, ¶¶ 310-13, PageID##5231-32.) Parties' tangible compliance costs, "administrative" expenses incurred by the NRSC and NRCC's independent expenditure ("IE") units total, at most, 5-10% of overall expenses when excluding advertising costs that would have been incurred through either independent or coordinated spending.[8] (Opinion & Order, R.49, at 37-38, PageID##5490-91; Findings, R.49-1, ¶ 71, PageID#5510; FEC Facts, R.43, ¶¶ 325-27, PageID##5237-38.) Appellants fail to show that these administrative expenses are traceable specifically to complying with the limits and that they would not incur such expenses even without IE units, as many costs — including employee salaries and benefits, consultant fees, polling and research, office space and related expenses — presumably would transfer to an expanded coordinated spending operation. But most importantly, if it is the independence of independent

[8] In 2022, non-media expenses incurred by the NRSC's IE unit were approximately $3 million out of $37,379,382 spent and for the NRCC, were approximately $5 million out of $92,364,793.51 spent. (Findings, R.49-1, ¶¶ 76, 81, PageID##5512-14.)

expenditures that increases such costs, that follows from the constitutional necessity of independent spending being done independently, and thus is no different for individuals or other political committees, including super PACs. The lowest-unit rate guarantee, for example, applicable only to "legally qualified candidates" not "groups, organizations or persons other than candidates," Findings, R.49-1, ¶ 81, PageID##5513-14; FEC Facts, R.43, ¶¶ 335-39, PageID##5540-42 (citing *KVUE, Inc. v. Moore*, 709 F.2d 922, 934-36, 936 n.63 (5th Cir. 1983); FCC, Use of Broad. & Cablecast Facilities by Candidates for Public Office, 34 F.C.C. 2d 510, 529 (1972), is a benefit that parties can uniquely exploit by virtue of relatively high coordinated expenditure limits.

It is therefore unsurprising that parties, although subject to the challenged limits for nearly 50 years, maintain a central role the political system. Parties have prospered under current law, in part, because "it already favors [them] in substantial ways, including the much higher limits on the contributions they may accept" compared to candidates or traditional political committees. (Krasno Rept., R.36-1, at 15, PageID#413; *see* FEC Facts, ¶¶251-339, PageID##5210-41.) Party receipts have continued to rise substantially in recent decades, even adjusting for inflation, giving party committees the capacity to spend more money in specific races. (*Id*.; Findings, R.49-1, ¶¶ 152-69, PageID##5531-34 (detailing party receipts in real-dollar figures since the early 1990s).) In recent election cycles, the

Democratic and Republican national party committees have successfully raised vast sums: in the 2020 cycle, the two parties raised more than $2.6 billion combined and in the 2022 cycle, $1.8 billion. (Findings, R.49-1, ¶¶ 158-59, 166-67, PageID##5532-24.)

Further, "there is little doubt that US parties in the electorate and in government are both at or near historically high levels" with large percentages of voters strongly identifying with parties and with considerable party discipline by elected officials. (FEC Facts, R.43, ¶¶ 270-76, PageID##5217-19; Krasno Rept., R.36-1, at 13, PageID#411.) "Despite decades of limitation on coordinated spending," parties have far from been "rendered useless." *Colorado II*, 533 U.S. at 455. Appellants' policy intimation that parties have been usurped or diminished as organizations, in the electorate, or in government — due to the development of super PACs — overstates the balance of the evidence adduced in this litigation and ignores parties' multifaceted roles in our democracy. These arguments also ignore the prospect that an effort to strengthen parties through the allowance of unlimited coordinated spending will lead to increased instances of actual and apparent corruption. This landscape bolsters the *Colorado II* Court's conclusion rejecting "the Party's claim to suffer a burden unique in any way that should make a categorical difference under the First Amendment." 533 U.S. at 447.

3. Invalidating Coordinated Party Expenditure Limits Appreciably Harms the Political System and the Public Interest

Invalidating coordinated party expenditure limits risks candidates replacing the longstanding status quo "with a system where individual contribution limits to candidates are multiplied from [$3,300 or] $6,600" per election to $41,300 annually when spent through coordination with party committees. (Krasno Rept., R.36-1, at 7, PageID#405; FEC Facts, R.43, ¶¶ 210-16, PageID##5195-97.) As the FEC's expert explained: "[P]arties display no natural resistance to quid pro quo corruption and that under the current system big donors can make contributions to party committees that policymakers control. The fact that scandals specifically involving federal coordinated expenditures have not been more common suggests that the current regulations are working as intended." (Krasno Rept., R.36-1, at 13, PageID#411.)

The limits thus "serve to instill citizen confidence in the system by minimizing, if not completely preventing, this [risk] of corruption." (Krasno *Cao* Rept., R.36-3, at 3, PageID#482.) Appellants' proposed scheme allows for uninhibited potential quid pro quos, where "[e]lected officials . . . act contrary to their obligations of office by the prospect of . . . infusions of money into their campaigns." *NCPAC*, 470 U.S. at 497. Incessant pressure on elected officials to secure fundraising advantages by assuaging contributors' demands — whether

campaign or party contributors — impedes effective governance and erodes public trust. No one knows this better than Congress, whose members have personal experience with campaigns and the money and pressures required for success. Congress should remain "entitled to" its well-crafted legislative judgment. *Colorado II*, 533 U.S. at 465.

CONCLUSION

For the foregoing reasons, the certified question should be decided in favor of the Commission.

Respectfully submitted,

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April 4, 2024

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify, on this 4th day of April, that:

1. This brief complies with the word limit of Fed. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Fed. R. App. 32(f) and Sixth Circuit Rule 32(b)(1), this brief contains 12,996 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in a 14-point Times New Roman font.

/s/ *Shaina Ward*
Shaina Ward

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2024, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Sixth Circuit by using the Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Shaina Ward*
Shaina Ward

ADDENDUM

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 30(g), Defendant-Appellee the Federal Election Commission designates the following filings from the district court's electronic records:

Record Entry No.	Page ID Nos.	Description
1	1 - 28	Complaint
20	215 - 216	Plaintiffs' Motion to Certify Questions to the En Banc Court of Appeals
21	218 - 261	Plaintiffs' Memorandum in Support of Their Motion to Certify Questions to the En Banc Court of Appeals
26	304 - 324	FEC's Opposition to Plaintiffs' Motion to Certify Questions to the En Banc Court of Appeals
27	326 - 341	Plaintiffs' Reply in Support of Their Motion to Certify Questions to the En Banc Court of Appeals
36-1	399 - 414	Expert Report of Jonathan Krasno in *NRSC v. FEC*, Unlimited Party Coordinated Expenditures and Quid Pro Quo Corruption
36-3	480 - 502	Expert Report of Jonathan Krasno in *Cao v. FEC*, Political Party Committees and Coordinated Expenditures
36-5	648 - 683	Expert Report of Donald P. Green in *McConnell v. FEC*, Report on the Bipartisan Campaign Reform Act
36-9	1066 - 1119	Pl. NRCC's First Objections & Responses to Defendant's First Set of Discovery Requests
36-10	1121 - 1176	Pl. NRSC's First Objections & Responses to Defendant's First Set of Discovery Requests
36-11	1178 - 1273	Declaration of Robert Hickmott in *Colorado II*
36-12	1275 - 1281	Declaration of Robert Hickmott in *McConnell*
36-13	1283 - 1309	Declaration of Paul Clark, Ph.D. in *NRSC v. FEC*

36-14	1313	4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed. 1836) (hereinafter, "*Debates in the State Conventions*")
36-15	1321 - 1333	James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174 (1994)
36-20	1403 - 1407	Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (1970) (excerpt)
36-21	1409 - 1424	2 *Debates in the State Conventions* (excerpt Jan. 15-16, 1788)
36-22	1426 - 1444	2 *Debates in the State Conventions* (excerpt June 25, 1788)
36-23	1446 - 1448	E. E. Schattschneider, *Party Government* (1942) (excerpt)
36-24	1450 - 1455	*The Federalist No. 10* (James Madison)
36-25	1457 - 1472	George Washington, *Farewell Address to the People of the U.S. of America* (A. Boyd Hamilton publ. Sept. 17, 1797)
36-26	1474 - 1476	*The Federalist No. 68* (Hamilton)
36-27	1478 - 1494	1 *The Records of the Federal Convention of 1787* (Max Farrand ed. 1911) (hereinafter "*Farrand's Records*") (excerpt June 2, 1787)
36-28	1496 - 1501	*The Federalist No. 22* (Hamilton)
36-29	1503 - 1518	2 *Debates in the State Conventions* 51 (excerpt Jan. 21, 1788)
36-30	1520 - 1529	2 *Debates in the State Conventions* (excerpt Jan. 16, 1788)
37-4	1808- 1839	2 *Farrand's Records* (excerpt Aug. 8-9, 1787)
37-5	1841 - 1847	*The Federalist No. 81* (Hamilton)
37-6	1849 - 1852	*The Federalist No. 73* (Hamilton)
37-10	1881 - 1906	*Debates and Other Proceedings of the Convention of Virginia* (2d ed. 1805)
37-17	2005 - 2053	2 Debates in the State Conventions (excerpt Dec. 11, 1787)
37-18	2055 - 2068	1 *Farrand's Records* (excerpt June 7, 1787)
37-21	2112 - 2167	Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and*

		the Seventeenth Amendment, 36 San Diego L. Rev. 671 (1999)
37-24	2231 - 2286	Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246 (2017)
37-25	2288 - 2304	Nathaniel Chipman, *Sketches of the Principles of Government* (1793) (excerpt)
37-26	2306 - 2311	*The Federalist No. 43* (Madison)
37-27	2313 - 2317	Joseph Priestley, *An Essay on the First Principles of Government, and on the Nature of Political, Civil, and Religious Liberty* (2d ed.1771) (excerpt)
37-28	2319 - 2321	Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly on the Proceedings of Sundry of the Other States in Answer to Their Resolutions* (1800) (excerpt)
37-29	2323 - 2326	*People v. Ruggles*, 8 Johns. 290, 1811 WL 1329 (N.Y. Sup. Ct. 1811)
37-30	2328 - 2329	8 Annals of Congress (1798) (excerpt)
38-5	2567 - 2572	Declaration of Martin Meehan in *Cao v. FEC*
38-16	2798 - 2811	Indictment, *United States v. Bankman-Fried*, Cr. No. 22-673 (S.D.N.Y. Dec. 13, 2022)
38-24	3047 - 3077	Pl. Vance's First Objections & Responses to Defendant's First Set of Discovery Requests
38-29	3130 - 3140	Jack Abramoff, *Capitol Punishment: The Hard Truth About Washington Corruption From America's Most Notorious Lobbyist* (WND Books 2011) (excerpts)
38-30	3142 - 3155	Plea Agreement, *United States v. Abramoff*, No. 06-01 (D.D.C. Jan. 3, 2006)
38-31	3157 - 3171	Factual Basis for the Plea of Jack A. Abramoff, *United States v. Abramoff*, No. 06-01 (D.D.C. Jan. 3, 2006)
38-32	3173 - 3181	Plea Agreement, *United States v. Ney*, No. 06-272 (D.D.C. Sept. 13, 2006)
38-33	3183 - 3194	Factual Basis for the Plea of Robert W. Ney, *United States v. Ney*, No. 06-272 (D.D.C. Sept. 13, 2006)
38-36	3217 - 3222	Declaration of Timothy E. Wirth in *Colorado II*

38-38	3229 - 3295	*Wisconsin v. Chvala*, Crim. Compl. (Wis. Cir. Court, Oct. 17, 2002)
39-3	3370 - 3437	Indictment, *United States v. Menendez*, Cr. No. 15-155, (D.N.J. Apr. 1, 2015)
39-5	3451 - 3455	Kenneth P. Vogel and Ken Bensinger, *U.S. Scrutinizes Political Donations by Sam Bankman-Fried and Allies*, N.Y. TIMES (Dec. 22, 2022)
39-20	3588 - 3590	Carolyn Smith, *Chvala Reaches Plea Deal*, BADGER HERALD (Oct. 25, 2005)
39-23	3600 - 3605	Michael Beckel, *Two Dozen Bankrollers-Turned-Ambassadors Bundled at Least $10 Million for Barack Obama*, OpenSecrets.org (Nov. 18, 2009)
39-27	3655 - 3657	Paul Richter, *Obama donor George Tsunis ends his nomination as Norway ambassador*, L.A. TIMES, Dec. 13, 2014
39-28	3659 - 3671	Allan Holmes, Peter Cary, Joe Yerardi, and Chris Zubak-Skees, *Did billionaires pay off Republicans for passing the Trump tax bill?*, THE CENTER FOR PUBLIC INTEGRITY (Feb. 7, 2019)
39-29	3673 – 3676	*Koch network 'piggy banks' closed until Republicans pass health and tax reform*, THE GUARDIAN (Jun. 26, 2017)
39-30	3679	Rebecca Savransky, *Graham: 'Financial contributions will stop' if GOP doesn't pass tax reform'*, THE HILL (Nov. 9, 2017)
39-36	3783 - 3792	Press Release, *U.S. Senator Robert Menendez, His Wife, And Three New Jersey Businessmen Charged With Bribery Offenses*, U.S. Attorney's Office, S.D.N.Y. (Sept. 22, 2023)
39-37	3794 - 3832	Indictment, *United States v. Menendez, et al.*, 23-CR-490 (S.D.N.Y.)
39-38	3834	FEC Campaign Finance Data, *Uribe Contributions*
39-39	3836	RPP_0000114, Letter from Justin Bis, Executive Director, Ohio Republican Party to Chairman Tom Emmer, NRCC (July 7, 2022)

39-40	3838	RPP_0000132, Letter from Chairman Robert Paduchik, Ohio Republican Party to Chairman Rick Scott, NRSC (June 6, 2022)
40-1	3853	RPP_0000115, Letter from Chairwoman Ronna McDaniel, RNC to Chairman Tom Emmer, NRCC (June 15, 2022)
40-2	3855	RPP_0000136, Letter from Chairwoman Ronna McDaniel, RNC to Chairman Rick Scott, NRSC (June 2, 2022)
40-6	3886	RPP_0000116, NRCC Summary of Independent Expenditure Unit Division Expenses
40-7	3888 - 3889	RPP_0000199, NRSC Independent Expenditure Data
40-11	3930	RPP_0000131, NRSC Independent Expenditures 2022 Budget
43	5111 - 5243	FEC's Proposed Findings of Fact
44	5245 - 5279	Plaintiffs' Proposed Findings of Fact
45	5281 - 5308	FEC's Partial Opposition to Plaintiffs' Motion to Certify Questions to the En Banc Court of Appeals
46	5310 - 5331	Plaintiffs' Brief Concerning Proposed Findings of Fact
47	5333 - 5443	FEC's Brief in Support of Its Proposed Findings of Fact and Responses to Plaintiffs' Proposed Findings of Fact
48	5445 - 5452	Plaintiffs' Supplemental Reply in Support of Their Motion to Certify Questions to the En Banc Court of Appeals
49	5454 - 5495	Opinion & Order Certifying Question to *En Banc* Court of Appeals
49-1	5496 - 5537	Appendix: Findings of Adjudicative Fact

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pursuant to Federal Rule of Appellate Procedure 28(f), Defendant-Appellee the Federal Election Commission sets forth the relevant parts of the following statutes and regulations:

1. **52 U.S.C. § 30101 provides in relevant part**:
Definitions

When used in this Act:

* * *

(8)(A) The term 'contribution' includes-

(i) 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; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

* * *

(9)(A) The term 'expenditure' includes-

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

2. **52 U.S.C. § 30116(d) provides:**

Limitations on contributions and expenditures

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2), (3), and (4) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e)). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds-

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of-

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e)); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(4) Independent versus coordinated expenditures by party.-

(A) In general.-On or after the date on which a political party nominates a candidate, no committee of the political party may make-

(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in section 30101(17) of this title) with respect to the candidate during the election cycle; or

(ii) any independent expenditure (as defined in section 30101(17) of this title) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle.

(B) Application.-For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

(C) Transfers.-A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate

(5) The limitations contained in paragraphs (2), (3), and (4) of this subsection shall not apply to expenditures made from any of the accounts described in subsection (a)(9).

3. **11 C.F.R. § 109.37(a) provides:**

What is a "party coordinated communication"?

(a) ***Definition.*** A political party communication is coordinated with a candidate, a candidate's authorized committee, or agent of any of the foregoing, when the communication satisfies the conditions set forth in paragraphs (a)(1), (a)(2), and (a)(3) of this section.

(1) The communication is paid for by a political party committee or its agent.

(2) The communication satisfies at least one of the content standards described in paragraphs (a)(2)(i) through (a)(2)(iii) of this section.

(i) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see 11 CFR 109.21(d)(6).

(ii) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(iii) A public communication, as defined in 11 CFR 100.26, that satisfies paragraphs (a)(2)(iii)(A) or (B) of this section:

(A) *References to House and Senate candidates.* The public communication refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus.

(B) *References to Presidential and Vice Presidential candidates.* The public communication refers to a clearly identified Presidential or Vice Presidential candidate and is

publicly distributed or otherwise publicly disseminated in a jurisdiction during the period of time beginning 120 days before the clearly identified candidate's primary or preference election in that jurisdiction, or nominating convention or caucus in that jurisdiction, up to and including the day of the general election.

(3) The communication satisfies at least one of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR 109.21(e), (g), and (h). A candidate's response to an inquiry about that candidate's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6). Notwithstanding paragraph (b)(1) of this section, the candidate with whom a party coordinated communication is coordinated does not receive or accept an in-kind contribution, and is not required to report an expenditure that results from conduct described in 11 CFR 109.21(d)(4) or (d)(5), unless the candidate, authorized committee, or an agent of any of the foregoing, engages in conduct described in 11 CFR 109.21(d)(1) through (d)(3).