APPENDIX

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APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; JAMES D. VANCE, Senator; STEVE CHABOT, former Representative, *Plaintiffs-Appellants*, *v.* FEDERAL ELECTION COMMISSION, et al., *Defendants-Appellees*.	No. 24-3051

On Certified Question of Constitutional Law
Transmitted by the United States District Court for the Southern District of Ohio at Cincinnati.

No. 1:22-cv-00639—Douglas Russell Cole, District Judge.

Argued En Banc: June 12, 2024

Decided and Filed: September 5, 2024

Before: SUTTON, Chief Judge; MOORE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE, STRANCH, THAPAR, BUSH, LARSEN, NALBANDIAN, READLER, MURPHY, DAVIS, MATHIS, and BLOOMEKATZ, Circuit Judges.

COUNSEL

ARGUED: Noel J. Francisco, JONES DAY, Washington, D.C., for Appellants. Jason X. Hamilton, FEDERAL ELECTION COMMISSION, Washington, D.C., for Appellees. **ON BRIEF**: Noel J. Francisco, John M. Gore, E. Stewart Crosland, Brinton Lucas, JONES DAY, Washington, D.C., Sarah Welch, JONES DAY, Cleveland, Ohio, for Appellants. Jason X. Hamilton, Shaina Ward, Blake L. Weiman, FEDERAL ELECTION COMMISSION, Washington, D.C., for Appellees. Charles J. Cooper, Peter A. Patterson, John D. Ohlendorf, COOPER & KIRK, PLLC, Washington, D.C., T. Elliot Gaiser, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, Brett R. Nolan, INSTITUTE FOR FREE SPEECH, Washington, D.C., Tara Malloy, CAMPAIGN LEGAL CENTER, Washington, D.C., for Amici Curiae.

SUTTON, C.J., delivered the opinion of the court in which GIBBONS, GRIFFIN, KETHLEDGE, THAPAR, BUSH, LARSEN, NALBANDIAN, MURPHY, and MATHIS, JJ., joined. THAPAR, J. (pp. 13–24), delivered a separate concurring opinion in which KETHLEDGE, MURPHY, and NALBANDIAN,

JJ., concurred. BUSH, J. (pp. 25–44), delivered a separate concurring dubitante opinion. STRANCH, J. (pp. 45–75), delivered a separate opinion concurring in the judgment, in which MOORE and CLAY, JJ., concurred in full, and DAVIS and BLOOMEKATZ, JJ., concurred in Parts I and II. BLOOMEKATZ, J. (pg. 76), delivered a separate opinion concurring in the judgment. READLER, J. (pp. 77–103), delivered a separate dissenting opinion.

OPINION

SUTTON, Chief Judge. At issue is whether the Federal Election Campaign Act's limits on coordinated campaign expenditures, which restrict political parties from spending money on campaign advertising with input from the party's candidate for office, violate the First Amendment. In 2001, the Supreme Court held that they do not. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465. In this action, the plaintiffs argue that the law and facts have changed since 2001, making the *Colorado* decision no longer binding on lower courts. The Supreme Court, they point out, has tightened the free-speech restrictions on campaign finance regulations in the last two decades. *See, e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014) (plurality opinion); *id.* at 231–32 (Thomas, J., concurring in the judgment); *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 313 (2022). And since then, they add, the terrain of political fundraising and spending has changed, most notably with 2014 amendments to the Act and with the rise of unlimited

spending by political action committees. These are fair points. But none of them gives us authority to overlook or for that matter override the Supreme Court's decision in this case. The key reality is that the Supreme Court has not overruled the 2001 *Colorado* decision or the deferential review it applied to these provisions of the Act. In a hierarchical legal system, we must follow that decision and thus must deny the plaintiffs' First Amendment facial and as-applied challenges.

I.

The plaintiffs in today's case are the national senatorial and congressional committees of the Republican Party, Senator J.D. Vance, and former Representative Steve Chabot. Invoking the First Amendment to the United States Constitution, they challenge the validity of the current limits on political parties' coordinated expenditures. *See* 52 U.S.C. § 30116(d). They seek declaratory and injunctive relief that bars the defendants—the Federal Election Commission and its six commissioners—from enforcing these limits against them.

The political party committees, more specifically, wish to obtain input about their campaign advertisements from the candidates they support in order to unify their political message, something the Act's limits on coordinated party expenditures restrict. The no-coordination requirements also increase their costs, create redundancies, and discourage them from communicating effectively with their candidates and spending money efficiently to support them. The Federal Election Commission regularly updates the limits on coordinated party expenditures with which

the plaintiffs are required to comply for any given election cycle. Under then-existing limits in the 2021–2022 election cycle, the National Republican Senatorial Committee spent roughly $15.5 million on coordinated party expenditures with Republican Senate nominees, and the National Republican Congressional Committee spent roughly $8.3 million on coordinated party expenditures with Republican House nominees. These coordinated party expenditures primarily fund political advertising.

The two individual plaintiffs support these requests. Senator Vance seeks the freedom to accept the party's funds and to give input about how they should be used in his political campaigns. Former Representative Chabot joins in that request.

Consistent with the Act, the plaintiffs asked the district court to certify the constitutional question to our en banc Court. 52 U.S.C. § 30110. The parties engaged in discovery for three months. After establishing a factual record and concluding that the plaintiffs raised a non-frivolous question, the district court certified this question to our full Court: "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?" R.49 at 41.

II.

Before turning to the merits, one procedural wrinkle deserves mention. Representative Chabot no longer serves in Congress, and he currently does not intend

to run for office. That raises the possibility that his claim is moot. But that possibility makes no difference to our jurisdiction over this case. The claims of the party committees and Senator Vance remain live, which is all that matters when it comes to our authority to address the shared constitutional claims presented in this case. *See T.M. ex rel. H.C. v. DeWine*, 49 F.4th 1082, 1087 n.3 (6th Cir. 2022).

III.

Facial challenge. The first question is whether the Federal Election Campaign Act's limits on coordinated party expenditures facially violate the First Amendment.

A.

In 1972, Congress enacted the Federal Election Campaign Act to regulate fundraising and spending in federal political campaigns. Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 52 U.S.C. § 30101 *et seq.*). As amended in 1974, the Act limits the amount of money an individual or group may contribute to or spend on a political candidate. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, tit. I, sec. 101(a), § 608(b), (e), 88 Stat. 1263, 1263–65. It imposes similar restrictions on political parties. *Id.* § 608(f), 88 Stat. at 1265–66 (corresponds to current 52 U.S.C. § 30116(d)). The Federal Election Commission administers the Act and may promulgate regulations under it. 52 U.S.C. §§ 30106(b)(1), 30111(a)(8).

Since 1976, the Supreme Court has grappled with the relationship between the imperatives of the Act and the imperatives of the First Amendment. In

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Supreme Court held that the ceilings on individual campaign contributions do not violate the free-speech guarantees of the First Amendment because they safeguard the electoral process from corruption and its appearance. *Id.* at 58. At the same time, the Court ruled that, when individuals and organizations spend money to voice their own political opinions, the First Amendment protects that right, prompting the Court to invalidate the Act's limits on independent expenditures. *Id.*

Buckley did not end debates over the intersection of the Act and the First Amendment. Over the years, the Court has addressed the validity of several of the Act's provisions, attempting to balance the free-speech interest of using one's resources to voice a political opinion against "[t]he governmental interest in preventing both actual corruption and the appearance of corruption." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982). For the most part, this formulation has led the Court to uphold contribution limits and to invalidate expenditure limits. *Compare Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981) (upholding contribution limit with respect to multi-candidate political committees), *with FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 241 (1986) (invalidating expenditure limit with respect to the use of a company's treasury funds), *and FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 501 (1985) (invalidating expenditure limit with respect to independent political committees).

A pair of decisions arising from Colorado refined this approach with respect to the Act's spending limits on political parties. In the first decision, the Court

addressed the Act's limits on a political party's own expenditures in favor of an electoral candidate. *See* 2 U.S.C. § 441a(d)(3) (transferred to 52 U.S.C. § 30116(d)(3)). In the context of a political party's "independent" expenditures—those spent without input from the candidate—the Court invalidated the limits under the "exacting scrutiny" standard, *Buckley*, 424 U.S. at 44, that applies to political expenditures, *Colo. Republican Fed. Campaign Comm. v. FEC* (*Colorado I*), 518 U.S. 604, 616 (1996) (opinion of Breyer, J.); *id.* at 627–29 (opinion of Kennedy, J.). Such campaign activity, the Court reasoned, amounted to "core" political speech, and the government had not shown that the limits were "necessary to combat a substantial danger of corruption of the electoral system." *Id.* at 616–18 (opinion of Breyer, J.).

In the sequel to that decision, the Supreme Court addressed the Act's application to "coordinated" political party expenditures—those made with input from the candidate the party supports. In this setting, the Court applied a more deferential level of review—the "scrutiny appropriate for a contribution limit"—requiring the restriction only to be "'closely drawn' to match . . . the 'sufficiently important' government interest in combating political corruption." *FEC v. Colo. Republican Fed. Campaign Comm.* (*Colorado II*), 533 U.S. 431, 456 (2001) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000)). The Court acknowledged that political parties play a unique role in American politics as "dominant players, second only to the candidates themselves, in federal elections." *Id.* at 450 (quotation omitted). Still, the Court explained, coordinated party expenditures

permit "donations" to a party to be "passed through to [the candidate] for spending on virtually identical items as his own campaign funds." *Id.* at 460. In that way, the Court worried, donors and candidates may sidestep the contribution limits that *Buckley* allowed, prompting the Court to hold that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." *Id.* at 465. For these reasons and others, the Court rejected a facial challenge to the spending limits.

B.

That brings us to today's dispute and today's question: Do the Act's limits on coordinated party expenditures facially violate the First Amendment?

The Supreme Court, as just shown, asked and answered that same question in *Colorado II*. When faced with a question that the Supreme Court has answered, our choices generally end. "[L]ower courts must follow Supreme Court precedent." *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813 (6th Cir. 2020). Even if a holding of the Supreme Court "appears to rest on reasons rejected in some other line of decisions," we must nonetheless follow it, "leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). We have long recognized, and long adhered to, this principle. *See United States v. Gibson*, 881 F.2d 318, 323 & n.2 (6th Cir. 1989); *Thompson*, 972 F.3d at 813; *Taylor v. Buchanan*, 4 F.4th 406, 408 (6th Cir. 2021).

The plaintiffs at one level agree. They accept that, "if *Colorado II* directly controls" this case, we "should

follow it." *See* First Br. 41 (quotation omitted). But they challenge the "if." In their view, *Colorado II* no longer binds the lower courts because later decisions by the Supreme Court have undermined its reasoning and because recent campaign finance developments have undermined several aspects of the decision.

Changed doctrine. Start with the plaintiffs' reliance on the Supreme Court's more recent campaign finance decisions. Since *Colorado II*, the plaintiffs maintain, the Supreme Court has "made clear that preventing *quid pro quo* corruption or its appearance is the only interest" that allows Congress to impose campaign finance restrictions and "that such restrictions must be narrowly tailored to that interest." *See id.* at 22. This change in reasoning, they say, leaves lower courts free to reassess *Colorado II*.

We accept the premise but not the conclusion. As to the premise, the plaintiffs point to several ways in which the Court's recent decisions create tension with *Colorado II*'s reasoning. First, since 2001, the Court "has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *Cruz*, 596 U.S. at 305; *see* First Br. 41–42. While the First Amendment allows "restrictions on direct contributions," it does not allow Congress to "layer[] on top" additional restrictions, "ostensibly to prevent circumvention of the base limits." *McCutcheon*, 572 U.S. at 221. This kind of "prophylaxis-upon-prophylaxis approach," the Court has recently explained, is disfavored. *Id.* (quotation omitted). By contrast, when earlier cases like *Colorado II* discussed corruption, they did "not always sp[eak] about corruption in a clear or consistent voice," dimming "[t]he line between *quid*

pro quo corruption and general influence." *Id.* at 208–09 (quotation omitted); *see also id.* at 239–40 (Breyer, J., dissenting) (explaining that *Colorado II* relied on the "undue influence" rationale, which is "considerably broader" than quid pro quo corruption).

Second, the Court's recent campaign finance decisions say that the government must show that a given campaign finance restriction will have a tangible effect on corruption. *See* First Br. 29. The later decisions demand "actual evidence" that a spending restriction will reduce "*quid pro quo* corruption or its appearance." *Cruz*, 596 U.S. at 310. Yet in this case, the plaintiffs argue, the government did not present sufficient evidence of corruption or its perception. *See* First Br. 34–35, 42.

Third, since *Colorado II*, the Court has strengthened the "closely drawn" test, emphasizing that this "rigorous" test demands "narrow[] tailor[ing]." *McCutcheon*, 572 U.S. at 197, 199, 218 (quotations omitted); *see* First Br. 42. *Colorado II*, however, made no mention of narrow tailoring and seemed to disavow it, saying it would not invalidate the coordinated spending limits based on "unskillful tailoring." 533 U.S. at 463 n.26.

All in all, the plaintiffs identify several ways in which tension has emerged between the reasoning of *Colorado II* and the reasoning of later decisions of the Court. If all we had were *Cruz* and *McCutcheon* to guide us, there would be much for us to analyze and much for us to independently determine about the validity of these coordinated expenditure limits.

But that is not all we have. *Colorado II* remains standing. Any shifts in reasoning do not shift the

precedential terrain from our vantage point. The Supreme Court has never overruled the decision. Even when the Supreme Court embraces a new line of reasoning in a given area and even when that reasoning allegedly undercuts the foundation of a decision, it remains the Court's job, not ours, to overrule it. *Rodriguez de Quijas*, 490 U.S. at 484; *see also Agostini v. Felton*, 521 U.S. 203, 237–38 (1997). "[V]ertical *stare decisis* is absolute, as it must be in a hierarchical system." *Ramos v. Louisiana*, 590 U.S. 83, 124 n.5 (2020) (Kavanaugh, J., concurring in part). The Supreme Court might choose to knock down a "legal last-man-standing," or it might choose to prop it up. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015). Either way, the option is theirs, not ours. *Cf. Flood v. Kuhn*, 407 U.S. 258, 282, 284 (1972) (keeping in place an "aberration" in caselaw). The key function of a high court—providing the last word in resolving cases and controversies—would not work if lower courts could revisit the final resolution of a dispute every time tension emerges between that decision and a later one.

Changed statute and changed facts. It is not just the legal doctrine that has changed since 2001, the plaintiffs add. *See* First Br. 43. Congress itself altered the campaign finance laws in 2014. It exempted "segregated account[s] of a national committee of a political party" from the coordinated party expenditure limits if those accounts are used to "defray expenses incurred with respect to a presidential nominating convention," the "headquarters buildings of the party," or "the preparation for and the conduct of election recounts and contests and other legal proceedings." 52 U.S.C.

§ 30116(a)(9), (d)(5). The new exemptions, the plaintiffs maintain, "radically altered [the Act's] nature and structure," *see* First Br. 44 (quoting *Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533, 546 (D.C. Cir. 2019)), and showed that the other limits on coordinated party expenditures are not "narrowly tailored" to prevent quid pro quo corruption, *see id.* at 39–40.

Were we faced with a clear playing field, we could appreciate how these new exemptions might affect the analysis. In *McCutcheon*, for example, the Court reviewed the campaign finance regulations at issue for "narrow[] tailor[ing]." 572 U.S. at 218 (quotation omitted). If that test applied here, an increase in the Act's exemptions might show that the limit on coordinated party expenditures does too little for First Amendment purposes—that it addresses its policy target in underinclusive ways. The problem is, *Colorado II* applied a deferential form of review in upholding these precise provisions, refusing to invalidate the limits due to "unskillful tailoring." 533 U.S. at 456, 463 n.26. That Congress added three new exemptions—for party conventions, party headquarters, and election recounts—does not suffice to invalidate the Act's limits on coordinated party expenditures under the more deferential form of review that applies to contribution limits. These changes to the Act simply do not suffice to alter the verdict of *Colorado II*.

In a variation on this theme, the plaintiffs separately argue that a changed "factual backdrop" makes *Colorado II* inapplicable. *See* First Br. 45. From the rise of super "PACs" (political action committees) to the fall of political parties' power to the

advent of social media, the plaintiffs argue that political campaigns and political spending have materially changed in the last two decades. *See id.* at 45–47. So they have. And so it may be that *Colorado II*'s assumption that "political parties are dominant players . . . in federal elections," 533 U.S. at 450 (quotation omitted), has a quaint ring to it. But, again, these changed circumstances do not change the deferential review that *Colorado II* applied to the same provisions. Even if *Colorado II*, like many Supreme Court precedents, did not fully anticipate the future, that does not empower the lower courts to look the other way every time a social change or new norm casts doubt on an earlier decision, particularly one that applied deferential review to the issue.

The plaintiffs point out that "at least 28 states largely give parties free rein to make coordinated expenditures on behalf of their state-level nominees," and that no evidence of corruption has materialized. *See* First Br. 34–35. State practices can be telling, to be sure. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And, yes, these practices could bear on whether coordinated expenditures run the risk of corruption. *See* First Br. 34–35. But, again, any changes in understanding about the impact of coordinated political party expenditures on the risk of corruption raise a question for the Court, not for us, under the level of review that *Colorado II* applied.

All of this makes it unnecessary for us to decide precisely when, if ever, changes to a statute or the underlying facts could permit a lower court to reach a different outcome from an earlier Supreme Court decision about the validity of the same statute. That's

because each of the claimed changes would not alter *Colorado II* even on its own terms. Under these circumstances, any new assessment of the validity of the limits on coordinated party expenditures remains where it customarily does in a hierarchical legal system: the Supreme Court's province, not ours.

We are not the first court of appeals to confront arguments that *Colorado II* no longer controls facial challenges to the Act's limits on coordinated party expenditures. An en banc decision by the Fifth Circuit unanimously agreed that *Colorado II* would control facial challenges to these provisions. *In re Cao*, 619 F.3d 410, 431–32, 435 (5th Cir. 2010) (en banc); *id.* at 435 (Jolly, J., concurring in the result); *id.* at 437 n.3, 443 (Jones, C.J., concurring in part and dissenting in part).

IV.

As-applied challenge. The second question is whether the Act's limits on coordinated party expenditures violate the First Amendment as applied to the plaintiffs' coordinated expenditures.

Even if *Colorado II* requires us to reject this facial challenge to the Act's limits on coordinated party expenditures, the plaintiffs argue that the same is not true of their as-applied challenge. *See* First Br. 48–49. That is because *Colorado II* left open the possibility that future litigants could bring an "as-applied challenge focused on application of the limit to specific expenditures." 533 U.S. at 456 n.17. In sorting out what types of as-applied challenges *Colorado II* left open, it is useful to recall what *Colorado I* decided. Hewing to the contribution/ expenditure dichotomy, it deployed exacting scrutiny in invalidating the Act's

limits on a political party's "independent" expenditures. 518 U.S. at 618–19. Thus, when *Colorado II* held that limits on "coordinated" party expenditures should be treated as a type of contribution that triggers less rigorous scrutiny, it raised the salience of what amounts to a "coordinated" expenditure. One type of expenditure that readily counted as coordinated, the Court in *Colorado II* explained, is the "payment of the candidate's bills." 533 U.S. at 456 n.17. But it did not say anything more about what counts as coordination. The upshot is that *Colorado II* left open the possibility that a future claimant could argue that an expenditure did not involve coordination, meaning that *Colorado I* would control and would prohibit any monetary limit on that advertisement or expenditure.

This reservation of authority—to treat future as-applied challenges as coming under the *Colorado I* rubric rather than the *Colorado II* rubric—does not apply to today's case, however, in view of the breadth of the plaintiffs' as-applied challenge. They do not target the Act's application to a specific type of non-coordination or to a specific advertising expenditure. They broadly challenge the coordinated expenditure limits "as applied to the political advertising addressed in 11 C.F.R. § 109.37." *See* First Br. 5. That regulation is not modest in scope. It defines a "party coordinated communication" to include a "communication . . . paid for by a political party committee or its agent" that (i) "disseminates, distributes, or republishes . . . campaign materials prepared by a candidate"; (ii) "expressly advocates the election or defeat of a clearly identified candidate for Federal office"; or (iii) "refers to a clearly identified"

candidate for Congress, the presidency, or the vice-presidency. 11 C.F.R. § 109.37(a). Nothing in their complaint or briefs limits this challenge to specific settings that do not involve coordination or to a specific type of advertisement.

If we accepted the plaintiffs' invitation to grant as-applied relief in this setting, it is difficult to see what would be left of *Colorado II*. The record shows that roughly 97% of the committees' expenditures relate to the "political advertising" they wish to use. No less importantly, the only way to accept this as-applied challenge would be to reject the reasoning of *Colorado II*. While the rejection of a facial challenge does not eliminate all as-applied attacks to the same statute, it does eliminate as-applied challenges that rest on the same theory of invalidation.

Today's circumstances, notably, differ from the as-applied challenge raised in the Fifth Circuit case. There, the plaintiffs targeted the Act's application to shared input about the *timing* of a *single* advertising expenditure. *In re Cao,* 619 F.3d at 424–26. Had the plaintiffs in our case challenged a single advertising expenditure with respect to one aspect of alleged coordination—timing—we would have to address the same complexities that the Fifth Circuit faced in handling such a narrow as-applied challenge. *Compare id.* at 428–35, *with id.* at 436–40, 443–49 (Jones, C.J., concurring in part and dissenting in part), *and id.* at 451–53 (Clement, J., concurring in part and dissenting in part). But that's not the kind of as-applied challenge the plaintiffs filed here. They wish to be freed of all of the limits on coordinated party expenditures with respect to all "political advertising" covered by the regulation. To honor that request

would necessarily slight the reasoning of *Colorado II* and would leave little if any coordinated expenditures for that decision to cover. That simply is not the kind of as-applied challenge the Court left open for future litigants to bring.

For these reasons, we answer the certified question in the negative. The limits on coordinated party expenditures in § 315 of the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. § 30116, do not 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.

CONCURRENCE

THAPAR Circuit Judge, concurring. I agree with the majority opinion that *FEC v. Colorado Republican Federal Campaign Committee* (*Colorado II*) controls here. 533 U.S. 431 (2001); *see* Majority Op. at 2. *Colorado II*, however, is an outlier in our First Amendment jurisprudence generally and in campaign-finance doctrine specifically. Indeed, even under *Buckley*'s ahistorical, tiers-of-scrutiny approach, coordinated-party spending limits pose grave constitutional concerns.

I.

The First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. When the founding generation appended these words to the Constitution,

they weren't creating a rule "subject to future judges' assessments of its usefulness." *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). Rather, the First Amendment "codified a pre-existing right," the bounds of which are defined by "the scope [it was] understood to have when the people adopted [it]." *Id.* at 592, 634–35. For that reason, judges have long looked to practices "deeply embedded in the history and tradition of this country"—particularly those around the time of ratification—when defining the contours of the First Amendment. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). That makes sense. If the Free Speech and Press Clauses constitutionalized a historically defined right, then history is vital to correctly interpreting these Clauses.

History should therefore guide our First Amendment jurisprudence. Specifically, courts should engage in the two-step inquiry that our Second Amendment jurisprudence uses. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 31–70 (2022). First, courts should ask "whether [an] Amendment's text covers an individual's conduct." *Oakland Tactical Supply, LLC v. Howell Twp.*, 103 F.4th 1186, 1203 (6th Cir. 2024) (Kethledge, J., dissenting); *see Bruen*, 597 U.S. at 31–33. If so, courts should move to a second step, in which "the government must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition." *Oakland Tactical Supply*, 103 F.4th at 1203 (Kethledge, J., dissenting); *see Bruen*, 597 U.S. at 33–70.

Applying this approach to the First Amendment, courts should first determine whether the challenger's "proposed course of conduct" falls within the Free Speech and Press Clauses' protections. *Bruen*, 597

U.S. at 32. Specifically, a litigant challenging a law on First Amendment grounds must show that his proscribed conduct has some speech or press element. And he must show that his speech doesn't fall into one of the "historic and traditional categories" of expression—like obscenity or defamation—that are outside "the freedom of speech" as the founding generation understood it. *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). If a challenger can't locate his conduct in the First Amendment's scope, then his challenge fails.

But if a regulation *does* infringe on First Amendment-protected activity, courts would proceed to the second step. At this point, the burden would shift to the government to show that the challenged regulation is consistent with the historical understanding of the First Amendment. *Cf. Bruen*, 597 U.S. at 33–34. In this respect, history both defines the First Amendment's scope and sheds light on the kinds of regulations that comply with it. *See United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) (noting that original history can inform both the meaning of a constitutional right and the kinds of regulations that are compatible with it).

Thus, if our court had to resolve a coordinated-spending case in the first instance, the plaintiffs would first need to show that a party's coordinated spending is within the Free Speech and Press Clauses' historical scope. *Cf. McConnell v. FEC*, 540 U.S. 93, 250–55 (2003) (Scalia, J., concurring in part) (collecting cases supporting the principle that "an attack upon the funding of speech is an attack upon speech itself").

Assuming that coordinated party spending is within-scope, the government would then need to show that the limits at issue here are nonetheless constitutional. To evaluate this second prong, litigants and courts might look to founding-era restrictions on political activity, such as anti-bribery laws. And we'd want to look at what kinds of prophylactic measures (if any) early Congresses took to reduce corruption. These examples would guide our assessment of whether coordinated-party-spending limits are compatible with the First Amendment.

When it comes to campaign-related speech, however, we "do not paint on a blank canvas." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). For the past five decades, our campaign-finance doctrine has followed a two-tiered scrutiny approach that the Supreme Court set forth in *Buckley v. Valeo*. 464 U.S. 1 (1976) (per curiam). *See, e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) (plurality op.). When the government tries to limit how much someone may spend on election-related speech, strict scrutiny applies. *Id.* And when the government tries to limit how much money someone may give to another, a form of intermediate scrutiny applies. *Id.*

For good reason, there's a growing chorus of voices casting doubt on a tiers-of-scrutiny approach to constitutional law. *Bruen,* 597 U.S. at 17–19 (rejecting a two-tiered approach to the Keep and Bear Arms Clause). As others have noted, courts invented this doctrine by accident, and tiered scrutiny lacks any basis in our Constitution's text, history, and tradition. *See Rahimi*, 144 S. Ct. at 1921 (Kavanaugh, J., concurring) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 125

(1991) (Kennedy, J., concurring in the judgment)); J. Alicea & J. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, National Affairs 72, 73 (2019). Indeed, by giving judges free rein to weigh a statute's means and ends, tiered scrutiny sits in tension with the historically derived nature of our constitutional rights. *Bruen*, 597 U.S. at 25; *see also United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (arguing that tiers of scrutiny "cannot supersede . . . those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts").

What's more, a tiers-of-scrutiny approach strains courts' institutional competence. Courts, after all, are creatures of precedent and legal history. We discern legal rules from the "famous old cases" of our past, be they judicial precedents or political episodes like King Charles II's efforts to control the British press. Antonin Scalia, *A Matter of Interpretation* 6 (1997); *see Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–16 (1931). And then we apply those rules to the facts before us. *See, e.g.*, *United States v. Watson*, 423 U.S. 411, 418–19 (1976) (applying "ancient common-law" rules to a Fourth Amendment claim); *Crawford v. Washington*, 541 U.S. 36, 44–45 (2004) (using the takeaways from Sir Walter Raleigh's treason trial to guide Confrontation Clause jurisprudence).

By contrast, the tiers of scrutiny force courts to perform tasks for which we're "not institutionally suited." *Nat'l Pork Producers Council v. Ross,* 598 U.S. 356, 380–81 (2023) (plurality op.) (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008)). Federal judges lack the econometric training (and democratic legitimacy) to make free-wheeling policy

judgments. Simply put, judges are not equipped to evaluate whether campaign-finance regulations adequately reduce corruption. *See id.* at 382; *see also Bruen*, 597 U.S. at 22 (criticizing the tiers of scrutiny as a "judge-empowering interest-balancing inquiry"). Indeed, the Supreme Court has squarely rejected such a cost-benefit balancing approach to the First Amendment. *See Stevens*, 559 U.S. at 470 (calling such an approach "startling and dangerous").

Nevertheless, even where means-ends scrutiny reigns supreme, courts "still often rel[y] directly on history" to resolve cases. *Rahimi*, 144 S. Ct. at 1921 n.7 (Kavanaugh, J., concurring). After all, history can tell us "how and why" a government could regulate otherwise-protected activity. *Bruen*, 597 U.S. at 29. And that maps nicely onto the two things that courts evaluate under the tiers of scrutiny: the purpose a regulation serves, and the way in which it advances that purpose. *See id.* at 111–12 (Breyer, J., dissenting) (observing that history and tiered-scrutiny analyses both consider these aspects of a regulation). Perhaps for this reason, history has been dispositive for several recent First Amendment decisions. *See Vidal v. Elster*, 144 S. Ct. 1507, 1515–16 (2024) (declining to apply tiered scrutiny when a law has support in constitutional history and tradition); *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 477 (2022) ("What history suggests, we believe our contemporary doctrine confirms.").

Judge Stranch argues that turning to regulatory history and tradition to make sense of the First Amendment disserves democratic values because founding-era speech regulations were passed by white, property-owning men. Stranch Concurring Op. at 69.

As judges, we cannot change the anti-democratic sins of the past, but we can avoid repeating them today. Our job is to interpret the Constitution. We need objective criteria to guide our interpretation if we are to avoid usurping the people's democratic authority to amend the Constitution as they see fit. By enforcing the law as it is, we stay in our lane and leave space for the people to change it as they please. "History, not policy," is therefore our "proper guide," because history is "less subjective" than open-ended policy considerations. *Rahimi*, 144 S. Ct. at 1912 (Kavanaugh, J., concurring). Looking to history rather than policy to steer our constitutional interpretation ensures that we do only our jobs, so the people remain free to do theirs.

In any event, lower courts have an obligation to follow Supreme Court doctrine, ahistorical or otherwise. And that means the tiers of scrutiny apply here. But even under that framework, *Colorado II*'s holding is questionable. Indeed, limits on party-coordinated speech fail even intermediate scrutiny. *Contra Colorado II*, 533 U.S. at 446, 465.

II.

Under *Buckley*'s version of intermediate scrutiny, campaign-finance limits must (A) advance a "sufficiently important" government interest and (B) be "closely drawn" to that interest. *McCutcheon*, 572 U.S. at 197 (plurality op.) (quoting *Buckley*, 424 U.S. at 25). While *Colorado II* purported to apply this scrutiny to coordinated-party-spending limits, its analysis is inconsistent with modern campaign-

finance doctrine. Under modern doctrine, these limits fail both prongs of intermediate scrutiny.[1]

A. *Important Government Interest*

The Supreme Court has made clear that the government has only one legitimate interest in limiting spending on campaign speech: the prevention of quid-pro-quo corruption (i.e., bribery) and its appearance. *FEC v. Cruz*, 596 U.S. 289, 305 (2022). Even on this basic starting point, however, *Colorado II* is out of step with modern doctrine. *Colorado II* held that the government has important interests in limiting "not only . . . quid pro quo agreements, but also . . . undue influence on an officeholder's judgment, and the appearance of such influence." 533 U.S. at 441. As the majority opinion correctly explains, however, the Supreme Court has since narrowed the universe of permissible purposes. *See* Majority Op. at 7. Under current doctrine, preventing corruption and its appearance are the *only* valid goals for campaign-finance restrictions. *See McCutcheon,* 572 at 206–08 (plurality op.) (holding the government may not limit "mere influence or access").

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[1] To be sure, not all forms of coordinated-party spending directly involve speech. The spending limits here, however, apply broadly to any money spent "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A); *see also id.* § 30101(9)(B) (carveouts). And as a practical matter, nearly all coordinated-party spending is on speech- and press-related activities. *See* Majority Op. at 11–12. Thus, if the limits are unconstitutional as applied to campaign-related speech, they'd likely be overbroad under the Supreme Court's First Amendment doctrine.

With that in mind, supporters of coordinated-spending limits must articulate a theory for how these limits prevent corruption. Over the years, courts and litigants have offered two. First, these limits prevent a party from corrupting its own candidates. Second, they prevent donors from circumventing donor-to-candidate contribution limits, which are themselves anti-corruption mechanisms. Consider each in turn.

Preventing Party-Candidate Corruption. Supporters of coordinated-spending limits have argued that a party's coordinated expenditures are functionally equivalent to direct contributions to a candidate. *See, e.g.*, *Colorado II*, 533 U.S. at 464. If that comparison holds true, then perhaps influential party members could dangle the promise of coordinated spending to "induc[e]" candidates into doing the party's bidding. *Id.* at 460 n.23. For example, a party could make a large, coordinated expenditure in a candidate's race in exchange for his vote on a piece of upcoming legislation. *Id.* Such arrangements, the argument goes, are a form of quid-pro-quo corruption.

The FEC doesn't rely heavily on this theory, and for good reason: it doesn't make any sense to think of a party as "corrupting" its candidates. After all, "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes." *Colorado Republican Fed. Campaign Comm. v. FEC* (*Colorado I*), 518 U.S. 604, 646 (1996) (Thomas, J., concurring in the judgment and dissenting in part). Thus, "[w]hen political parties achieve that aim, that achievement does not . . . constitute a subversion of the political process." *Id.* (internal quotation omitted). Moreover,

parties tend to have numerous members with wide views and interests, meaning it's unlikely for any one "corrupting" interest to predominate. *Id.* at 646–47.

Additionally, this anti-corruption argument relies on a dubious premise: that coordinated spending is functionally the same as a direct contribution. Indeed, *Colorado II* openly admitted this isn't always the case. 533 U.S. at 456 n.17. For instance, imagine a party simply wanted to coordinate the timing of a $25,000 ad campaign with a candidate. *Cf. In re Cao*, 619 F.3d 410, 437–38 (5th Cir. 2010) (en banc) (Jones, C.J., concurring in part and dissenting in part). Under FEC regulations, that counts as coordinated spending. *See* 11 C.F.R. § 109.21(d)(2)(v). Yet it strains credulity to argue that such coordination is the same as writing the candidate a $25,000 check. Coordination comes in all shapes and sizes, and not all of it is equivalent to a direct contribution. *See Colorado II*, 533 U.S. at 468 & n.2 (Thomas, J., dissenting).

Simply put, a supposed interest in preventing party-candidate "corruption" can't sustain coordinated-party-spending limits.

Preventing Corruption-by-Circumvention. Before this court, the FEC primarily argues that coordinated-party-spending limits advance anti-corruption efforts by preventing donors from circumventing donor-to-candidate contribution limits. *See also Colorado II*, 533 U.S. at 457. And because those limits work to prevent bribery, the government has an interest in making sure would-be bribers can't circumvent them. *See Buckley*, 424 U.S. at 46–47. According to the FEC, this justifies coordinated-spending limits. If parties could make unlimited coordinated expenditures, a

donor who's maxed-out his candidate-contribution limit could circumvent these limits by channeling additional dollars through the candidate's party. The party could then spend those dollars in coordination with the candidate. As a result, the candidate receives more money from a donor than direct contribution limits permit, increasing the chances of corruption.

At least in the abstract, this "anti-circumvention" interest is sufficiently "important" to pass intermediate scrutiny. *Cf. id.* at 35–36 ("[P]reventing individuals from evading the applicable contribution limitations" is a "permissible purpose."). The government may limit large-dollar contributions to a candidate to reduce corruption; it follows that the government may limit contributions funneled to a candidate through an intermediary, like a political party.

Nevertheless, courts must "greet the assertion of an anti[circumvention] interest with a measure of skepticism." *Cruz*, 596 U.S. at 306. That's because coordinated-party-spending limits reflect a "prophylaxis-upon-prophylaxis approach to regulating campaign finance." *Id.* (internal quotation omitted). Recall that the only permissible goal of campaign-finance regulations is preventing bribery and its appearance. In service of that goal, the Federal Election Campaign Act imposes *five* prophylaxes. *First*, the donor-to-candidate contribution limits: most contributions to a candidate aren't bribes, but the government may limit all contributions as a prophylactic measure. *Id.*; 52 U.S.C. § 30116(a)(1)(A). *Second*, the donor-to-party limits: to prevent donors from circumventing donor-to-candidate limits, the government also limits how much donors may

contribute to parties. *Cf. California Med. Ass'n v. FEC,* 453 U.S. 182, 193–200 (1981) (plurality op.); *id.* at 201–03 (Blackmun, J., concurring in part); *McConnell*, 540 U.S. at 144–46; 52 U.S.C. § 30116(a)(1)(B). *Third*, the earmarking rule: to further prevent circumvention, the Act treats "earmarked" party contributions as direct contributions to the earmarked candidate. *See* 52 U.S.C. § 30116(a)(8). *Fourth*, disclosure requirements: to shine sunlight on any potential bribery, a party must publicly report its own spending, as well as its donors' names and donation amounts. *See id.* § 30104(b). And *fifth*—in the event (1) a donor wants to bribe a candidate, (2) the donor-to-party limits are large enough to facilitate bribe-sized contributions, (3) the donor has evaded FEC earmarking enforcement, and (4) a donor isn't discouraged by the fact his bribe will be reported publicly—the Act sets another safeguard. It limits how much a party may spend in coordination with its candidates. *See id.* § 30116(d). "Such a prophylaxis-upon-prophylaxis[-upon-prophylaxis-upon-prophylaxis-upon-prophylaxis] approach . . . is a significant indicator that the regulation may not be necessary for the interest it seeks to protect." *Cruz*, 596 U.S. at 306.

The Act's exceptions for certain kinds of coordinated-party spending only reinforce my doubts. In general, the government can't prove a compelling interest when a policy has exceptions that cut against its proffered goal. *See, e.g.*, *Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993). And here, the Act creates an

exception for coordinated-party spending on election-recount lawsuits. 52 U.S.C. § 30116(a)(9)(C), (d)(5). This flatly undermines the government's anti-circumvention arguments. If the government is worried donors will launder bribes to candidates through parties, why permit such bribery for recount lawsuits? Does funneling money to a candidate's election-night recount really pose less of a bribery risk than funneling money to his advertisements? Of course not. Yet the Act permits the former expenditure while forbidding the latter. If strict scrutiny applied to coordinated-spending limits, these exceptions would be fatal. But even under intermediate scrutiny, these exceptions provide one more reason to reject the FEC's anti-circumvention rationale.

Putting these weighty concerns aside, the FEC faces a lofty challenge to prove an anticircumvention interest. Under *Cruz*, the FEC must provide "record evidence or legislative findings demonstrating" that coordinated-party-expenditure limits "further[] a permissible anticorruption goal." 596 U.S. at 307, 313. Specifically, the FEC needs to identify an instance of "quid pro quo corruption in this context"—an instance in which (1) a donor gave money to a political party, (2) the party coordinated the spending of that money with a candidate, (3) in furtherance of a bribery scheme between the donor and the candidate. *Id.* at 307.

Despite having decades to look for such examples, the FEC identifies only one case that comes close to

meeting these criteria.[2] Specifically, it points to an incident in which an Ohio school-board member allegedly helped a construction company secure a $96,000 government contract. *See* Plea Agreement 40, *United States v. Pumper*, No. 09-CR-00317 (SL), (N.D. Ohio Dec. 4, 2013). In exchange, the construction company made a $6,000 earmarked contribution to the county-level Democratic Party. *Id.* The party then *allegedly*—this fact is notably absent from the plea agreement—used $4,850 of that money to pay for the board member's campaign ads. *Compare id., with* Information 26–27, *United States v. Pumper,* No. 09-CR-00317 (SL), (N.D. Ohio July 8, 2009). To be sure, this example fits the bill: a donor used coordinated-party spending to facilitate a quid pro quo. At the same time, this lone example is a rather thin reed on which to hinge a nationwide limit on parties' core political speech. After all, federal anti-bribery laws addressed the corruption in that case. *See generally* Plea Agreement, *Pumper*, No. 09-CR-00317 (SL).

In short, the FEC's anti-circumvention case is rather paltry. We're left with a quintuple prophylactic statutory scheme, nonsensical exceptions to the spending limits, and a lone supporting example.

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[2] The FEC's other examples aren't up to spec for numerous reasons. Some allege only campaign-finance law violations, not quid-pro-quo corruption. Others don't include any specific allegations that the parties in question coordinated expenditures with the allegedly corrupt candidate. And other examples are simply instances of "influence" or "access" that fall short of quid-pro-quo corruption.

B. *Closely Drawn*

Things look even worse for the FEC on the "closely drawn" prong. To prevail at this step, the FEC needs to show that party-coordinated-spending limits "avoid unnecessary abridgment of associational freedoms," *Buckley*, 424 U.S. at 25, and are "narrowly tailored to achieve the desired objective," *McCutcheon*, 572 U.S. at 218 (plurality op.). Again, *Colorado II* shows its age here. As the majority opinion points out, *Colorado II*'s closely drawn analysis afforded Congress significant deference. *See* Majority Op. at 9. The Court held that Congress was "entitled to its choice" among different approaches to regulating campaign finance, and that "unskillful tailoring" isn't enough to invalidate a restriction. *Colorado II*, 533 U.S. at 463 n.26, 465. Since then, however, the Court has likened the "closely drawn" analysis to the "narrowly tailored" prong of heightened scrutiny. *See McCutcheon*, 572 U.S. at 218, 221 (striking down limits when "there [were] multiple alternatives available to Congress that would serve the Government's anti-circumvention interest, while avoiding unnecessary abridgment of First Amendment rights" (internal quotation omitted)). And the Court has openly rejected arguments that it should simply "defer to Congress's legislative judgment" about which campaign-finance limits to enact. *Cruz*, 596 U.S. at 312–13. When subjected to this more rigorous form of closely drawn scrutiny, coordinated-party-spending limits fail to pass muster.

Why does the FEC think coordinated-spending limits are necessary to prevent circumvention? Its argument boils down to this: without such limits, "[a]n individual maximizing contributions to a candidate ($3,300) and maximizing contributions to a party

committee such as the NRSC ($41,300) . . . [could] functionally raise[] the base limit for what the donor can directly contribute for the candidate's use by more than 12 times." Second Br. 32 (emphasis deleted). But this logic runs into an immediate problem: to the extent donors could legally do this,[3] it's because *the government* set party-contribution limits twelve times higher than candidate-contribution limits. *Compare* 52 U.S.C. § 30116(a)(1)(A), *with id.* § 30116(a)(1)(B); *see also Buckley*, 424 U.S. at 58 n.66 (noting that similar disparities allegedly give national parties and their candidates a financial advantage over independents and regional third parties). Having created this fundraising disparity, the government can't use it as an excuse to curtail parties' speech. *Cf. Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002). If the government's worried about the disparity between party- and candidate-contribution limits, the solution is simple: just lower the party-contribution limits.

Moreover, coordinated-party-spending limits target the wrong actor. The FEC's anti-corruption argument focuses primarily on *donors* corrupting candidates. Yet the spending limits here restrict the *parties*. In other words, there's a "substantial mismatch" between these limits' application and the supposed corruption they target. *McCutcheon*, 572 U.S. at 199 (plurality op.). By contrast, if the government simply lowered the amount donors could give to parties, the limits

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[3] They couldn't, as it would flagrantly violate the Act's earmarking rules. *See* 52 U.S.C. § 30116(a)(8).

would more closely track the government's anti-corruption interest.

For its part, the FEC never argues that lowering donor-to-party limits would be less effective in preventing circumvention. Instead, the FEC simply contends that lowering donor-to-party limits would "harm[] parties much more dramatically than [coordinated-spending limits], that is, by drastically limiting what they may raise in the first instance." Second Br. 55. In making that argument, the FEC contravenes five decades of Supreme Court precedent. Since *Buckley*, the Court has made clear that spending limits "impose far greater restraints on the freedom of speech and association than . . . contribution limits." 424 U.S. at 44. Lowering donor-to-party limits would therefore pose a smaller First Amendment burden than the spending limits challenged here. And in the campaign-finance realm, the government is usually required to avoid unnecessarily burdening speech.

At base, coordinated-party-spending limits (1) punish parties for a government-created fundraising disparity, (2) target the wrong actor for anti-corruption purposes, and (3) pose a greater First Amendment burden than comparable contribution limits would. Thus, these limits are not "closely drawn" and fail intermediate scrutiny.

III.

Under *Buckley*'s tiers-of-scrutiny approach, coordinated-party-spending limits do not fare well. But as the majority opinion thoughtfully explains, vertical stare decisis precludes us from disturbing *Colorado II*'s holding here. *See* Majority Op. at 8–10. Notwithstanding changes in Supreme Court

jurisprudence, it's the Court's job to overrule its precedents, not ours. *Truesdell v. Friedlander*, 80 F.4th 762, 782 (6th Cir. 2023) (collecting cases). And while the Court has held that changes in statutes or facts can justify *its* departure from past precedents, it hasn't granted us similar license. *Cf. South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018) (changes in "real world" facts permitted the Supreme Court to overrule its precedents); *McCutcheon,* 572 U.S. at 200–203 (plurality op.) (changes in the applicable statutory regime permitted the Court to depart from *Buckley*).

To be sure, *Colorado II* left the door open for as-applied challenges. *See* 533 U.S. at 456 n.17; *see also Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 411–12 (2006) (per curiam) ("In upholding [a campaign-finance regulation] against a facial challenge, we did not purport to resolve future as-applied challenges."). And here, plaintiffs challenge spending limits as applied to party-coordinated communications. *See* 11 C.F.R. § 109.37. As the majority opinion notes, however, these communications constitute ninety-plus percent of parties' coordinated spending. *See* Majority Op. at 11. Thus, a judgment invalidating the limits as applied to communications "would cover such a substantial number" of coordinated expenditures that the limits "would be rendered substantially overbroad." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 498 (2007) (Scalia, J, concurring in part and concurring in the judgment). Such a holding would effectively nullify *Colorado II*—and that's not our prerogative.

* * *

Colorado II allows us to dodge the grave constitutional issues posed by coordinated-party-spending limits. These limits run afoul of modern campaign-finance doctrine and burden parties' and candidates' core political rights. For the plaintiffs, however, our court is not the proper audience for these concerns.

CONCURRENCE / DUBITANTE

JOHN K. BUSH, Circuit Judge, concurring dubitante. I agree with the majority that we are bound to uphold the limits on coordinated party expenditures in § 315 of the Federal Election Campaign Act of 1971 (FECA), as amended, 52 U.S.C. § 30116, based on the reasoning of *FEC v. Colorado Republican Federal Campaign Commission*, 533 U.S. 431 (2001) (*Colorado II*). I write separately, however, to consider the historical record not addressed by the majority.

In recent years, the Supreme Court has applied history and tradition to review the constitutionality of laws under many federal constitutional provisions, including the First Amendment. *See, e.g.*, *Vidal v. Elster*, 602 U.S. 286, 301 (2024) (First Amendment speech rights); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022) (First Amendment Establishment Clause rights); *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024) (Second Amendment rights); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022) (same); *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (same); *City of Grants Pass v. Johnson,* 144 S. Ct. 2202, 2215–16 (2024) (the Eighth Amendment's Cruel and Unusual Punishments Clause); *Dep't of State v. Munoz*, 144 S. Ct. 1812, 1822 (2024) (substantive due process rights); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 250 (2022) (same); *United States v. Texas*, 599 U.S. 670, 676 (2023) (Article III justiciability); *Consumer Fin.*

Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 426 (2024) (the Appropriations Clause). Yet in most cases involving campaign finance regulations, beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976), and also in *Colorado II*, the Court has not fully engaged with—and sometimes, has not even mentioned—evidence of history or tradition.

To its credit, the Federal Election Commission (FEC) sought to address such proof in this case. *See* Second Br. at 49–50; Defs.' Proposed Findings of Facts at 3–23, R. 43, PageID 5118–38. In doing so, the FEC argued that historical precedent aligns with the holding of *Colorado II*. *See* Second Br. at 48–50. But, in fact, the pertinent history and tradition appear to cut against, not support, the FEC's position.

The Supreme Court should consider revisiting *Colorado II* for two reasons. First, it conflicts with recent decisions of the Court, as explained in Judge Thapar's concurrence and Judge Readler's dissent. Second, as explained below, *Colorado II* does not address history and tradition that also calls its holding into question.

I.

Before addressing evidence of the past, though, one asks: why should this type of proof even matter here? In *Buckley*, for example, the Supreme Court considered some history from the Founding era and subsequent years in the part of its opinion that reviewed the constitutionality of the FEC under the Appointments Clause and separation-of-powers principles, *see* 424 U.S. at 1204–34, but otherwise the Court made no use of historical research to address constitutional challenges to FECA provisions.

Likewise, in *Colorado II*, the Court did not mention examples from the past apart from case law.

The dearth of historical analysis in *Colorado II* contrasts with many recent decisions of the Court that emphasize history and tradition together with case law as necessary for constitutional interpretation. Although the Justices differ on the degree of emphasis depending on the constitutional issue, they all appear to agree that evidence of the past may be relevant in a wide variety of constitutional cases. *See generally Vidal*, 602 U.S. 286; *United States v. Rahimi*, 144 S. Ct. 1889. Indeed, Justice Sotomayor recently observed that "history proves a lot to me and to my colleagues generally." Transcript of Oral Argument at 10, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719).[1]

History proves a lot for many reasons. Three immediately come to mind.

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[1] The emphasis on history is not, as Judge Stranch's concurrence implies, a "great experiment." Stranch Concurring Op. at 75. Rather, it is a return to the traditional method of interpreting the Constitution according to its reasonable meaning when created. *See, e.g.*, 1 Joseph Story, Commentaries on the Constitution of the United States § 405, 387–88 (1833) (noting that "[w]hen [the Constitution's] words are plain, clear, and determinate, they require no interpretation," though contemporary history and interpretation may help interpret less-than-clear text). The great experiment in constitutional jurisprudence was the theory of a "Living Constitution," first hypothesized in the 20th century, that purported to allow for meanings of constitutional provisions to change through means other than the amendment process of Article V of the Constitution. *See, e.g.*, Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. Rev. 549, 590 (2009).

First, history allows us to understand linguistical meaning at the time of ratification. All interpretation of the Constitution "begin[s] with its text." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Historical evidence reveals word usage then, which may differ from what it is today. *Heller*, 554 U.S. at 576. As explained by Justice Barrett, "[o]riginal history" serves to "elucidate[] how contemporaries" in the ratification generation "understood the text—for example, the meaning of the phrase 'bear Arms'" in the Second Amendment. *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring).[2]

Second, history allows us, at least with respect to some constitutional provisions, to determine categories of private conduct that were typically subject to regulation by government when the relevant constitutional text was ratified. As Justice Kavanaugh observed, this preratification history is particularly relevant for "vague constitutional text." *Id.* at 1912 (Kavanaugh, J., concurring). If government never or seldom regulated a type of

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[2] Finding the original linguistical meaning, or fixed communicative content, of words should not be a matter for controversy, as Judge Stranch seems to imply it is. *See* Stranch Concurring Op. at 72–73. As Professor Lawrence Solum has explained, even some non-originalist jurisprudential methods value the original linguistical meaning of constitutional text. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 9 (2015). The issue is not whether there is an original meaning, but rather whether a judge should be constrained by it. And no one seriously questions that, in analyzing words used in the Constitution, linguistical history from the era of constitutional ratification is probative of that original meaning. *See, e.g.*, Story, *supra* note 1, at § 405, 387.

conduct during the pre-ratification era, then that may suggest that such conduct is constitutionally protected. But if government did typically regulate the conduct pre-ratification, then that may support an inference that the constitutional text does not bar government intervention. From an individual's perspective, such history helps "determin[e] the affirmative scope or contours of . . . [the] constitutional right" that the person holds. *Id.* at 1912 n.1. From the government's perspective, such history helps "determine[e] the exceptions to a constitutional right," *id.,* thus defining those areas in which the government is empowered to regulate the individual.

Third, evidence of how Americans ordered their lives after ratifying a particular constitutional text—what we call tradition—also may help reveal that text's original meaning. If there was no regulation of a particular type of private conduct for a long and uninterrupted period, then this post-ratification evidence may show that government was not understood to have the constitutional authority to regulate that conduct. And, conversely, if over the post-ratification period there is evidence of regulation, then that proof may be relevant to show that constitutional power to regulate was understood to exist. As Justice Kavanaugh explained, "[p]ost-ratification interpretations and applications by government actors—at least when reasonably consistent and longstanding—can be probative of the meaning of vague constitutional text" and "[t]he collective understanding of Americans who, over time, have interpreted and applied the broadly worded constitutional text can provide good guidance for a judge who is trying to interpret that same text decades

or centuries later." *Id.* at 1916. Such evidence of historical tradition "becomes especially important" if the only alternative to its use is "the judge simply default[ing] to his or her own policy preferences." *Id.*[3]

The usefulness of history and tradition, however, is tempered by the fact that the world in which we live is not the same world as when the Constitution was ratified or the worlds of the post-ratification generations who came before us. Whether because of progress in how we live (think technological advancements), how we treat each other (think social transformation such as the abolition of slavery), or some other reason, today's America is not your Founding Fathers' America. Perhaps because of the differences, the Supreme Court in *Rahimi* observed that its emphasis on history and tradition is "not meant to suggest a law trapped in amber." *Id.* at 1897 (majority opinion); *see also id.* at 1925 (Barrett, J., concurring) ("21st-century regulations" need not "follow late 18th-century policy choices."). But, except as it has been amended, the Constitution remains the same for us as it existed for those before us. *See id.* at 1908 (Gorsuch, J., concurring) ("Developments in the world may change, facts on the ground may evolve, and new laws may invite new challenges, but the

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[3] Judge Stranch argues that even though a private activity may not have been regulated in the preratification and early post-ratification eras, such history and tradition do not necessarily mean that government lacked the power to regulate. *See* Stranch Concurring Op. at 73–74. Judge Stranch's point is valid in the abstract but, under the *Rahimi* framework, the FEC bears the burden of justifying the regulation with historical analogues. 144 S. Ct. at 1897. To explain how the FEC fails that burden, I offer historical examples below.

Constitution the people adopted remains our enduring guide."). Unless amended, original guarantees of liberty in the Constitution remain undiminished over time. Thus, *Rahimi* reaffirmed that the Second Amendment should be applied today based on the full scope of its original meaning.[4]

In doing so, we find guidance from general, not identical, historical analogues. For Second Amendment jurisprudence, the Court does not search for "a 'dead ringer' or a 'historical twin'" as the standard for historical relevance. *Id.* (majority opinion). Rather, to determine original meaning, "[a] court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Id.* (quoting *Bruen*, 597 U.S. at 29 & n.7). By "relevantly similar" the Court means historical analogues that reveal conceptual, not necessarily exact, parallels. As Justice Barrett put it, "[h]istorical regulations reveal a principle, not a mold." *Id.* at 1925 (Barrett, J., concurring).

The principle to be drawn, however, must not be at too high a level of abstraction. So, for example, the

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[4] As Judge Stranch recognizes, the Constitution has been amended to extend its original guarantees of freedom to all Americans without regard to race or sex. *See* Stranch Concurring Op. at 69. But that is not a reason to deny to all Americans today the full scope of liberty enjoyed by those who adopted and ratified the Constitution. The Constitution has been amended to *extend* its rights protections, not to reduce the scope of those protections. As explained below, my concern about *Colorado II* is that it appears to countenance an America in which we have less liberty under the First Amendment than the Founders enjoyed.

Court rejected "the Government's contention that Rahimi may be disarmed simply because he is not 'responsible.'" *Id.* at 1903 (majority opinion). The Court noted: "'Responsible' is a vague term" and "[i]t is unclear what . . . a rule would entail" if it based the government's power to disarm on whether someone is "responsible" or not. *Id.* Instead, the Court upheld the disarmament law at issue because it did "not broadly restrict arms use by the public generally" and because the burden and penalty of the law "fit[] within the regulatory tradition" of historical examples—namely, surety and going armed laws. *Id.* at 1901.

Having just rendered its decision in *Rahimi,* the Court has yet to consider how that case applies beyond the Second Amendment. But many of the concurring opinions in *Rahimi* suggest that it will have broader constitutional importance. Justice Gorsuch, for example, conveyed in his concurrence that consideration of historical evidence is appropriate in every constitutional case: "Come to this court with arguments from text and history, and we are bound to reason through them as best we can." *Id.* at 1909 (Gorsuch, J., concurring). And Justice Barrett, while disclaiming "freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights," nonetheless invoked generally a theory of constitutional interpretation "built on two core principles: that the meaning of constitutional text is fixed at the time of its ratification and that the 'discoverable historical meaning . . . has legal significance and is authoritative in most circumstances.'" *Id.* at 1924 (Barrett, J., concurring) (quoting Keith E. Whittington, *Originalism: A Critical Introduction*, 82 Ford. L. Rev.

375, 378 (2013)). Justice Kavanaugh likewise wrote broadly of reliance on not only text and precedent but also history and tradition, and he repeatedly cited the First Amendment in particular as appropriate for historical analysis: "When performing that Article III duty, the court does not implement its own policy judgments about, for example, free speech or gun regulation. Rather, the Court interprets and applies the Constitution by examining text, pre-ratification and post-ratification history, and precedent." *Id.* at 1910 (Kavanaugh, J., concurring) (emphasis added); *see id.* at 1911, 1915 (citing the First Amendment).

With these directions in mind, it appears that many, and perhaps a majority, of Justices would consider evidence of history and tradition as relevant to analyze the constitutionality of the regulation at issue here. It is to the FEC's arguments based on such proof that I now turn.

II.

The FEC does not make any argument about the linguistics history of the First Amendment in support of its position. Instead, the FEC makes three points about historical practice generally. First, it relies on pre-ratification history to argue that "concerns about political party corruption animated the Founding." Defs.' Proposed Findings of Fact 3, R. 43, PageID 5118 (capitalization and bolding omitted). Second, it assesses "text of the Constitution" that "addresses corruption and faction." *Id.*, PageID 5124 (capitalization and bolding omitted). And third, the FEC argues based on a combination of pre- and post-ratification history: "Founding-era thinkers viewed legislative efforts to promote the public good as valid,

including through laws impacting speech rights." *Id.*, PageID 5133 (capitalization and bolding omitted).

In support of its arguments, however, the FEC fails to meet the *Rahimi* standard. The FEC advances no fairly drawn principle from history or text showing that the restriction at issue "is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Rahimi*, 2024 WL 3074728, at 1898 (quoting *Bruen*, 597 U.S. at 29 & 29 n.7). In fact, pre- and post-ratification history confirms the plain meaning of the constitutional language: when the people ratified the guarantee of First Amendment that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend I, there was no exception relevantly similar to the restriction at issue here that was understood to permit Congress to abridge citizens' freedom to coordinate their speech.

A. Evidence of Founders' Concerns About Political Parties and Government Corruption

The FEC begins with evidence from the Constitutional Convention that the Founders were concerned about government corruption. *See* Defs.' Proposed Findings of Fact 3–5, R. 43, PageID 5118–20. No one disputes that. Indeed, American disgust with corrupt British officials was a principal reason for the War of Independence.[5] But the FEC's high-level

[5] Gouverneur Morris colorfully captured the American attitude to perceived British corruption: "Trust Crocodiles, trust the hungry Wolk in your Flock, or a Rattle Snake in your Bosom, you

definition of government corruption finds no support in the historical record when it gets down into the weeds: it categorizes a wide swath of coordinated private conduct related to speech as potential sources of "corruption" even though such conduct was never regulated in the Founding era or early American Republic. In those years there were never any per se limitations on the ability of individuals or groups to contribute and coordinate political expenditures.

Tellingly, while the FEC argues that the Framers opposed government corruption, it does not point to a single piece of historical evidence that anyone in the Founding generation considered the *amount* or *degree of coordination* for political contributions to be sanctionable. The FEC cites no pre-First Amendment or early American law that provides historical support for congressional authority to generally regulate in the manner challenged here.

Perhaps to divert attention from this absence of proof, the FEC instead cites evidence that "the Framers identified 'faction'-related corruption as dangerous to the nation, including to elections." Defs.' Proposed Findings of Fact 5, R. 43, PageID 5120 (capitalization and bolding omitted). The FEC's logic appears to be that the Founders considered "factions" to be causes of government corruption, that political parties were labelled as factions, and therefore the First Amendment permits the regulation of how

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may yet be something Wise. But trust the King, his Ministers, his Commissioners, 'tis Madness in the Extreme." Gouverneur Morris, *Oration on the Necessity for Declaring Independence from Britain (1776)*, *in* To Secure the Blessings of Liberty: Selected Writings of Gouverneur Morris 24 (J. Jackson Barlow ed., 2012).

political parties coordinate their speech. What is missing from the FEC's syllogism, however, is any evidence linking the Framers' general concerns about factions and corruption to any specific law that regulated the coordination of expenditures and spending for political speech. The FEC's argument is similar to the government's proposed test based on "responsible" citizens that was rejected in *Rahimi*. Unmoored from any historical example of a government restriction to define its application, the FEC's "faction" and "corruption" test is similarly vague and overinclusive.

The FEC is correct about one thing: political parties did not exist at the Founding, at least in their modern sense. But even before ratification, and in the early days of the Republic, there were competing ideological groups in America. Like-minded groups sought to advance their political causes through coordination of messaging, candidates, and supporters.

These groups campaigned vigorously against one another, as political parties do today. The political group divisions included the Patriots versus the Loyalists in the runup to and during the American Revolution;[6] the Federalists versus the Antifederalists during the debates over the adoption and ratification

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[6] *See, e.g.*, Robert G. Parkinson, *Print, the Press, and the American Revolution* (Sept. 3, 2015), https://doi.org/10.1093/acrefore/ 9780199329175.013.9 (describing the political division between, on the one hand, the Patriots and those printers with whom they coordinated, and on the other hand, those persons who remained loyal to the Crown and the printers who "made their newspapers available for loyalists to submit essays that criticized patriot resistance efforts").

of the Constitution;[7] and the Federal (or Anti-Republican) Party versus the Anti-Administration Party (or Jeffersonian Republicans, later Democratic-Republicans) in the early Republic.[8] James Madison may have derided political groups as motivated by "the spirit of party and faction," The Federalist No. 10 (James Madison), but he—and indeed every prominent Founder, including purportedly neutral George Washington[9]—aligned with at least one of these competing groups at one time or another. And throughout this history of American political contests, speech by political groups and candidates inevitably included combined political contribution and spending on each side of the political spectrum.

For example, in the period leading to the American Revolution, coordination of speech was necessary to rally the American colonies, later states, in their fight for independence. In the 1760s the Sons of Liberty and other aligned groups used committees of correspondence, which had long existed "as a way for colonial legislature to communicate with their agents

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[7] *See, e.g.*, Michael J. Klarman, The Framers' Coup: The Making of the United States Constitution 8 (2016) (noting that the "contest" between Federalists and Antifederalists "over ratification was, perhaps to a surprising degree, fought largely with the weapons of ordinary politics").

[8] *See, e.g.*, Jon Meacham, Thomas Jefferson: The Art of Power 295 (2012) (Jefferson describing the "two parties" that existed in the United States as of 1795 as "The Republican part of our Union" and the "Anti-republicans").

[9] *See, e.g.*, Williard Sterne Randall, The Founders' Fortunes: How Money Shaped the Birth of America 275 (2022) (noting that Washington eventually sided with Federalists over Jeffersonian Republicans in relation to revolutionary France).

in London," "to organize resistance between cities."[10] Similarly, in the 1770s "there were three consecutive systems of committees of correspondence: the Boston-Massachusetts system, the inter-colonial system, and the post-Coercive Acts system," all employed throughout the colonies to effect fundamental political change.[11]

Along with coordinated correspondence came coordinated funding for Patriot politicians. One example: Boston merchant John Hancock joined with other benefactors to anonymously fund Samuel Adams, a leader of the Sons of Liberty who represented Massachusetts in the Continental Congress.[12]

Also, "Patriot leaders from the mid-1760s through the Treaty of Paris spent a great deal of time and, more illuminating, money supporting all kinds of print: subsidizing printers, aiding in paper supplies, contributing private correspondence to newspapers, ordering the publication of certain documents, treating printing presses as military contraband, sending pamphlets in diplomatic packets, arranging for illustrations for a child's book of British

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[10] Catherine Treese, *Committees of Correspondence*, Digital Encyclopedia of George Washington, https://www.mountvernon.org/ library/digitalhistory/digital-encyclopedia/article/committees-of-correspondence/#:~:text=Committees%20of%20correspondence%20had%20existed,to%20organize%20resistance%20between%20cities.

[11] *Id.*

[12] *See* Stacy Schiff, The Revolutionary: Samuel Adams 61, 219 (2022).

atrocities."[13] Another example: Robert Morris, the Superintendent of Finance for the Office of Finance of the Continental Congress, joined with his assistant Gouverneur Morris, future stylist of the Constitution—along with George Washington and New York politician Robert R. Livingston—to provide a stipend of "$800 a year (about $10,000 today)" to political-tract author Thomas Paine "to write articles 'informing the people and rousing them into action.'"[14] The payments to Paine were kept "secret, as 'a Salary publicly and avowedly given . . . would injure the Effect of Mr. Paine's Publications, and subject him to injurious personal Reflections.'"[15]

Paine's chief benefactor, Philadelphia trader Robert Morris, was called "the Financier of the Revolution" for good reason. He, along with Haym Salomon, another Philadelphia businessman, were among a small group who personally contributed large sums to the American Confederation to help finance the war effort.[16] General Washington himself was part of that funding group: he spent around $160,000 (around $5

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[13] Parkinson, *supra* note 6.

[14] Richard Brookhiser, Gentleman Revolutionary: Gouverneur Morris—The Rake Who Wrote the Constitution 70 (2003) (quoting John Keane, Tom Paine 218 (1995)); *see also* Melanie R. Miller, Envoy to the Terror: Gouverneur Morris & the French Revolution 106 (2005).

[15] Charles Rappleye, Robert Morris: Financier of the American Revolution 296 (2010) (quoting Agreement with Robert Livingston and George Washington (Feb. 10, 1782), *in* 4 The Papers of Robert Morris, 1781–1784, at 201 (E.J. Ferguson ed., 1973)).

[16] *Id.* at 245.

million today) of his wealth to pay for war-related expenses of the Continental Army.[17]

Coordinated political money thus not only talked; it fought for our nation's independence. In 1781, the year of Yorktown, Alexander Hamilton observed: "Tis by introducing order into our financing—by restoring public credit, not by gaining battles, that we are finally to gain our object."[18] The public credit of which Hamilton wrote found restoration from funding provided by three foreign nations (France, Spain, and the Netherlands)[19] and a handful of affluent Americans.[20]

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[17] *Revolution and the New Nation (1754-1820s)*, Nat'l Archives and Recs. Admin., http://www.archives.gov/exhibits/american_originals/acctbk.html (last updated July 1, 1998).

[18] Letter From Alexander Hamilton to Robert Morris (Apr. 30, 1781), *in* 2 The Papers of Alexander Hamilton 1779-1781, 604 (Harold C. Syrett ed., 1961) https://founders.archives.gov/documents/Hamilton/01-02-02-1167.

[19] Office of the Historian, *Milestones in the History of U.S. Foreign Relations: U.S. Debt and Foreign Loans, 1775–1795*, United States Department of State, https://history.state.gov/milestones/1784-1800/loans#:~:text=During%20the%20Revolution%2C%20the%20French,from%20Dutch%20bankers%20in%2017 82 (describing financial support from the French, Dutch, and Spanish during the American Revolution).

[20] *See* Thomas Shachtman, The Founding Fortunes: How the Wealthy Paid for and Profited from America's Revolution 109 (2019) (noting that war funding came from "some of the wealthy" who had "dug into their pockets"). One example: On June 8, 1780, Robert Morris "and several score 'men of property' gathered at the London Coffee House [in Philadelphia] to raise a fund 'to be

The Confederation Congress accepted money with no limit imposed by that Congress or the newly formed state governments on the amount that anyone could contribute to the public fisc or on the degree of cooperation between private citizens to raise and spend such funds. The Founders addressed government corruption not through restrictions on political spending levels or coordination, but through measures against bribery and similar activity.

In that regard, there are several episodes from the Founding Era and early American Republic when charges of corruption were raised against government officials for allegedly accepting improper payments. Among these examples are the "Silas Deane affair" in 1778, when Deane, an American diplomat in France, was accused of receiving inappropriate compensation related to his mission, and the "Fauchet scandal" in 1795, when then-Secretary of State Edmund Randolph resigned from Washington's cabinet after being accused, like Deane, of taking a French bribe.[21] Benjamin Franklin also came under scrutiny when

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given in bounties to promote the recruiting service of the United States.' Before the week was out, Philadelphia's merchants and traders had raised four hundred pounds in hard money and more than one hundred thousand dollars in Continental paper." Rappleye, *supra* note 15, at 215.

[21] *See* Brookhiser, *supra* note 14, at 56 ("Historians sometimes treat the fight over Deane as the seed time of American political parties, the conservative revolutionaries defending Deane, the radical ones attacking him."); John J. Reardon, Edmund Randolph: A Biography 306–13 (1974) (describing the Fauchet scandal).

Louis XVI gave him an incredibly valuable gift at the end of his time in France.[22]

Investigations of such charges centered on whether the government official was paid to do something to directly benefit a private interest—the essence of bribery.[23] And this quid pro quo corruption was what the Founding generation recognized as outside the scope of state constitutional, statutory, or common law protection for free speech. Bribery was investigated and prosecuted if warranted. Coordinated political contributions and spending were not.

After the war, this condition of affairs continued, including during the state debates over ratification of the Constitution. In New York, for example, "Federalists dominated the newspapers in the state," but "Antifederalists were more successful in getting their views publicly circulated than were their counterparts in most other states. Both parties established county committees to supervise the nomination of candidates for the ratifying convention

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[22] *See* Randall, *supra* note 9, at 252.

[23] Bribery today is defined much the same as it was at the Founding. *Compare Snyder v. United States*, 144 S. Ct. 1947, 1951 (2024) ("As a general matter, bribes are payments made or agreed to before an official act in order to influence the official with respect to that future official act." (emphasis omitted)), *with* Giles Jacob, New-Law Dictionary: Containing the Interpretation and Definition of Words and Terms Used in the Law (10th ed. 1782) (defining bribery: "taken largely it signifies the receiving, or offering, any undue reward, to or by any person concerned in the administration of public justice whether judge, officer &c to act contrary to his duty, and sometimes it signifies the taking or giving a reward for a public office").

and to coordinate with allies across the state."[24] "The Federalists' shrewd strategizing illustrates how the ratifying contest was a political campaign not very different from ordinary politics, much more than it was an abstract debate between proponents of competing political philosophies."[25]

It has been argued that the Antifederalists lost the constitutional ratification debate, in large part, because their message was scattershot—"immense and heterogeneous, encompassing speeches, pamphlets, essays, and letters."[26] Federalists, in contrast, directed much of their messaging at least in New York through a singular channel controlled by just three people—Alexander Hamilton, John Jay, and James Madison.[27] They wrote under the singular pseudonym of "Publius" to produce *The Federalist Papers*, which they disseminated through combined efforts.[28] Their political advocacy—what one historian called a "Triumvirate"—thus serves as an early example where coordination of privately produced and financed speech was perhaps as important as its content to achieve political victory.[29]

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[24] Klarman, *supra* note 7, at 485.

[25] *Id.* at 612; *see also* Pauline Maier, Ratification: The People Debate the Constitution 1787–1788, at 328 (2010) ("The contest for delegates in New York was distinctive. More than in any other state, the fight was between two organized parties.").

[26] *The Essential Antifederalist*, at xii (W. B. Allen et al. eds., 2d ed. 2002).

[27] Maier, *supra* note 25, at 84.

[28] *Id.*

[29] *See* Bruce Chadwick, Triumvirate: The Story of the Unlikely Alliance That Saved the Constitution and United the Nation 27

Federalists did their messaging through news media paid for, at least in part, by Federalist politicians and their supporters. "[A]lmost all newspapers were published in cities," where most people supported the Constitution, unlike rural areas, where most Antifederalists lived.[30] "[T]hose rare newspaper editors" who printed pieces opposing ratification faced "economic boycotts launched by their overwhelmingly Federalist advertisers and readers."[31] "Federalists also tended to control printing offices and taverns, the latter of which served as unofficial post offices and thus could block circulation of Antifederalist pamphlets."[32]

And just after the Constitution was ratified, coordinated political fundraising and spending continued through nascent political parties and their newspaper affiliates. During President Washington's administration, cabinet sniping between Secretary of Treasury Alexander Hamilton (a leader of the Federal Party) and then-Secretary of State Thomas Jefferson (the leader of the emerging Jeffersonian Republican Party) drove a partisan newspaper war, financed through private subscriptions as well as secret

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(2009) ("There was no known formal written note between them [*i.e.*, Jefferson, Madison, and Jay] acknowledging the formation of the Triumvirate, but any study of their activities leaves no doubt that they not only put one together, but planned one of the great lobbying campaigns in American history to get the Constitution ratified.").

[30] Klarman, *supra* note 7, at 408.

[31] *Id.*

[32] *Id.*

payments coordinated by Federalists on the one hand and Jeffersonian Republicans on the other.[33]

"To build his political party, Jefferson needed financial backers, a publicity machine, and a large constituency of loyal voters."[34] "Always quicker than Jefferson, Hamilton already had all three, tapping wealthy New York bankers for financial support and votes and corralling political workers from the nearly five hundred customs officials, tax collectors, and Treasury Department employees who depended on him for employment."[35]

So, in 1791, Jefferson and Madison made a trip together to New York City to start building their political party. No longer closely aligned with Hamilton's politics, Madison now allied more with Jefferson. The two met with Robert R. Livingston, Aaron Burr, and "Philip Freneau, a writer they hoped to recruit to start a newspaper to compete with the pro-Hamilton *Gazette of the United States*."[36] Freneau "was to be subsidized by the Department of State, where Jefferson employed him as a translator."[37] "The

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[33] *See* H.W. Brands, Founding Partisans: Hamilton, Madison, Jefferson, Adams, and the Brawling Birth of American Politics 188–89 (2023); David Stephen Heidler & Jeanne T. Heidler, Washington's Circle: The Creation of the President 251 (2016); Brookhiser, *supra* note 14, at 159.

[34] Harlow Giles Unger, "Mr. President": George Washington and the Making of the Nation's Highest Office 129 (2013).

[35] *Id.*

[36] Meacham, *supra* note 8, at 256.

[37] *Id.*

Freneau appointment was a critical step for the emerging [Jeffersonian] Republican Party."[38]

Historian H.W. Brands made the point that the FEC emphasizes—that "[p]arties had been something the framers identified with corrupt monarchies; most would have been horrified at the thought parties would spring up in republican America."[39] But Brands added that "parties *did* spring up, and with each year after the midpoint of Washington's president, they grew stronger."[40]

Indeed, as evidenced by the activities of Jefferson, Madison and others, the parties had their genesis even earlier than Brands suggests—in 1791, the year when the First Amendment was ratified. And it was no secret to the Americans who ratified the Amendment that political parties were being formed. In 1792, U.S. Senator Rufus King (a future Federal Party presidential nominee) wrote another Federalist, Gouverneur Morris (who then was the U.S. minister plenipotentiary in revolutionary France), that American newspapers allowed a reader to "form a pretty good opinion of the State of parties here. The gazette of the U.S. published at Philadelphia by [John] Fenno is one side"—the Federal Party—"and the national Gazette published at the same place by

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[38] *Id.*

[39] Brands, *supra* note 33, at 299.

[40] *Id.* at 299–300.

[Jeffersonian Republican Philip] Freneau, a clerk in Jefferson's Office, is on the other."[41]

King explained to Morris that the division between American political parties "proceeds from that Rivalry which always has & will prevail in a free country."[42] Morris could understand King's point from his vantage point in France. In the early days of the French Revolution—the time of "the Reign of Terror"—political competition had disappeared in France, thanks to the Jacobins' guillotine-enforced censor of dissent from any opposing party.[43] When Morris sent Jefferson some French gazettes in 1792, he cautioned that they were "written not only in the Spirit of a Party but under the Eye of a Party. The first must influence the most honest Printer in the Coloring of some Facts and the second will restrain the boldest Printer in the publishing of other Facts."[44]

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[41] Letter from Rufus King to Gouverneur Morris (Sept. 1, 1792), *in* 2 A Diary of the French Revolution by Gouverneur Morris 566 (Beatrix Cary Davenport ed., 1939).

[42] *Id.* at 567.

[43] In 1793 Morris wrote Washington from Paris: "The revolutionary Tribunal establish'd here to judge on general Principles give unlimited Scope to Will. It is an emphatical Phrase in Fashion among the Patriots that *Terror is the order of the Day*." Letter from Gouverneur Morris to George Washington (Oct. 18, 1793), *in* 14 The Papers of George Washington, 1 September–31 December 1793, at 229 (David R. Hoth ed., 2008), https://founders.archives.gov/documents/Washington/05-14-02-0162; *see also* Randall, *supra* note 9, at 275 (noting "the mass guillotining of the Reign of Terror").

[44] Letter from Gouverneur Morris to Thomas Jefferson (Aug. 16, 1792), *in* 24 The Papers of Thomas Jefferson 1 June-31 December 1792, at 301 (John Catanzariti ed., 1990)

But in America, with its emerging rival-party system, things were very different, and freedom of political speech flourished. In October 1795, Jefferson wrote in his notes: "Two parties then do exist within the US."[45] The parties competed throughout the nation during the election of 1796. As historian John Ferling wrote, "[s]ome degree of party organization, however primitive, existed in almost every state. What is more, each party was identified with a core set of ideas. Those who followed politics knew what the parties stood for, understood the stakes in this election, and—as has largely been true throughout America's political history—believed that the election of a candidate who was affiliated with a party afforded a general expectation of how that candidate could be expected to act once in office."[46] And government imposed no restrictions on how the emerging political parties communicated to the public who their candidates were and where they stood on the issues. To be sure, Congress passed the constitutionally questionable Sedition Act of 1798, 1 Stat. 596, but not even that legislation attempted to limit, as does the law at issue here, contributions and spending on political speech or the coordination of such.[47]

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https://founders.archives.gov/documents/Jefferson/01-24-02-0287.

[45] Meacham, *supra* note 8, at 295.

[46] John Ferling, Adams vs. Jefferson: The Tumultuous Election of 1800, at 87 (2004).

[47] The Sedition Act was one of several statutes now collectively known as the Alien and Sedition Acts. *Ludecke v. Watkins*, 335 U.S. 160, 172 n.18 (1948). The Sedition Act prohibited any person from writing, printing, or uttering criticism of the federal

Left unregulated, political parties became even more intertwined with their respective candidates in the bitterly contested election of 1800. Shortly afterward, Jefferson met with John Adams, the Federalist he had defeated in that election:

> Mr. Adams, said I, this is no personal contest between you [and] me. [T]wo systems of principles on the subject of government divide our fellow-citizens into two parties. [W]ith one of these you concur, [and] I with the other [A]s we have been longer on the public stage than most of

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government. Sedition Act of 1798, 1 Stat. 596; *see New York Times Co. v. Sullivan,* 376 U.S. 254, 273–74 (1964) (summarizing the Act). The Supreme Court has indicated that the Sedition Act does not reflect the Founding generation's consensus view of the First Amendment: it was "vigorously and contemporaneously attacked as unconstitutional." *Ludecke*, 335 U.S. at 172 n.18. Jefferson and Madison ghostwrote the initial drafts of the Virginia and Kentucky Resolutions, the final versions of which openly challenged the constitutionality of the Sedition Act, among other statutes within the Alien and Sedition Acts. *See generally* Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 Const. Comment. 315 (1994) (providing historical background to the Resolutions). But the Supreme Court did not review the Sedition Act before President Jefferson allowed it to expire in 1801. *Sullivan*, 376 U.S. at 276 & 276 n.16 (1964). Ultimately, Congress repaid the fines levied against those prosecuted under the Sedition Act "on the ground that it was unconstitutional," and President Jefferson "pardoned those who had been convicted and sentenced under the Act and remitted their fines." *Id.* (summarizing this history, related legislation, and later assessments by Supreme Court justices as "reflect[ing] a broad consensus that the [Sedition] Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment").

> those now living, our names happen to be more generally known. [O]ne of these parties therefore has put your name at its head, the other mine. [W]ere we both to die today, tomorrow two other names would be in the place of ours, without any change in the motion of the machine. [Its] motion is from [its] principle, not from you or myself.[48]

As Jefferson's words reveal, candidates were known by their political parties, and vice versa, in the early Republic. No law restricted the coordination of their speech. Delegates to the Constitutional Convention may have condemned factions as a talking point, but political parties were not condemned in practice through any restriction on their activities in support of candidates under the Constitution. That history and tradition stand in bold contrast to the FEC's historically unsupported attempt to justify its restriction of First Amendment liberty here.

B. The Constitutional Text

To bolster its shaky First Amendment historical evidence, the FEC turns to other provisions of the Constitution besides the First Amendment. The FEC cites a number of provisions that it contends "address[] corruption and faction": the Foreign Emoluments Clause; the Domestic Emoluments Clause; the Ineligibility Clause; the provision regarding size of the legislature in Article I, Section 2; the provision

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[48] Letter from Thomas Jefferson to Benjamin Rush (Jan. 26, 1811), *in* 3 The Papers of Thomas Jefferson, Retirement Series, 12 August 1810 to 17 June 1811, at 304 (J. Jefferson Looney ed., 2006) https://founders.archives.gov/documents/Jefferson/03-03-02-0231.

regarding the president's veto power in Article I, Section 7, Clause 2; the Elections Clause of Article I, Section 4; and various constitutional amendments. Defs.' Proposed Findings of Fact 9–18, R. 43, PageID 5124–33. But none of these constitutional provisions cited by the FEC contain any language creating an exception to the First Amendment supporting the FEC's regulation of speech in this case.

Besides the constitutional text cited by the FEC, the People's representatives in the Constitutional Convention, the state ratifying conventions, and the early Congresses combatted government corruption at the national level in at least three other ways. First, the Constitution delineated a structure of government to protect against tyranny—the separation of powers, checks and balances between branches of the national government, and division of powers between the national and state governments.[49] Second, the nation's charter listed "Bribery" as a ground for impeachment of "the President, Vice President, and all civil Officers of the United States." *See* U.S. Const. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, *Bribery*, or other high Crimes and Misdemeanors." (emphasis added)). Third, through statutes, Congress criminalized bribery and similar misconduct—what the Supreme Court has since called prohibitions of

[49] *See* Maier, *supra* note 25, at 463 ("The division of power between the states and the nation, like that among the branches of the federal government, provided a structural check on potentially oppressive power.").

"*quid pro quo* corruption."[50] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 197 (2014) (plurality opinion); *see, e.g.*, the Crimes Act of 1790 § 29, 1 Stat. 112 (criminalizing federal judge bribery); Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29 (criminalizing customs officials bribery); Act of Mar. 3, 1791, ch. 15, § 47, 1 Stat. 199 (criminalizing tax official bribery).[51] Again, none of these laws at the Founding and in the early

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[50] Congress did not legislate on a blank slate. William Blackstone, "whose works constituted the preeminent authority on English law for the founding generation," *Alden v. Maine*, 527 U.S. 706, 715 (1999), described the "the infamous practice of bribery and corruption" within Parliament. 1 William Blackstone, Commentaries *179. English law was primarily concerned with candidates from giving bribes to electors to secure office. *Id.* As punishment, both the bribed elector and bribing officer were fined and "forever disabled from voting and holding any office in any corporation." *Id.*

[51] Some uncertainty existed in that period as to how to punish bribery, though. In *United States v. Worrall*, a panel addressed whether a prosecutor could indict a defendant in federal court for bribery when Congress did not punish that offense. 2 U.S. 384 (C.C.D. Pa. 1798). Justice Chase—riding circuit—concluded that the Constitution limited federal courts to punish only crimes defined by Congress, and federal criminal common law did not exist, so the defendant there could not be indicted for attempting to bribe a tax official. *Id.* at 394–95. Justice Chase's panel colleague, Judge Peters, determined that the power to punish an offense is inherent to governing, so the defendant could be indicted for bribery absent a congressional statute punishing that crime. *Id.* at 395. That position found support in English common law. *See* Blackstone, *supra* note 50, at *179 n.51 (noting that "bribery [was] a crime at common law"). The divided panel in *Worrell* ultimately split the difference: it mitigated the defendant's sentence to three months in prison and a $200 fine. *Worrall*, 2 U.S. at 396.

Republic prohibited coordinated political contributions and spending.

Judged by this early legal landscape, the FECA restriction here is far afield from those methods of regulation recognized by relevant history and tradition to be within the national government's power.

C. Regulation of Speech for the Public Good

Finally, the FEC argues that "Founding-era thinkers viewed legislative efforts to promote the public good as valid, including through laws impacting speech rights." Defs.' Proposed Findings of Fact 18, R. 43, PageID 5133 (capitalization and bolding omitted). This argument rests on two premises: first, that "political theorists in the Framers' time viewed speech as subject to regulation for the public good," and second, that "Founding-era courts generally did not overturn important regulations of speech." *Id.,* PageID 5133–35 (capitalization and bolding omitted). Again, the FEC offers no evidence in support of those general propositions that bears upon the specific type of political speech regulation here. As noted, not even the most egregious regulation of speech in the early Republic, the Sedition Act, abridged speech in the way that the law at issue does here. The FEC thus points to no "[h]istorical regulation" that "reveal[s] a principle" of government authority to regulate in the manner the FEC seeks to justify. *Rahimi*, 2024 WL 3074728, at 1925 (Barrett, J., concurring).

III.

The FEC attempts to get around its failure of proof by trying to shoehorn the challenged rule into the

category of laws that it claims may be justified as indirect means to combat quid pro quo corruption. Essentially, the FEC's reasoning is that (1) the larger a campaign contribution is, the more likely there is to be a quid pro quo, and (2) it is therefore reasonable to place limits on coordinated contributions and spending because donors otherwise could increase their contributions to a candidate by coordinating funds given to a political party with funds donated directly to a candidate from that party. Second Br. at 31.

But as explained above, the historical record, in fact, shows that the Founding generation did not view coordinated political contributions and spending as sanctionable in and of themselves. In fact, individuals who combined sizable resources to support the American Revolution and the Constitution were met with applause, not opprobrium. And substantial coordination of activities for political parties and their respective candidates soon took root in the early American Republic. The FEC offers no evidence of any legislated limits on coordinated political contributions and spending in this era.

IV.

This case is not the first time that our *en banc* court has held that we are bound by Supreme Court constitutional precedent, though many of us disagree with the logic or historical underpinnings of that precedent and some of us even offer a dissent that argues the precedent can be distinguished. *See, e.g.*, *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018); *id.* at 955 (Bush, J., concurring dubitante); *id.* at 966 (Clay, J., concurring in the judgment only); *id.*

at 976–77 (White, J., concurring); *id.* at 977–78 (Stranch, J. dissenting). So I am not concerned, as Judge Stranch appears to be, by the majority opinion's reasoning that outlines relevant issues or the separate writings of judges who concur or dissent in this case.

None of us is vested with Supreme Court authority. In this case, all that we can do as lower court judges is essentially make suggestions for that Court to consider. This is a legitimate function for our court, especially where, has here, the case is a strong candidate for certiorari.

I, therefore, concur with the Court's opinion, but respectfully submit this opinion to explain my doubts about the precedent that binds us. The dearth of historical examples supporting the FEC's position calls for the Supreme Court to reexamine its First Amendment jurisprudence that applies here. I respectfully submit that it is time to read some American history, which suggests that coordinated party expenditure limits violate the First Amendment.

CONCURRING IN THE JUDGMENT

JANE B. STRANCH, Circuit Judge, concurring in the judgment. The plaintiffs filed this lawsuit to ask the Supreme Court to overrule its decision in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001), a case now known as "*Colorado II*," and urge us to rule against them "promptly" to facilitate the higher court's review. *See* First Br. 49-54. That posture should have made this an easy case, one we could unanimously resolve in a handful of pages. It instead produces handfuls of opinions encouraging the Supreme Court to rework campaign finance, First Amendment, and constitutional law in new and audacious ways. The en banc majority tells the Justices that *Colorado II* is "a 'legal last-man-standing'" primed for the Court to "knock down." Maj. Op. at 8 (quoting *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015)). The dissent seizes the prerogative of overturning Supreme Court precedent for itself and would do that work now. The concurrences go further still, urging the Court to import the history and tradition test it devised in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) to the First Amendment and substantive constitutional law more broadly. I, too, must therefore write to explain why each is wrong.

I.

Enacted in 1971 and amended in 1974 to become the pantheon of campaign finance law it is today, the

Federal Election Campaign Act, "FECA," set out to regulate federal elections in four main ways: disclosure requirements, campaign contribution limits, campaign expenditure limits, and public campaign financing. Its canonical regulation is the base contribution limit, which limits the amount an individual may donate directly to a candidate. Set at $3,300 in 2024, the base limit has checked actual and apparent "quid pro quo" corruption in U.S. federal elections for the last fifty years. *Buckley v. Valeo*, 424 U.S. 1, 26-29 (1976) (per curiam).

The base limit is no mere figurehead. It is fortified by a series of regulations that prevent circumvention by donors masking de facto contributions under more creative labels. These companion regulations ensure that the Act limits not only contributions in name, but also those employing other aliases. They prohibit individual donors and outside political committees from evading the base limit by routing contributions through a corporation or labor union, 52 U.S.C. § 30118; by supplying goods or services for pennies on the dollar, 11 C.F.R. § 100.52; or by simply paying the candidate's bills or purchasing advertisements at the candidate's direction, *id.* § 109.21. For what has now been decades, the Supreme Court has upheld FECA's contribution limits in both name and substance. *See, e.g.*, *Buckley*, 424 U.S. at 29; *Colorado II*, 533 U.S. at 465; *FEC v. Beaumont*, 539 U.S. 146, 155 (2003).

Among these anti-circumvention measures is the so-called "party coordinated expenditure limit," a regulation that moderates the extent to which a political party may coordinate its spending with a candidate. 52 U.S.C. § 30116(d). When individual donors and outside committees spend in coordination

with candidates, they are subject to the usual base contribution limits, but party committees are authorized to engage in additional coordinated spending beyond the base limits, even though that spending may be tantamount to a contribution. *Id.* FECA extends this unique privilege to political parties subject to a state-by-state cap: in Ohio, from which this case hails, a national party committee may coordinate expenditures with a candidate up to $61,800 in the House and $1,138,000 in the Senate, orders of magnitude above the $5,000 the same committee could contribute to the candidate directly.[1]

The plaintiffs—the National Republican Senatorial Committee (NRSC), the National Republican Congressional Committee (NRCC), Ohio Senator James D. Vance, and former Ohio Representative Steve Chabot—claim that the party privilege to engage in coordinated expenditures must go even further, arguing that any limit on such spending violates the First Amendment. And they are not the first to challenge FECA's party spending limits. As originally drafted, the party expenditure limits applied not only to party coordinated spending but to all party spending, including independent expenditures. The Supreme Court considered an as-applied challenge to the original provision in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), now called "*Colorado I*," and a facial challenge to the provision in *Colorado II*. *Colorado I* held the provision unconstitutional as applied to

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[1] *See Contribution limits for 2023-2024 federal elections*, FEC, https://perma.cc/UM3X-XKTQ; *Coordinated party expenditure limits*, FEC, https://perma.cc/BA9L-UE4V.

purely independent expenditures. *Colorado I*, 518 U.S. at 618 (opinion of Breyer, J.). *Colorado II* held the limits were facially valid regulations of "coordinated expenditures." *Colorado II*, 533 U.S. at 465. The "constitutionally significant fact" distinguishing the decisions was the Court's distinction between "coordinated expenditures" and "expenditures truly independent." *Id.* at 464-65 (quoting *Colorado I*, 518 U.S. at 617 (opinion of Breyer, J.)).

The plaintiffs take up again the constitutional challenge to the party coordination limits in this suit. They moved to certify the constitutional question under a FECA provision that directs district courts confronting challenges to the Act's constitutionality to certify such questions to the en banc court of appeals. *See* 52 U.S.C. § 30110. The district court concluded that Senator Vance and NRSC have standing and that the constitutional question was non-frivolous. It also entered findings of adjudicative fact on the plaintiffs' coordinated spending and other campaign finance activities. It then certified the question to the en banc court.

II.

All recognize that "our work" here is, at most, "a warm-up for eventual Supreme Court review." Dissenting Op. at 78. The plaintiffs spend the warm-up trying out their Supreme Court strategy, testing their stare decisis arguments for why *Colorado II* can be overruled and their merits arguments for why it should be. The en banc majority rightly concludes that we lack authority to reach the merits of the plaintiffs' claims, but along the way it wrongly and

unnecessarily validates the plaintiffs' stare decisis theories. Maj. Op. at 6-10. The dissent recruits those inapt theories to reach the conclusion that our court may overrule Supreme Court precedent. I begin by addressing these errors.

A.

The Supreme Court "asked and answered" the constitutional question raised here in *Colorado II*, holding that the party coordinated expenditure limits are facially valid corollaries to the base contribution limit. *Id.* at 6. Intending to ask the Supreme Court to revisit that decision, the plaintiffs revive the question here in its identical form. Still, for purposes of this stop on the road to the certiorari pool, the plaintiffs argue that *Colorado II* does not control their facial challenge by contending that the decision is inconsistent with the Court's more recent campaign finance doctrine. They also add a challenge, styled "as-applied," to the party coordinated communication limits, asserting that because *Colorado II* addressed no such challenge, we are free to do so here.

As a lower federal court operating under "one supreme Court," our court has a "constitutional obligation to follow" Supreme Court precedent "unless and until it is overruled by" the Supreme Court. *Ramos v. Louisiana*, 590 U.S. 83, 124 n.5 (2020) (Kavanaugh, J., concurring) (quoting U.S. Const., art. III, § 1). When Supreme Court precedent "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." *Rodriguez de Quijas v.*

Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989). 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 v. Buchanan*, 4 F.4th 406, 409 (6th Cir. 2021). All this holds true even when a plaintiff offers a theory "technically distinguishable" from the theory considered in the applicable Supreme Court decision but that would, if accepted, "functionally overrule the decision." *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 814 (6th Cir. 2020).

The plaintiffs' facial claim is not even "technically distinguishable" from *Colorado II*—it *is* the claim presented in *Colorado II*. *Id.* They challenge the same regulation (the party coordinated expenditure limits) on the same grounds (that the limits violate the First Amendment) under the same theory (the one articulated in Justice Thomas's dissent and rejected by the majority) seeking the same relief (a declaration that the limits are unconstitutional and an injunction barring the FEC from enforcing them). *Colorado II* "directly controls" that challenge and deprives this court of the authority to overrule it. *Rodriguez de Quijas*, 490 U.S. at 484. The purportedly "as-applied" challenge, meanwhile, is directed at the limits' application to party coordinated communications. *See* 11 C.F.R. § 109.37. The plaintiffs concede, however, that "virtually all" party independent expenditures are party coordinated communications. *See* First Br. 27. For that reason, the as-applied challenge could succeed only if we rejected the "principle of law" on which *Colorado II* rests, *In re Cao*, 619 F.3d 410, 430 (5th Cir. 2010) (quoting *Penry v. Lynaugh*, 492 U.S.

302, 354 (1989) (Scalia, J., dissenting)), and granting the challenge would "functionally overrule" *Colorado II*, *Thompson*, 972 F.3d at 814. We are "preclude[d]" from taking that leap. *In re Cao*, 619 F.3d at 430 (quoting *Penry*, 492 U.S. at 354 (Scalia, J., dissenting)).

For these simple reasons, the plaintiffs' facial and as-applied challenges are equally controlled by *Colorado II* and the majority rightly answers the certified question "in the negative." Maj. Op. at 12.

B.

The en banc majority could have left things there and would likely have reached near consensus on our court. It instead reaches out to "accept the premise" of the plaintiffs' claim that post-*Colorado II* developments have fatally undermined the decision, even as it ultimately rejects "the conclusion" that those changes empower us to overrule *Colorado II* ourselves. *Id.* at 7. The dissent likewise parrots the plaintiffs' premise as an excuse to reach the merits. I cannot accept either the premise or the conclusion.

1.

The plaintiffs start with changed doctrine. They argue that the Supreme Court has tightened the parameters of the "closely drawn" test since *Colorado II* to the point of nullifying the framework that decision applied. As *Buckley* explained it, the test asks whether a regulation serves an "important interest" using "means closely drawn to avoid unnecessary abridgment of" First Amendment freedoms. *See Buckley*, 424 U.S. at 25. The plaintiffs assert that post-*Colorado II* cases have filled out the test's details,

clarifying that the "only" government interest that can justify campaign finance regulation is preventing quid pro quo corruption or its appearance and suggesting that such regulations must be "narrowly tailored" to their objectives, a "rigorous" level of review. *McCutcheon v. FEC*, 572 U.S. 185, 199, 206-07, 218 (2014) (plurality opinion) (first quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); and then quoting *Buckley*, 424 U.S. at 29). They contend that *Colorado II* is inconsistent with this framework because it accepted a theory of corruption broader than quid pro quo corruption and applied a level of scrutiny more forgiving than narrow tailoring. The majority endorses this argument; the dissent hangs its hat on it.

As for corruption, *Colorado II* made clear that the core "danger" addressed by the party coordination limits was "quid pro quo" corruption. *Colorado II*, 533 U.S. at 464 (italics omitted) (quoting *Buckley*, 424 U.S. at 47). That understanding follows directly from the recognition that limiting coordinated spending serves an "identical" function to limiting direct contributions, *see id.* at 460, themselves long understood as targeting "quid pro quo" corruption, *Buckley*, 424 U.S. at 26. *Colorado II* did, to be sure, reference in a single parenthetical the premise generally accepted at the time that regulable corruption included "not only . . . quid pro quo agreements, but also . . . undue influence." *Colorado II*, 533 U.S. at 441 (italics omitted). But the Court's brief observation that undue influence might be regulable generally did not drive its conclusion that coordinated expenditures could be limited specifically. Its actual discussion of party coordinated spending focused explicitly on quid pro

quo corruption. *See id.* at 441, 464-65. This analysis is consistent with current doctrine.[2]

As for tailoring, *Colorado II* engaged in just the kind of analysis assessing a contribution limit calls for. It applied the traditional *Buckley* test, as more recent cases have, asking whether the party coordination limits were "'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combating political corruption." *Id.* at 456 (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000)); *see McCutcheon*, 572 U.S. at 199 (applying the same test). Cases have defined the demands of that test with different language: *Buckley* described it as weeding out "unnecessary abridgment of associational freedoms," 424 U.S. at 25; *Colorado II* referred to it as requiring skillful tailoring, *see* 533 U.S. at 463 n.26; *McCutcheon* characterized it as looking for "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective," 572 U.S. at 218 (ellipses omitted) (quoting *Fox*, 492 U.S. at 480). Whatever the adjectives employed, the test has always

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[2] The majority claims that Justice Breyer's dissenting opinion in *McCutcheon* made clear that "*Colorado II* relied on the 'undue influence' rationale." Maj. Op. at 7 (quoting *McCutcheon*, 572 U.S. at 239-40 (Breyer, J., dissenting)). What Justice Breyer in fact explained, however, was that the Court's conception of the term corruption had until *Citizens United* "includ[ed] 'undue influence.'" *McCutcheon*, 572 U.S. at 239-40 (Breyer, J., dissenting). His dissent never asserted that *Colorado II* turned on the broader understanding.

been understood as a "rigorous standard of review." *Buckley*, 424 U.S. at 29. And *Colorado II* undertook that review faithfully, considering each of the posited alternatives to the coordination limits and explaining why they were inadequate substitutes. *See Colorado II*, 533 U.S. at 461-65; *accord McCutcheon*, 572 U.S. at 221-23 (applying the same framework).

The majority also invokes a third purported change in doctrine not advanced in the plaintiffs' briefing, claiming that the Supreme Court's more recent campaign finance cases "demand," for the first time, "'actual evidence' that a spending restriction will" achieve its objectives. Maj. Op. at 7 (quoting *FEC v. Cruz*, 596 U.S. 289, 310 (2022)). Again, however, the substance of this argument is nothing new—the Court has long looked to "record evidence," "legislative findings," and experience as justification for campaign finance regulations. *See Colorado I*, 518 U.S. at 618, 621 (opinion of Breyer, J.). *Colorado II* continued this tradition, identifying "substantial evidence" that placed "beyond serious doubt" that "contribution limits would be eroded" absent limits on party coordinated spending. *Colorado II*, 533 U.S. at 457.

All told, I do not perceive "tension" between *Colorado II*'s reasoning and the reasoning of more recent Supreme Court decisions. Maj. Op. at 7-8. Like its progeny, *Colorado II* evaluated the party coordinated spending limits against a quid pro quo corruption rubric, identified evidence that the limits in fact serve their anti-corruption goal, and conducted a rigorous tailoring analysis checking the law's fit with its objectives.

2.

The plaintiffs turn from perceived changes in doctrine to a perceptible change in FECA's text. They contend that the Consolidated Appropriations Act of 2014, popularly known as the "Cromnibus" amendments, created a "distinct legal backdrop" that now renders the coordination limits "fatally underinclusive." First Br. 43. The majority cosigns this argument, "appreciat[ing] how these new exceptions might affect the analysis" were we writing on a blank slate, and positing that the "increase in the Act's exemptions might show that the limit on coordinated party expenditures does too little for First Amendment purposes—that it addresses its policy target in underinclusive ways." Maj. Op. at 9. The dissent claims we "owe it to the parties before us to address the constitutional significance of these statutory changes head on." Dissenting Op. at 89.

The First Amendment, to be clear, "imposes no freestanding 'underinclusiveness limitation'"—we would not say "that a law violates the First Amendment by abridging *too little* speech." *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448-49 (2015) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)). There is thus "no constitutional basis for attacking contribution limits on the ground that they are too high." *Davis v. FEC*, 554 U.S. 724, 737 (2008). The significance of underinclusiveness is instead that it "can raise 'doubts about whether the government is in fact pursuing the interest it invokes'" or "reveal that a law does not actually advance a compelling interest." *Williams-Yulee*, 575 U.S. at 448-49 (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011)).

The Cromnibus amendments increased individual contribution limits for funding of three special-purpose categories of party spending—presidential nominating conventions; party headquarters; and election recounts and legal proceedings—and exempted spending through those accounts from the party coordinated expenditure limits. *See* 52 U.S.C. § 30116(a)(9). These special-purpose categories create a new allowance for spending largely targeted at general party-building activities while leaving in place limits on funds designed "to benefit federal candidates directly." *See McConnell v. FEC*, 540 U.S. 93, 167 (2003) (opinion of Stevens & O'Connor, JJ.), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). The result relaxes limits on contributions that carry a lighter risk of quid pro quo corruption while maintaining existing limits on "contributions that pose the greatest risk." *Id.* Far from raising doubts about the purpose the party coordinated spending limits serve, the Cromnibus amendments instead tighten the limits' fit with their anti-corruption goals. That only bolsters *Colorado II*'s conclusion.

3.

The plaintiffs round out their facial challenge by positing factual developments. They say three factual changes undermine *Colorado II*'s premise that political parties are dominant players in federal elections and the corresponding corruption risks that attended that assumption. One, Super PAC spending injected billions of dollars in undisclosed campaign outlays to the 2020 presidential election from a source that did not exist until 2010, "stripp[ing] parties of any

former 'dominance' in the electoral sphere." First Br. 47 (brackets omitted) (quoting *Colorado II,* 533 U.S. at 450); *see* R. 49-1, PageID 5535. Two, soft money produced nearly $500 million in campaign funding in 2000 and is now off the table.[3] Three, the internet today provides "significant information about political candidates and issues." *Citizens United*, 558 U.S. at 364. The majority accepts the plaintiffs' characterization of these changes, agreeing, without citing the record, that the notion of political party import in federal elections "has a quaint ring to it." Maj. Op. at 9. The dissent does too, finding "authority" for the proposition in a footnote to a district court opinion penned in 2010. Dissenting Op. at 89.

The record says otherwise. The data show that the major political parties raised over $2.5 billion during the 2020 presidential election cycle, more than double their haul in the 2000 campaign. R. 49-1, PageID 5531-34. This lawsuit itself reveals how valuable party spending remains to federal candidates—precisely because, the plaintiffs tell us, parties may coordinate spending with candidates. *See* R. 49-1, PageID 5515. At the same time, none of the factual changes on which the plaintiffs and majority fixate displace *Colorado II*'s fundamental concern with coordinated spending, "the constitutionally significant fact" in its analysis and a tool that remains alive and

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[3] Nathaniel Persily, Robert F. Bauer & Benjamin L. Ginsberg, *Campaign Finance in the United States: Assessing an Era of Fundamental Change* at 15 tbl. 1 (2018),

https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf.

well for party actors. *Colorado II*, 533 U.S. at 464 (quoting *Colorado I*, 518 U.S. at 617 (opinion of Breyer, J.)). Super PAC spending has of course skyrocketed, but it is, by definition, "not coordinated with a candidate," reducing its value to candidates and mitigating the "danger" that it "will be given as a quid pro quo." *Citizens United*, 558 U.S. at 357, 360 (emphasis omitted) (quoting *Buckley*, 424 U.S. at 47). The same was true of soft money. *See McConnell*, 540 U.S. at 123. And no one explains how technological advances reduce the danger that parties will be used as conduits for quid pro quo exchanges. What the record ultimately shows is parties continuing to spend vast amounts in federal elections while maintaining a unique privilege to coordinate spending with candidates, funding that is "as useful to the candidate as cash" and particularly susceptible to being "given 'as a quid pro quo for improper commitments from the candidate.'" *Colorado II*, 533 U.S. at 446 (italics omitted) (quoting *Buckley*, 424 U.S. at 47). The corruptive risk of that spending remains as real and acute today as it was in *Colorado II*.

4.

The plaintiffs end with a fallback position, contending that even if *Colorado II* forecloses their facial challenge, it leaves their as-applied challenge open to plenary review. The majority here sees through this argument, but the dissent sees what the fifteen remaining members of the en banc court have purportedly missed: that it is "abundantly clear" the as-applied challenge "is fairly before us for resolution." Dissenting Op. at 91-92.

Colorado II left open the possibility that certain coordinated expenditures might be susceptible to an as-applied challenge. The majority there acknowledged that "specific" coordinated expenditures might not be tantamount to contributions. *See Colorado II*, 533 U.S. at 456 n.17. Justice Thomas's dissent fleshed the idea out, explaining that the coordination limits cover "a broad array of conduct" that runs the spectrum from de facto contributions on one end to outlays that "largely resemble" ordinary independent expenditures on the other. *Id.* at 467 (Thomas, J., dissenting). The dissent hypothesized that a party paying "a candidate's media bills" would be "virtually indistinguishable" from a party contributing to that candidate directly, but that a party-developed "advertising campaign" aired after simply consulting the candidate "on which time slot the advertisement should run" would be constitutionally indistinguishable from a purely independent expenditure. *Id.* at 467-68 (Thomas, J., dissenting) (quoting *Colorado I*, 518 U.S. at 624 (opinion of Breyer, J.)). An as-applied challenge under *Colorado II*, then, must carve out a distinction based on "the degree of coordination with the candidate." *See In re Cao*, 619 F.3d at 430.

The plaintiffs ask us to invalidate the party coordinated expenditure limits as they apply to party coordinated communications. The phrase "party coordinated communication" is a term of art covering "public political advertising" that "is coordinated with a candidate" and "paid for by a political party committee." 11 C.F.R. §§ 109.37(a), 100.26. Like the facial challenge in *Colorado II*, party coordinated communications span "a broad array of conduct." *See*

Colorado II, 533 U.S. at 467 (Thomas, J., dissenting). On the one hand, such communications cover expenditures with which a candidate is heavily involved, such as political advertisements prepared by the candidate and disseminated at the candidate's request on the party's dime. *See* 11 C.F.R. §§ 109.37(a), 109.21(d)(1), 100.26. On the other, such communications also cover expenditures where a candidate may be less involved, like party-developed advertisements run with material input from the candidate on the "timing or frequency of the communication." 11 C.F.R. § 109.21(d)(2)(v); *see id.* §§ 109.37(a), 100.26. In total, party coordinated communications amount to "between 96.5% and 100%" of the plaintiffs' independent expenditures. R. 49-1, PageID 5513-14. The plaintiffs seek to invalidate the limits as they apply to all party coordinated communications, drawing no distinction based on degree of coordination.

The en banc Fifth Circuit addressed a similar challenge in *In re Cao*. The Republican National Committee in that case challenged the party coordinated spending limits as applied to its "own speech." *In re Cao*, 619 F.3d at 425. It argued that its "own speech," defined as speech "attributable" to the Committee, could not be regulated regardless of whether and to what extent it was coordinated with a candidate. *Id.* Under that position, a communication created by a candidate and passed along to a party for dissemination could not be limited as a party coordinated expenditure so long as the party adopted the message. *Id.* at 429. The Fifth Circuit explained that this "exceedingly broad argument," agnostic to "the degree of coordination," would "effectually

overrule all restrictions on coordinated expenditures" and "eviscerate" the holding of *Colorado II*. *Id.* at 428-30. Recognizing that a plaintiff may not "successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision," that en banc court turned away the plaintiffs' suit. *Id.* at 430 (quoting *RNC v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010), *summ. aff'd*, 561 U.S. 1040 (2010)).[4]

The plaintiffs' challenge here is a variation of the suit the Fifth Circuit addressed in *In re Cao*. The plaintiffs seek to invalidate the party coordinated communication limits writ large, foregoing any distinctions based on "degree of coordination." *Id.* at 429. They readily admit that "virtually all" party

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[4] The majority recasts the challenge in *In re Cao* as narrowly addressing FECA's "application to shared input about the *timing* of a *single* advertising expenditure." Maj. Op. at 12. The en banc Fifth Circuit went out of its way to prevent that mischaracterization, using italics to emphasize that the plaintiffs' "*only*" argument was the "exceedingly broad" one that Congress may not regulate any speech attributable to the Committee "regardless of the extent of coordination with the candidate." *In re Cao*, 619 F.3d at 425, 428. It even explained that in "response to friendly questions from the en banc bench," the plaintiffs' counsel "refused to adopt the position that the level of coordination should affect whether an expenditure may be regulated." *Id.* at 425. The argument transcript reflects the insistence of counsel for the Committee that "the degree of coordination does not affect whose speech it is at all . . . . There is no degree of being pregnant. You're either or not." *Id.* at 425-26. All this makes clear that *In re Cao* concerned far more than "input about the *timing* of a *single* advertising expenditure." Maj. Op. at 12.

independent expenditures fall into this category. *See* First Br. 27. The challenge sweeps in candidate-developed advertisements when the parties pick up the tab, even if it also covers ads for which the candidate just consults on timing, taking on conduct all nine justices in *Colorado II* considered "indistinguishable" from contributions. *See Colorado II*, 533 U.S. at 444, 456 n.17; *id.* at 467 (Thomas, J., dissenting). As even the dissent acknowledges, granting the plaintiffs' relief would permit a candidate to "create and produce an advertisement before handing it off to a party committee for publication and payment." Dissenting Op. at 91. The as-applied challenge could thus succeed only if we rejected the "principle of law" set forth in *Colorado II*, *In re Cao*, 619 F.3d at 430 (quoting *Penry*, 492 U.S. at 354 (Scalia, J., dissenting)), and accepting it would "functionally overrule" the *Colorado II* decision. *Thompson*, 972 F.3d at 814. That "broad position . . . must fail." *In re Cao*, 619 F.3d at 430.

* * *

Colorado II answers the certified question here, and that is all we needed to say. The en banc majority nonetheless reaches out to endorse the plaintiffs' view that doctrinal, statutory, and factual changes undermine *Colorado II*, paving the way for the stare decisis analysis it apparently believes the Supreme Court will soon conduct. The dissent does not just endorse the plaintiffs' view, it ratifies it, seizing the Supreme Court's authority for itself. I would not have opined on these issues, but because my colleagues do, I must respectfully disagree.

III.

The dissent, and several of my concurring colleagues, conduct a plenary review of the plaintiffs' facial challenge on the merits, assessing whether the party coordinated spending limits are constitutional on their face. So, I must do the same.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). That means the plaintiffs cannot succeed merely by showing that the modest forms of communication the statute limits are unconstitutional (e.g., consulting a candidate on media buy timing), they must also "shoulder the[] heavy burden" of showing that spending involving near-total coordination (e.g., paying a candidate's media bills) violates the First Amendment as well. *See id.* As do the parties, I assess whether the plaintiffs have met that burden applying closely drawn scrutiny to ask whether the limits serve a "sufficiently important interest" using "means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25; *see Colorado II*, 533 U.S. at 456; *McCutcheon*, 572 U.S. at 218.[5]

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[5] A different standard, facial overbreadth, applies in some cases "when a facial suit is based on the First Amendment." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024). That standard asks whether "a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (brackets omitted) (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021)). "The

A.

The Supreme Court "has recognized only one permissible ground for restricting political speech: the prevention of 'quid pro quo' corruption or its appearance." *Cruz*, 596 U.S. at 305 (emphasis omitted) (quoting *McCutcheon*, 572 U.S. at 207). Quid pro quo corruption is the "direct exchange of an official act for money," at its worst, "dollars for political favors." *McCutcheon*, 572 U.S. at 192 (quoting *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 497 (1985)); *see Shrink Missouri*, 528 U.S. at 389. The government's interest in preventing quid pro quo corruption is "compelling," *McCutcheon*, 572 U.S. at 199 (quoting *Nat'l Conservative Pol. Action Comm.*, 470 U.S. at 496), and stemming the appearance of such corruption is of "almost equal concern," *Shrink Missouri*, 528 U.S. at 388 (quoting *Buckley*, 424 U.S. at 27).[6]

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overbreadth claimant," however, "bears the burden of demonstrating, 'from the text of the law and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (brackets omitted) (quoting *N.Y. State Club Ass'n., Inc. v. City of New York*, 487 U.S. 1, 14 (1988)). But the plaintiffs have not even attempted to "lay the groundwork for [a] facial overbreadth claim" here. *Colorado II*, 533 U.S. at 456 n.17. We must therefore conduct an ordinary facial analysis.

[6] Grafting a statutory definition of bribery from criminal law cases onto the definition of quid pro quo corruption in campaign finance cases, the dissent invents a new meaning of that term: "campaign finance regulations must narrowly target the exchange of money for an official's formal exercise of the powers of her office." Dissenting Op. at 86. That circumscribed definition ignores *McCutcheon*'s characterization of the "hallmark of corruption" as "the financial *quid pro quo*: dollars for political *favors*." *McCutcheon*, 572 U.S. at 192 (second emphasis added)

When the Government defends a campaign finance regulation, it "bears the burden of proving" that the regulation in fact addresses quid pro quos. *McCutcheon*, 572 U.S. at 210 (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000)). That proof can come from record evidence, legislative findings, or experience under the law. *See Cruz*, 596 U.S. at 307; *McCutcheon*, 572 U.S. at 219. It is considered with an eye to context, minding the "difficulty of mustering evidence to support long-enforced statutes," *Colorado II*, 533 U.S. at 457, and recognizing "that no data can be marshaled to capture perfectly the counterfactual world in which" the regulation does "not exist," *McCutcheon*, 572 U.S. at 219. For these reasons, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *McConnell*, 540 U.S. at 144 (quoting *Shrink Missouri*, 528 U.S. at 391).

(quoting *Nat'l Conservative Pol. Action Comm.*, 470 U.S. at 497). It ignores too *Buckley*'s explanation that federal bribery laws "deal with only the most blatant and specific" forms of quid pro quo corruption. *Buckley*, 424 U.S. at 639. And finally, that definition ignores that the cases it relies on involved interpretation of defined terms in specific federal statutes, interpretation that was informed by concern with "overzealous prosecutions," statutory vagueness, and "federalism." *McDonnell v. United States*, 579 U.S. 550, 576 (2016). None of those concerns are relevant here. Indeed, an expansive definition of quid pro quo corruption is called for in this context, especially to address the risk of "the appearance of corruption," which is of "almost equal concern as the danger of actual quid pro quo arrangements." *Buckley*, 424 U.S. at 27.

Under this framework, the Supreme Court has repeatedly "held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption." *McCutcheon*, 572 U.S. at 191. It has also confirmed that "circumvention is a valid theory of corruption." *McConnell*, 540 U.S. at 144 (quoting *Colorado II*, 533 U.S. at 456); *see McCutcheon*, 572 U.S. at 218; *Beaumont*, 539 U.S. at 155. The question here, then, is whether limits on party coordinated spending in fact "prevent circumvention of the base limits." *McCutcheon*, 572 U.S. at 210.

The theory for coordination as circumvention is straightforward: coordinated spending, at least, as relevant to this facial challenge, in its strongest forms, is "virtually indistinguishable from simple contributions." *Colorado I*, 518 U.S. at 624 (opinion of Breyer, J.); *see Colorado II*, 533 U.S. at 444-45; *id.* at 467 (Thomas, J., dissenting). The reason is self-evident. A supporter who underwrites a candidate's media bills is as valuable to the candidate as the supporter who contributes to the candidate directly. *Colorado I*, 518 U.S. at 624 (opinion of Breyer, J.); *see Colorado II*, 533 U.S. at 444-45; *id.* at 467 (Thomas, J., dissenting). The base limit would have little meaning if candidates could simply forward their media bills on to maxed-out donors. Coordination limits prevent that possibility. With such a straightforward theory of corruption under a law so long on the books, the empirical support needed to validate it is modest. *See McConnell*, 540 U.S. at 144.

Experience confirms that, absent regulation, political actors will in fact pursue circumvention via party conduits. *Colorado II* identified a circumvention

strategy popular with the Democratic Party known as "tallying." The scheme enabled donors to "give to the party with the tacit understanding that the favored candidate [would] benefit." *Colorado II*, 533 U.S. at 458-59. Candidates encouraged donors who had maximized their contributions to the candidate's campaign to continue giving to the party on the understanding that the party would allocate the contributions to spending on the candidate. *See id.* at 459. Candidates understood that the support they received from the party would be a function of the amount they raised for it; contributors understood that the amount they contributed to the party would be credited to their preferred candidate. *Id.* The party maintained this system by tallying contributions "to connect donors to candidates." *Id.* The scheme is direct evidence that coordination limits target circumvention of the base contribution limits and that opening "the floodgates" on coordinated spending would close the door on meaningful base limits. *Id.* at 459 n.22.

A decade after *Colorado II*, the en banc Fifth Circuit concluded in *In re Cao* that the risks identified in *Colorado II* persisted. The plaintiffs in that case, including the RNC, admitted they had "taken steps to circumvent the Act's individual donor contribution limits." *In re Cao*, 619 F.3d at 429. "The district court found that 'the RNC encourages its candidates to tell their "maxed out" donors to contribute to the RNC.'" *Id.* (brackets omitted) (quoting *Cao v. FEC*, 688 F. Supp. 2d 498, 526 (E.D. La. 2010)). The candidate in that case, Representative Cao, confirmed the practice, testifying in his deposition that he had "personally suggested to donors who had given the maximum

amount to his campaign that they could also contribute to the party." *Id.* (quoting *Cao*, 688 F. Supp. 2d at 526). The RNC later exchanged donor lists with its candidates so the party could see who had contributed to a campaign and vice versa. *Id.* These practices confirm that the circumvention risk identified in *Colorado II* still lurks beneath the coordination limits' surface.[7]

The FEC also goes a step beyond showing that the coordination limits are in fact anticircumvention measures by identifying a storied tradition of quid pro quo corruption capitalizing on party conduits. It starts with examples as infamous as Teapot Dome, recounting how two oil industry executives relieved the Republican Party of a $1.5 million debt in apparent exchange for executive action granting them a favorable lease on Teapot Dome's oil reserves. The scandal helped motivate Congress's early campaign finance laws. Those laws, however, did not remove political parties from the funneling business. The dairy industry in the 1970's channeled millions of dollars to President Nixon through the Republican Party and its various committees, milking a $100 million subsidy from President Nixon in exchange. *See Buckley v. Valeo*, 519 F.2d 821, 839 & n.36 (D.C.

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[7] This dynamic operates in other contexts as well. *McConnell* explained how in the lead up to BCRA, parties worked with donors and candidates to use the soft money loophole to circumvent the base contribution limits. *See McConnell*, 540 U.S. at 146. A similar dynamic exists under the so-called "internet exemption." *Campaign Legal Ctr. v. FEC*, No. 22-5336, --- F.4th ---, 2024 WL 3335909, at *1 (D.C. Cir. July 9, 2024). This is all the more evidence that donors capitalize on circumvention opportunities wherever they are presented.

Cir. 1975). President Nixon's misconduct, in turn, motivated the 1974 FECA amendments that form the heartland of the law today. *See Wagner v. FEC*, 793 F.3d 1, 12-13 (D.C. Cir. 2015). But parties have nonetheless continued serving as conduits for quid pro quo exchanges. Representative Bob Ney, as just one example, pleaded guilty in 2006 "to a series of quid pro quos with the lobbyist Jack Abramoff" that included contributions to the NRCC that Ney solicited as quids in return for legislative quos. *See id.* at 15.

States tell the same story. Wisconsin Senate Majority Leader Charles Chvala pleaded guilty to felony corruption charges in response to a criminal complaint alleging that he distributed political favors in exchange for contributions to the state's Democratic committees. *See generally* R. 38-38. Ohio business executive Steven Pumper pleaded guilty to contributing funds to the Cuyahoga County Democratic Party that he knew would be earmarked for a school board member's campaign in exchange for the board member using his position to help award construction contracts to Pumper's company. *See Construction Executive Steven Pumper Sentenced To Eight Years In Prison For Paying Bribes To Public Officials*, U.S. Att'ys Off. N.D. Ohio (Dec. 4, 2013), https://perma.cc/M87Z-P9P7. Another Ohio business executive, Karen L. Finley, pleaded guilty to charges of conspiracy to commit bribery for her role in funneling campaign funds to Columbus elected officials through contributions to the Franklin County Democratic Party and the Ohio Democratic Party in exchange for local government contracts. *See* Information, *United States v. Finley*, No. 2:15-CR-148, ECF No. 3, PageID 6-11 (S.D. Ohio 2015).

All this evidence demonstrates that contributions to parties are in fact used to circumvent the base contribution limits and that parties are indeed vulnerable conduits for quid pro quos. Coordinated expenditures offer "special value" to a candidate, leaving it "beyond serious doubt" that "contribution limits would be eroded" and the "inducement to circumvent" the base limit "enhanced" were party coordinated spending declared "wide open." *Colorado II*, 533 U.S. at 457, 464-65.[8]

The plaintiffs resist this conclusion in three ways. They argue first that Congress enacted the coordinated spending limits not to combat quid pro quo corruption but for the forbidden goal of reducing "what it saw as wasteful and excessive campaign spending." *Colorado I*, 518 U.S. at 618 (opinion of Breyer, J.). They draw that conclusion from *Colorado I* and *Buckley*, which speculated that "limitations on *overall* campaign expenditures" may have been

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[8] To put the scale of the new enticement in concrete terms, unleashing coordinated spending would immediately multiply donor contribution power by 13.5 times in House races and 38.5 times in Senate races. That is because absent coordinated spending limits, an individual donor could contribute to her preferred candidate not only the $3,300 base contribution amount per election, but, acting through the party, the additional $41,300 annual party contribution amount. Over the course of a two-year House election cycle, that enables the donor to increase the $6,600 she could have contributed to the candidate directly (assuming maximum contributions to both the primary and general elections) to $89,200 (assuming maximum annual contributions). Over a six-year Senate cycle, contributing through a party enables a donor to increase the $6,600 she could have contributed to the candidate directly to $254,400 (making the same assumptions).

calculated to serve that end. *Buckley*, 424 U.S. at 54 (emphasis added); *see Colorado I*, 518 U.S. at 618 (opinion of Breyer, J.). But those cases nowhere suggested that *coordinated* expenditure limits served such a function. To the contrary, FECA defined coordinated expenditures as a form of contribution under its "functional" conception of that term, and there can be no doubt that FECA's contribution limits were imposed to combat quid pro quo corruption and its appearance. *Colorado II*, 533 U.S. at 438, 440-41; *see Buckley*, 424 U.S. at 26. *Colorado II* therefore concluded that the party coordinated spending limits were in fact valid anti-corruption measures, and the plaintiffs have provided no independent evidence undermining that conclusion. *Colorado II*, 533 U.S. at 456-57 & n.19.

The plaintiffs, joined now by my concurring and dissenting colleagues, next contend that the FEC's evidence of quid pro quo corruption, a sampling of which is discussed above, does not show that the limits in fact target corruption. They claim the FEC can satisfy its evidentiary burden only by identifying specific instances of a donor funding party coordinated spending in exchange for an official act, and that it has failed to do so. But the Supreme Court sees things differently: the Commission need only show that the coordination rules "prevent circumvention of the base limits." *McCutcheon*, 572 U.S. at 210. And despite the "difficulty of mustering evidence to support long-enforced statutes," *Colorado II*, 533 U.S. at 457, the FEC has adduced that evidence here and more, showing not only that the limits serve their anti-circumvention goal, but also that party spending remains a conduit for quid pro quo corruption, with

coordinated spending the most "efficient and effective" form that spending takes, R. 49-1, PageID 5515. That evidence discharges the Commission's burden.

The plaintiffs' final rejoinder, again echoed by my colleagues, is that the limits are too underinclusive to be characterized as anti-corruption measures. They observe that FECA permits unlimited coordinated spending on get-out-the-vote activities and licenses coordinated spending on party infrastructure at many times the base limit, exceptions they say cannot be squared with the proposition that the more general limits combat corruption.

As explained, however, the First Amendment "imposes no freestanding 'underinclusiveness limitation,'"—its significance, again, is in rooting out "whether the government is in fact pursuing the interest it invokes'"—and lawmakers may "focus on their most pressing concerns" without addressing "all aspects of a problem in one fell swoop." *See Williams-Yulee*, 575 U.S. at 448-49 (first quoting *R.A.V.*, 505 U.S. at 387; and then quoting *Brown*, 564 U.S. at 802). Laws "that conceivably could have restricted even greater amounts of speech in service of their stated interests" may therefore pass even strict scrutiny. *Id.* at 449.

The first exception the plaintiffs invoke—get-out-the-vote activity—comes from the Bipartisan Campaign Reform Act, or "BCRA." The "prime motivating force" behind BCRA was closing the soft money loophole for sham issue advertising that Congress concluded had "virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble." *McConnell*, 540 U.S. at

169-70 (quoting S. Rep. No. 105-167, pt. 3, at 4535 (1998) (additional views of Senator Collins)). Congress was entitled to address those "pressing concerns" without restricting ancillary forms of speech that had not proven so corrosive, *see Williams-Yulee*, 575 U.S. at 449—indeed, had it restricted financing of volunteer-distributed yard signs without evidence of corruption, BCRA would surely have met with accusations of *over*-inclusiveness. The law does not betray an improper government interest motivating the party coordinated expenditure limits.

The second exception the plaintiffs identify—special-purpose accounts—comes from the Cromnibus amendments. As discussed, the Cromnibus amendments increased contribution and coordinated spending allowances for three categories of party-building activities. These special-purpose categories involve relatively "benign" spending, most of which does not benefit any one candidate directly, that Congress could reasonably have concluded poses a less acute risk of corruption than contributions like those that fund television advertisements for a specific race. *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 550 (D.C. Cir. 2019). The special-purpose accounts are thus entirely consistent with the anti-corruption goal of the party coordinated expenditure limits. In fact, taken together, the increased allowances for get-out-the-vote and party-building activities reflect limits precisely tailored to Congress's "most pressing concerns"—not evidence of improper motivation. *See Williams-Yulee*, 575 U.S. at 449.

All in all, the Commission's evidence and experience show both that the party coordinated spending limits prevent circumvention of the base limits and that

parties have throughout history been used as conduits in quid pro quo corruption schemes. Congress limits coordinated spending for precisely these reasons, and it has over the years calibrated the limits in connection with the corruptive risk of various campaign activities. Even despite the "difficulty of mustering evidence to support long-enforced statutes," the FEC has demonstrated that the party coordination limits combat quid pro corruption and its appearance. *Colorado II*, 533 U.S. at 457.

B.

A contribution limit that addresses quid pro quo corruption must also be "closely drawn to avoid unnecessary abridgment of associational freedoms." *McCutcheon*, 572 U.S. at 218 (quoting *Buckley*, 424 U.S. at 25). Closely drawn tailoring is less stringent than strict scrutiny. *Id.* It requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." *Id.* (ellipses omitted) (quoting *Fox*, 492 U.S. at 480).

The party contribution limit reflects Congress's careful balancing of two competing interests: preventing quid pro quo corruption on the one hand and promoting strong political parties on the other. FECA strengthens political parties by licensing them to receive larger individual contributions than candidates may accept and to engage in coordinated spending other groups may not conduct. It checks that power through moderate limits on coordinated

spending, without which the base contribution limit—a valid anti-corruption measure, all agree—would become a nullity. These coordination limits are themselves neatly tailored. The limits vary by candidate depending on the office sought and voting age population served, increasing parties' capacity for speech in states where each contribution's value is diluted. The limits exempt spending on volunteer get-out-the-vote activities, which pose a less urgent risk of corruption. And they are relaxed for three special-purpose party-building functions that pose a similarly moderate threat. All this has produced limits carefully tuned to the particular evils Congress identified over years of investigation and experience.

The plaintiffs maintain that this tailoring is not enough, identifying three alternative measures they contend would accomplish Congress's anti-circumvention goals through less restrictive means. My colleagues agree on each score. Tellingly, all do so only after omitting most of the closely drawn standard laid out in *McCutcheon*, erasing its acceptance of a "reasonable" fit, *McCutcheon*, 572 U.S. at 218 (quoting *Fox*, 492 U.S. at 480), and reducing the test to three words plucked from a 40-page opinion: a "rigorous" form of "narrow tailoring," Maj. Op. at 8; *see* Thapar Concurring Op. at 22; Dissenting Op. at 93; First Br. 42; *McCutcheon*, 572 U.S. at 197, 218. The dissent acknowledges that the test does not call for "the least restrictive means" available, but nonetheless goes on to fault the FEC for settling on the coordination limits when "a less restrictive alternative" remained available. Dissenting Op. at 102 (quoting *McCutcheon*, 572 U.S. at 218). These views collapse the distinction between expenditures and

contributions that the Supreme Court has repeatedly upheld.

The plaintiffs' alternatives are, in any event, unavailing. The first alternative the plaintiffs propose is the base limit on individual contributions to parties. They argue that reducing the limit on contributions a party may accept, $41,300 per year in 2024, would reduce the power of any individual to channel a corrupting amount through a party committee while preserving the ability of parties to coordinate freely with candidates. That solution, however, ignores Congress's competing interest in maintaining party strength. Reducing the limit on contributions to parties would inevitably curtail party fundraising ability, taking party capacity for independent spending—the category of political speech with the greatest constitutional protection—down with it. That replaces a moderate First Amendment burden with a more extreme one, a proposal at odds with constitutional tailoring. Given the choice between "competing constitutional interests in" this area in which Congress "enjoys particular expertise," *McConnell*, 540 U.S. at 137, Congress was "entitled to its choice," *Colorado II*, 533 U.S. at 464-65.

The plaintiffs' second alternative is FECA's existing disclosure requirement. They contend that disclosure is "a less restrictive alternative to flat bans on certain types or quantities of speech" and is now "effective to a degree not possible at the time [of] *Buckley*." *McCutcheon*, 572 U.S. at 223-24. But the Supreme Court has never suggested that disclosure is an adequate substitute for the base contribution limits, to which coordinated expenditures are the "functional equivalent." *Colorado II*, 533 U.S. at 447. And

disclosure seems a particularly poor deterrent for party conduit quid pro quos. In a world of unlimited coordinated spending, disclosures would continue to reveal only who made reportable contributions to a party and how much that party spent in coordination with each candidate, failing to identify the tacit candidate-contributor agreements that motivated specific pass-through contributions. The prospect of disclosing coordinated spending should deter corruption even less effectively in the context of coordinated spending than it does in the context of direct candidate contributions. Indeed, it is not hard to imagine a wary donor eschewing direct contributions to a candidate altogether when presented with the equally valuable, and more discreet, possibility of supplying uncapped party coordinated expenditures. Just as Congress's tools for preventing quid pro quo corruption are not confined to disclose-on-the-front-end, prosecute-on-the-back-end in the world of contributions to candidates, they are not so limited in the world of party coordinated expenditures.

The plaintiffs' third alternative is earmarking. FECA's earmarking provision treats contributions "earmarked or otherwise directed through an intermediary or conduit to [a] candidate" as contributions to that candidate. 52 U.S.C. § 30116(a)(8). FEC regulations define earmarking as any "designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate." 11 C.F.R. § 110.6(b)(1). The plaintiffs contend that

these earmarking provisions prohibit the collusion that party coordinated spending limits are designed to capture, rendering the limits unnecessary. In other words, the plaintiffs ask the FEC to count on illicit contributors exercising financial power over beholden candidates so openly that they will have to self-report their transactions.

That is never how "actual political conditions" have played out. *Colorado II*, 533 U.S. at 462. In practice, candidates solicit donations from well-heeled supporters, supporters contribute to the party once they have hit their preferred candidate's contribution limit, and the party spends to support their candidates in proportion to the amount each candidate has raised for the party. This well-oiled machine ensures that contributions will be effectively allocated without the agreements necessary to trigger earmarking, and these dynamics are at play in both major parties. *See id.* at 458-60; *In re Cao*, 619 F.3d at 429. Common sense and this experience make clear that earmarking captures "only the most clumsy attempts to pass contributions through to candidates." *Colorado II*, 533 U.S. at 462.

The potential for earmarking to neutralize party conduit corruption has, moreover, eroded over time with the rise of joint fundraising committees. Joint fundraising committees enable a single donor to consolidate their support in a joint committee that links federal party committees, state party committees, and outside PACs aligned with the same party. Br. of *Amici Curiae* Campaign Legal Ctr. & CREW at 22-27. Candidates and parties alike may solicit single checks to a joint committee—often named after a candidate, e.g., John Doe's Victory Fund—

which is then divided among the participating committees according to a predetermined allocation formula and capped only by the applicable contribution limits. *Id.* With the aggregate limits on such contributions dissolved by *McCutcheon*, joint committee contributions can now approach $1 million per donor. *Id.* at 24-25. And joined party committees may transfer these funds to a single party committee, arming that committee with a war chest to unleash on the headlining candidate's race. *See* 52 U.S.C. § 30116(a)(4); 11 C.F.R. §§ 102.6(a)(1)(ii), 110.3(c)(1). This leaves the beneficiary candidate, well aware of who contributed what to the joint fundraising committee and how the selected party committee intends to use the funds, with even more reason to reward generous donors with political favors. No form of earmarking can check that risk.

* * *

The plaintiffs' facial challenge must show that every application of the party coordinated spending limits is unconstitutional. Yet the Supreme Court has recognized since *Buckley* that coordinated expenditures, at least in some forms, "have virtually the same value to the candidate as a contribution" and pose the same "dangers of abuse." *See Buckley*, 424 U.S. at 46 & n.53. Even the *Colorado II* dissenters recognized that the statute "covers a broad array of conduct" that includes spending, like "direct payment of a candidate's media bills," that is "virtually indistinguishable from simple contributions." *Colorado II*, 533 U.S. at 462 (Thomas, J., dissenting) (quoting *Colorado I*, 518 U.S. at 624 (opinion of Breyer, J.)). And the dissent here does too, acknowledging that a "candidate could create and produce an

advertisement before handing it off to a party committee for publication and payment, leaving the committee in essence to foot the candidate's bill." Dissenting Op. at 91. My colleagues would nevertheless invalidate the limits because "coordination between a party and its candidate may well occur in more mundane ways" as well. *Id.*; *see* Thapar Concurring Op. at 18-19. But the focus must be on "circumstances in which" the limits are "most likely to be constitutional," not "hypothetical scenarios where" the limits "might raise constitutional concerns." *United States v. Rahimi*, 144 S. Ct. 1889, 1903 (2024). Confronted with this constitutional application of the coordination limits, the plaintiffs' facial challenge fails.

IV.

The concurrences, in many respects, would rework the law even more dramatically than the dissent. My concurring colleagues respect the rule of vertical stare decisis but share no such taste for horizontal stare decisis. Judge Thapar and Judge Bush explain in their separate but related writings that were they vested with Supreme Court authority, they would jettison a century of well-trodden First Amendment law and replace it with the nascent "history and tradition" test installed two terms ago in *Bruen*. *See* Thapar Concurring Op. at 13-14; Bush Concurring Op. at 26-28. As they see it, when parties raise a First Amendment question, we should offer a two-step answer. First, ask whether the "Amendment's text covers an individual's conduct." Thapar Concurring Op. at 13 (quoting *Oakland Tactical Supply, LLC v. Howell Twp.*, 103 F.4th 1186, 1203 (6th Cir. 2024)

(Kethledge, J., dissenting)); *see* Bush Concurring Op. at 27. Second, assuming it does, ask whether the government has justified the "regulation by demonstrating that it is consistent with the Nation's historical tradition." Thapar Concurring Op. at 13-14 (quoting *Oakland Tactical Supply*, 103 F.4th at 1203 (Kethledge, J., dissenting)); *see* Bush Concurring Op. at 27-28.

I would pause before grafting *Bruen*'s Second Amendment framework onto the First Amendment and other areas of American constitutional law. The test is, as the concurrences bring to the fore, plagued by theoretical and practical pitfalls. Its expansion risks undermining the judiciary's democratic legitimacy, straining its institutional competence, and doubling down on the series of flawed and underdeveloped premises that support it. I close by explaining why I would stick to "the well-trodden path." *Vidal v. Elster*, 602 U.S. 286, 325 (2024) (Sotomayor, J., concurring).

A.

Judge Thapar calls for adopting *Bruen*'s "history and tradition" test to "guide our First Amendment jurisprudence," offering two principal justifications for expanding the standard's reach. Thapar Concurring Op. at 13. He asserts that the history and tradition approach frees judges from making "free-wheeling policy judgments," preserving the judiciary's "democratic legitimacy." *Id.* at 16. He also maintains that by directing judges to plumb the reserves of "legal history," the test returns the judiciary to its core "institutional competence." *Id.* at 15-16. These objectives and hypotheses are, as theories, fair

enough. But let's be clear: Judge Thapar's proposal to make history and "tradition dispositive is *itself* a" policy judgment. *Vidal*, 602 U.S. at 324 (Barrett, J., concurring). And it does not score well on his own rubric.

I begin with the appeal to democratic legitimacy. Judge Thapar would "defin[e] the contours of the First Amendment" by looking to regulations that existed "around the time of ratification." *See* Thapar Concurring Op. at 13. Those regulations are, however, an odd place to locate democratic values. When the First Amendment was ratified in 1791, the franchise was generally limited to white and "property-owning men." Gilda Daniels, *Democracy's Destiny*, 109 Cal. L. Rev. 1067, 1099 (2021). And only they could "hold office." Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 976 (2002). It took generations to extend political participation to Black men; generations more to relinquish it to women. *See id.* at 961, 1043. The history and tradition test would nevertheless constrict constitutional meaning to the understandings endorsed only by the most privileged white men of the founding generation, arrogating to that plutocratic minority retroactive and everlasting authority to delimit the Constitution's bounds today. Whatever merits may attend stopping constitutional time in that era, democratic legitimacy cannot be among them.

I turn next to institutional competence. Judge Thapar's theory is that judges are "creatures of precedent and legal history," not policy and "econometric training." Thapar Concurring Op. at 15. So, the argument runs, blinkering considerations

outside the historical record keeps us in our rightful lane. But how we get from the premise that judges are creatures of precedent to the conclusion that judges should shirk that precedent in favor of becoming armchair historians is anyone's guess. Far from connecting those dots, the Supreme Court's latest exploration of history and tradition in *Rahimi* generated seven conflicting writings, leaving lower courts to guess, as Judge Bush's concurrence does here, what "perhaps a majority" of the Supreme Court "appears" to think about using "history and tradition" to assess "the constitutionality of [a] regulation" in a particular case. Bush Concurring Op. at 30.

And if the test has thrown the high court into disagreement, it has hurled lower courts into "chaos." *Rahimi*, 144 S. Ct. at 1929 n.3 (Jackson, J., concurring); *see id.* at 1897 (majority opinion) (lower "courts have misunderstood" the history and tradition test); *id.* at 1907 (Sotomayor, J., concurring) ("lower courts [are] struggling to apply" the history and tradition test); *id.* at 1923 (Kavanaugh, J., concurring) (lower courts may have a "difficult" time "[d]eciding constitutional cases" under the Court's "still-developing" history and tradition test); *id.* at 1925 (Barrett, J., concurring) (lower courts "have struggled with [the] use of history in" applying the history and tradition test); *id.* at 1926 & 1927 n.1 (Jackson, J., concurring) ("lower courts are struggling" to apply the history and tradition test); *id.* at 1930-47 (Thomas, J. dissenting) (the Court itself misapplies the history and tradition test). Courts applying *Bruen* have reached "conflicting conclusions on virtually every consequential Second Amendment issue to come before them." *Rahimi*, 144 S. Ct. at 1927 (Jackson, J.,

concurring) (quoting Brief for Second Amendment Law Scholars as Amici Curiae 4-5). As one district court put it, trial judges are not, it turns out, "experts in what white, wealthy, and male property owners thought about [] regulation in 1791." *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) (order).

Judge Bush's concurrence well-exemplifies lower courts' inability to apply the history and tradition standard. That test, the Supreme Court explained in *Rahimi*, calls for "considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898. Courts "must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'applying faithfully the balance struck by the founding generation to modern circumstances.'" *Id.* (brackets omitted) (quoting *Bruen*, 597 U.S. at 29). "Why and how the regulation burdens the right are central to this inquiry." *Id.* "The law must comport with the principles underlying the" constitutional provision, "but it need not be a 'dead ringer' or a 'historical twin.'" *Id.* (quoting *Bruen*, 597 U.S. at 30).

Nevertheless, the history and tradition test results in the hunt for just such a long-lost twin. Ignoring *Rahimi*'s focus on legal principles—the why and how of founding era regulation—Judge Bush's concurrence casts aside "the Framers' general concerns about factions and corruption" as the appropriate level of generality for the inquiry. Bush Concurring Op. at 32. His concurrence instead digs "into the weeds" of the historical record in search of "per se limitations on the ability of individuals or groups to contribute and

coordinate political expenditures." *Id.* at 31. The writing emphasizes its belief that this degree of specificity is required, underscoring that the FEC failed to "point to a single piece of historical evidence that anyone in the Founding generation considered the *amount* or *degree of coordination* for political contributions to be sanctionable." *Id.* It insists on a "specific law that regulated the coordination of expenditures and spending for political speech." *Id.* at 32. That is precisely the approach the Court rejected in *Rahimi*. *Rahimi*, 144 S. Ct. at 1903. And though this search for a dead ringer is dead wrong, the effort spent "slaying a straw man" captures perfectly the foibles of the history and tradition test. *Id.*

In short, Judge Thapar's democratic justifications for the history and tradition test would not generate democratic legitimacy in our society, they would ensure a society "trapped in amber," petrified in the antidemocratic past. *Rahimi*, 144 S. Ct. at 1897. His institutional competency justifications, meanwhile, are irreconcilable with the experience of Supreme Court Justices, legions of lower courts, and our own colleague in this case, all of whom have struggled to apply his test.

B.

Judge Bush starts from a premise similar to Judge Thapar's, arguing that history and tradition alone can ensure a "court does not implement its own policy judgments about, for example, free speech or gun regulation." Bush Concurring Op. at 30 (quoting *Rahimi*, 144 S. Ct. at 1910 (Kavanaugh, J., concurring)). That is a sympathetic aim. But as already stressed, "rendering tradition dispositive is

itself a" policy judgment. *Vidal*, 602 U.S. at 324 (Barrett, J., concurring). And the policy judgments do not end there. What is "the right level of generality" at which to interpret the historical record? *Rahimi*, 144 S. Ct. at 1926 (Barrett, J., concurring). "[H]ow many cases or laws would suffice" to show a tradition? *Bruen*, 597 U.S. at 112 (Breyer, J., dissenting). "How long after ratification may subsequent practice illuminate original public meaning?" *Id.* at 82 (Barrett, J., concurring). Which individual rights should be frozen in 1791, which reimagined in 1868? *See Rahimi*, 144 S. Ct. at 1898 n.1. When is history and tradition "dispositive," *Vidal*, 602 U.S. at 324 (Barrett, J., concurring), when does it simply "confirm[]" evidence amassed from other inputs, *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 477 (2022), and when must it yield to "competing considerations," *Trump v. United States*, 144 S. Ct. 2312, 2331 (2024); *see generally Trump v. Anderson*, 601 U.S. 100 (2024) (per curiam)? Policy decisions all.

Judge Bush's concurrence offers three features of the history and tradition test that he says make it a valuable constitutional guide. His first claim is that "history allows us to understand linguistical meaning at the time of ratification." Bush Concurring Op. at 27. The Constitution's "'original history' serves to 'elucidate how contemporaries' in the ratification generation 'understood the text—for example, the meaning of the phrase "bear Arms"' in the Second Amendment." *Id.* (brackets omitted) (quoting *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring)).

Judge Bush's promise that constitutional text has a "discoverable historical meaning" that "is fixed at the time of its ratification" and ascertainable now may

have some theoretical appeal, but the theory runs into unresolvable practical restraints. *Rahimi*, 144 S. Ct. at 1924 (Barrett, J., concurring) (quoting K. Whittington, *Originalism: A Critical Introduction*, 82 Ford. L. Rev. 375, 378 (2013)). At the outset, Judge Bush's proposal that we confine ourselves to digging through historical legal analogues to discern the fixed "original public meaning" of the Constitution's "communicative content," *see* Randy E. Barnett, Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 Nw. U. L. Rev. 433, 436 (2023), is a dangerously skewed, and oddly myopic, way of going about the task. Why leave other evidence of meaning off the table?

Beyond that, judges, as demonstrated, do not become "oracles" when asked to search "far into the dimmy past." *See Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). And who can blame us? History tells a murky tale, and what some jurists will see as a historical record whose conclusions are "not debatable," *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008), others will see as "provid[ing] a clear answer" in the other direction, *id.* at 637 (Stevens, J., dissenting), and still others will decry as rewritten in "one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I've ever seen in my lifetime," *MacNeil/Lehrer NewsHour: Interview by Charlayne Hunter-Gault with Warren Burger* (PBS television broadcast Dec. 16, 1991). This bug, it bears emphasizing, frustrates not only the exercise of judicial judgment in the "construction zone" of constitutional interpretation—where interpretive

methods inexorably clash whatever the method—but at the antecedent stage of setting the terms of the debate. *See* Barnett & Solum, *supra*, at 436-38. And as the historical record grows more opaque, the risk grows more acute that judges will commit the historical "equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends"—the very evil history and tradition is supposed to guard against. *Conroy*, 507 U.S. at 519 (Scalia, J., concurring). Neither Judge Bush nor Judge Thapar offers a solution to the problem that their proposed test licenses forays into "the dimmy past," without objective criteria to cabin judicial cherry-picking. *Id.*

Judge Bush's second claim is that pre-ratification history enables us "to determine categories of private conduct that were typically subject to regulation by government when the relevant constitutional text was ratified." Bush Concurring Op. at 27. The inference is that if conduct went unregulated, that "conduct is constitutionally protected," and that if conduct was regulated, "the constitutional text does not bar government intervention." *Id.*

This argument rests on three unstated and untenable premises. The theory starts with the assumption that pre-ratification lawmakers exercised the full universe of their regulatory powers. It presumes, in other words, that if pre-ratification policymakers declined to prohibit the use of, say, "muskets," they did so not as matter of policy but because of some external constraint on their authority. *See Rahimi*, 144 S. Ct. at 1897-98. The next premise is the converse inference—that if a practice was proscribed in the pre-ratification era, that prohibition

was consistent with individual rights as they were understood at the time. Founding era regulations, the argument runs, prevailed because they were legitimate, not because in an era that predated the constitution, and the power of judicial review that followed it, no court had yet had "occasion" to address them. *See id.* at 1923 (Kavanaugh, J., concurring). The last premise is that ratifying the constitution did nothing to change our constitutional order. Regulations permissible pre-ratification remained permissible post-ratification; laws impermissible pre-ratification remained impermissible afterward.

I cannot accept this logic. To be sure, there is an element of truth to each premise as far as each goes—pre-ratification legislatures may have acted with some measure of respect for what they conceived as individual rights, and some of those rights may have been codified in the Constitution. But just as surely, our forebears were as constrained by policy as much as power, tested the limits of their authority as much as today's lawmakers test theirs, and ratified the Constitution to perfect the status quo, not to enshrine it wholesale. That reality is essential to placing pre-ratification history in its proper context and underscores the folly of treating past as providence.

Judge Bush's third claim is that we can use post-ratification history to the same ends. The absence of post-ratification regulation of certain conduct, he contends, shows "government was not understood to have the constitutional authority to regulate that conduct"; the presence of it shows "that constitutional power to regulate was understood to exist." Bush Concurring Op. at 27-28.

The post-ratification theory, like the pre-ratification one, makes the same faulty assumption that ratification-era legislatures exercised the full extent of their powers, but only the full extent of their powers (the Alien and Sedition Acts would like a word).[9] And it brings with it a host of additional problems (many of which apply with similar force to the pre-ratification conundrum). How "widespread" must "a historical practice [] have been" to carry constitutional significance? *Rahimi*, 144 S. Ct. at 1916 n.4 (Kavanaugh, J., concurring). When must the practice "have started?" *Id.* (Kavanaugh, J., concurring). How long must it "have endured?" *Id.* (Kavanaugh, J., concurring). No one, on the Supreme Court or our court, quite knows. *See id.* (Kavanaugh, J., concurring); *Bruen*, 597 U.S. at 81-83 (Barrett, J., concurring). Rest assured, we are told, the nation's most "[r]espected scholars are" working on it. *Rahimi*, 144 S. Ct. at 1916 n.4 (Kavanaugh, J., concurring). But I am not assured by that suggestion, and I would not leave our time-tested body of First Amendment jurisprudence to forge down such a fraught path.

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The concurrences of Judges Thapar and Bush underscore the theoretical flaws and practical limitations of the history and tradition test. Raising

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[9] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273, 276 (1964) (cataloging the "broad consensus" that the Alien and Sedition Acts, which made it a crime to "write, print, utter or publish any false, scandalous and malicious writing or writings against the government of the United States" and were "never tested in" the Supreme Court, were "inconsistent with the First Amendment").

more questions than answers, they uncurtain the paradigm as an exercise in judicial and academic experimentation.[10] Our country always has, to be sure, been a "great experiment." Letter from George Washington to Catharine Sawbridge Macaulay Graham (January 9, 1790). But I would exercise restraint before subjecting it to more of this one.

V.

Though, respectfully, I would not have reached many of the issues my colleagues raise, I concur in the en banc majority's answer to the certified question. The "limits on coordinated party expenditures in § 315 of the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. § 30116," do not "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." *See* R. 49, PageID 5494.

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[10] Judge Bush objects to this characterization and instead casts his vote for a different "great experiment." Bush Concurring Op. at 26 n.1. The fact remains, however, that until this year, the Supreme Court "ha[d] never applied th[e] history-and-tradition test to a free-speech challenge." *Vidal*, 602 U.S. at 327 (Sotomayor, J., concurring). The application of this nascent test to new areas of constitutional law is, in my view, the epitome of judicial experimentation, as the notable struggle of judges to apply this test reveals.

CONCURRING IN THE JUDGMENT

BLOOMEKATZ, Circuit Judge, concurring in the judgment. I agree that *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*") remains binding precedent and the plaintiffs' arguments for abandoning it are unpersuasive, as articulated in Parts I and II of Judge Stranch's concurrence. That is all that is needed to resolve this case.

DISSENT

CHAD A. READLER, Circuit Judge, dissenting. As a visit to any social media site makes abundantly clear, political speech, in particular speech on electoral matters, holds a central place in American life. That political opinions are so widely expressed, if not widely shared, has a long pedigree, tracing back to the founding. As James Madison put the point while criticizing the 1798 Sedition Act, which punished speech against Congress: "the essential difference between the British government and the American constitutions" was that, on this side of the Atlantic, the people possessed "absolute sovereignty." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 569 (Jonathan Elliot ed., 1836) (Madison's Report on the Virginia Resolutions, House of Delegates, Session of 1799–1800). Inherent in that sovereignty is the ability to speak openly against public officials as well as candidates for office. "[T]he right of electing the members of the government," Madison explained, "constitutes more particularly the essence of a free and responsible government." *Id.* at 575. Exercising that right, in turn, requires "examining and discussing [the] merits and demerits of the candidates." *Id.*

These principles are embodied by the First Amendment to the United States Constitution, which prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I. The Amendment protects a range of expressive activity. But it "has its

fullest and most urgent application precisely to the conduct of campaigns for political office." *FEC v. Cruz*, 596 U.S. 289, 302 (2022) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). As judges, then, we are required "to err on the side of protecting political speech rather than suppressing it" when faced with a legal challenge to regulations restricting such conduct. *Id.* at 308 (quoting *McCutcheon v. FEC*, 572 U.S. 185, 209 (2014) (plurality opinion)).

With this understanding in mind, we confront a law limiting coordinated expressive activity between political party committees and their candidates. The National Republican Senatorial Committee, Republican Senator J.D. Vance, and former Republican Representative Steve Chabot together challenge the limits imposed by § 315 of the Federal Election Campaign Act of 1971 (FECA) on coordinated party committee expenditures. *See* 52 U.S.C. § 30116(d). Plaintiffs view those limits as at odds with the First Amendment, both facially and as applied to a subset of coordinated party expenses called "party coordinated communications," in essence, campaign advertising. *See* 11 C.F.R. §§ 109.37(a)(1)–(2), 100.26.

The challenging nature of the task before us bears emphasis. As this case touches election law, and as we find ourselves in the middle of an election season, we aimed to resolve the matter as expeditiously as possible. But because the district court was required to certify plaintiffs' challenge "immediately" to this Court sitting en banc, 52 U.S.C. § 30110, we act without the benefit of either a panel opinion or a decision on the merits by the district court. Much of the district court's efforts, rather, were directed to sifting through voluminous proposed findings of fact to

prepare a more confined record for appellate review. Equally true, by all accounts our work is simply a warm-up for eventual Supreme Court review. *See* First Br. at 23 (preserving in the alternative the argument that the Supreme Court should revisit its earlier campaign finance jurisprudence); Second Br. at 3 (suggesting that plaintiffs' "challenge before this Court is a necessary step in seeking Supreme Court relief"); *see also* Stranch Concurring Op. at 47 (acknowledging the same).

Even in this unusual posture, however, the weakness of the Federal Election Commission's position is apparent. The agency seeks to enforce a regulatory regime curtailing free speech. *See* 52 U.S.C. § 30106(b)(1) (authorizing the FEC to enforce FECA). Not just any speech, but political speech. And not just any speaker, but political parties, whose primary mission is to promote candidates for office. To that end, FECA limits a national party committee's coordinated expenditures, which the FEC defines as those expenditures "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate [or] a candidate's authorized committee." 11 C.F.R. § 109.20. A party committee may not exceed certain coordinated expense thresholds based on a candidate's state, the office sought, voting-age population, and inflation. 52 U.S.C. § 30116(d). In practice, this means that in 2024, party committee spending coordinated with Senate candidates has a limit ranging from $123,600 in the eight least-populated states to $3,772,100 in California. *See id.* § 30116(d)(3)(A)(i)–(ii). Coordinated spending on House races is similarly constrained. *See id.* § 30116(d)(3)(A)(i)–(ii), (d)(3)(B) (capping spending for

House candidates in states with only one representative at $123,600, and at $61,800 per candidate in all other states); *see also Coordinated Party Expenditure Limits*, Fed. Election Comm'n, https://perma.cc/25VD-83D9. In a world where overall campaign spending dwarfs these amounts, the FEC's enforcement efforts handcuff parties and their candidates alike. *See, e.g.*, *Raising: By the Numbers*, Fed. Election Comm'n, https://perma.cc/8Z5C-NJER (reporting $1,038,702,441 raised by all Senate candidates running in 2024 as of August 28, 2024).

These realities help reveal FECA's constitutional flaws. The Act's spending limits "operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). They target political debate, an "integral" aspect "of the system of government established by our Constitution." *Id.* And they serve to "reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Measured by the "rigorous standard of review" the Supreme Court requires, the coordinated expenditure limits fail to honor First Amendment guarantees. *McCutcheon*, 572 U.S. at 197 (citation omitted) (describing the scrutiny applicable to contribution limits).

Against all of this, the FEC points to a lone, largely obsolete precedent. Contrary to the FEC's suggestion, we may not turn back the jurisprudential clock some two decades to save an undeniably infirm law. Accordingly, I would reach the merits of plaintiffs' claims and find that the coordination restrictions violate the First Amendment.

I.

A. Much of the FEC's briefing is dedicated to the notion that we may not reach the weighty legal questions before us as part of a facial challenge to FECA. To the FEC's mind, resolution of those issues is directly controlled by the Supreme Court's decision in *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*, 533 U.S. 431 (2001). Second Br. at 24–30. True, *Colorado II* rejected a facial challenge to coordinated party committee expenditure limits. *Colorado II*, 533 U.S. at 465. And all agree that "lower courts must follow Supreme Court precedent," *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813 (6th Cir. 2020), even when a directly applicable decision "appears to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). As an "inferior Court[]," after all, we understandably take our lead from the Supreme Court. *See* U.S. Const. art. III, § 1.

Yet even those commands have their limits. In the rare case where doctrinal developments have entirely displaced an earlier Supreme Court decision, we must acknowledge as much. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) (criticizing lower courts for continuing to adhere to a dated precedent when it had become "apparent" that the Supreme Court had "long ago abandoned" the legal reasoning undergirding that precedent); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361 (1984) (finding "error" in a lower court applying a precedent that, while not "expressly overruled," failed to "retain[] current validity" in light of subsequent legal developments); *Ceres Terminals, Inc. v. Indus. Comm'n*, 53 F.3d 183,

184–85 (7th Cir. 1995) (Easterbrook, J.) (recognizing the possibility that "an inferior tribunal may disregard opinions that exist more as spectral apparitions than as living forces in the law"); *see also Rowe v. Peyton*, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd* 391 U.S. 54 (1968) ("[T]here are occasional situations in which subsequent Supreme Court opinions have so eroded an older case . . . as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case."). Said differently, we do not mechanically apply earlier Supreme Court doctrine when "events subsequent to the [Supreme Court's] last decision . . . approving the doctrine—especially later decisions by that court, or statutory changes—make it almost certain that the [Supreme Court] would repudiate the doctrine if given a chance to do so." *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986) (Posner, J.); *see also Hobbs v. Thompson,* 448 F.2d 456, 473 (5th Cir. 1971) (declining to apply Supreme Court doctrine that is "out of harmony with . . . a long line of cases decided subsequently"). As a lower court, remember, our concern is less with the precise outcome of a past case than it is with its reasoning and analysis. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989). And we do not apply that reasoning sightless to the context of the earlier decision or ensuing developments. As Justice Gorsuch recently reminded us, "[a] later court assessing a past decision must . . . appreciate the possibility that different facts and different legal arguments may dictate a different outcome." *Loper Bright Enters. v.*

Raimondo, 144 S. Ct. 2244, 2281 (2024) (Gorsuch, J., concurring).

The Supreme Court, in other words, guides us with its reasoning, reasoning we follow unless later repudiated. This approach to precedent is familiar. For instance, when the Supreme Court overruled *Lochner*-era precedent invalidating minimum wage laws, there was no need for lower courts to follow other *Lochner*-era precedent. *See W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Child.'s Hosp.*, 261 U.S. 525 (1923)). If a maximum hour law for bakers, *see Lochner v. New York*, 198 U.S. 45 (1905), or a law regulating the weight of loaves of bread, *see Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924), was challenged after *West Coast Hotel*, the latter case's logic would control. This is because the Supreme Court, through its reasoning in *West Coast Hotel*, "signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation." *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 265 (2022). And there is no shortage of other zombie precedents in the *United States Reports*—that is, cases technically still on the books, but whose logic has been discredited by the "court of history." *Trump v. Hawaii*, 585 U.S. 667, 710 (2018); *see also* Lee Epstein et al., *The Decision to Depart (or not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. Rev. 1115, 1126 (2015) ("The Justices have many techniques for undermining the vitality of their precedents: overruling them *sub silentio*, as well as limiting, questioning, criticizing, or distinguishing previous decisions."). Courts that apply such cases

without reflecting on their subsequent history do no more than treat them as "some ghoul . . . that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

For decades, the circuit courts have heeded this direction. For example, in responding to the government's citation to *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967), and related argument that "statutory silence indicates congressional intent to create a cause of action by implication," the Third Circuit noted that it "would be blind to subsequent developments in a dynamic area of the law . . . if [it] failed to recognize that in recent years the [Supreme] Court has been far more reluctant to infer rights of action for silent statutes." *United States v. City of Philadelphia*, 644 F.2d 187, 192 (3d Cir. 1980) (Aldisert, J.). Likewise, in the context of Establishment Clause jurisprudence, it was the appellate courts that recognized the death of the three-prong test first announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), taking their lead from intervening decisions of the Supreme Court. *See, e.g.*, *Woodring v. Jackson County*, 986 F.3d 979, 981 (7th Cir. 2021) (holding that intervening Supreme Court decisions required the abandonment of the *Lemon* test); *Perrier-Bilbo v. United States*, 954 F.3d 413, 425 (1st Cir. 2020) (same); *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1326 (11th Cir. 2020) (recognizing that "*Lemon* is dead"). The Supreme Court only later penned the doctrine's formal obituary in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022).

We too have been sensitive to changes in the legal landscape. Just last year in considering a nondelegation challenge to the Occupational Safety and Health Act, we declined to apply admittedly "binding" precedents—*Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935)—because doing so would be to read Supreme Court decisions "in isolation." *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 767 (6th Cir. 2023). The year before, in considering the scope of the exhaustion requirement for federal habeas petitions, we refused to follow *Fay v. Noia*, 372 U.S. 391 (1963), understanding it to be an "opinion largely discarded to the dustbin of legal history." *Johnson v. Bauman*, 27 F.4th 384, 392 (6th Cir. 2022). Three years earlier, we declined an invitation to extend the "inclination" in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), to create implied causes of action given subsequent Supreme Court precedent rejecting that approach. *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020). And we similarly refused to apply *Bowers v. Hardwick*, 478 U.S. 186 (1986), where later Supreme Court precedent, which had not yet overruled *Bowers*, had nonetheless undermined its application beyond its specific facts. *Stemler v. City of Florence,* 126 F.3d 856, 873–74 (6th Cir. 1997). In short, the inferior courts routinely read Supreme Court precedent with an eye to whether a precedent's vitality has been undermined by later jurisprudential developments. Indeed, it is our duty to do so.

Viewed in this light, we would be remiss not to account for the wave of intervening precedent that leaves *Colorado II* essentially on no footing at all. Not

only that, but both the statutory and factual backdrops have evolved deeply in the ensuing decades.

1. Most significant is the evolution in the law governing campaign finance. A key aspect of that evolution is the allowable grounds regulators may invoke under the First Amendment to justify restrictions on political speech. Today, the Supreme Court "recognizes only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *Cruz*, 596 U.S. at 305; *see also McCutcheon*, 572 U.S. at 207. In this context, quid pro quo corruption is "a direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192.

To put these developments in perspective, look back at the legal landscape over the last five decades. Ten years ago, the Supreme Court recapped the "series of cases over the [then] past 40 years" that "have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech." *Id.* This long history begins with *Buckley*. There, the Supreme Court considered a First Amendment challenge to FECA's restrictions on individual contributions and independent expenditures. 424 U.S. at 12–13. It treated the two differently. Applying "exacting scrutiny," the Supreme Court declared unconstitutional limits on expenditures "made totally independently of the candidate and his campaign." *Id.* at 44, 47, 51. It did so because restrictions on independent spending represented "substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19.

On the other hand, *Buckley* upheld FECA's contribution limits as a prophylactic measure against "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and . . . actions." *Id.* at 25. In so doing, *Buckley* blessed on constitutional grounds contribution limits (and, it seems, coordinated expenditure limits) so long as they are closely drawn means to achieve a sufficiently important governmental interest. *Buckley*, 424 U.S. at 28–29; *see also Colorado II*, 533 U.S. at 440 ("Ever since we first reviewed the 1971 Act, we have understood that limits on political expenditure deserve closer scrutiny than restrictions on political contributions.").

Further doctrinal developments came about in a case involving the Colorado Republican Party, one that would reach the Supreme Court twice. In *Colorado I*, the Supreme Court, citing *Buckley*, held that limits on a party's independent expenditures violated the First Amendment. *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 618 (1996) (plurality opinion); *see also id.* at 616 ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees."). The case would return to the Supreme Court in *Colorado II*. The question presented there was whether all limits on political party spending, including those on coordinated party expenses, were facially unconstitutional. 533 U.S. at 437. The Supreme Court rejected the facial challenge, upholding limitations on coordination on the basis that they prevented circumvention of individual

contribution limits and, thereby, potential corruption. *Id.* at 465. At this point in its history, it bears emphasizing, the Supreme Court understood "corruption" in this context to reach any form of "undue influence on an officeholder's judgement." *Id.* at 441. Along these lines, coordinated spending, the Supreme Court explained, could be as helpful to the candidate as direct contributions, which themselves raise the specter of corruption in this broad sense. *Id.* at 464–65.

That governing standard has been repudiated by the Supreme Court. And not once, but thrice. Begin with *Citizens United v. FEC*. There, the Supreme Court held that restrictions on political speech could not be justified by "[t]he fact that speakers may have influence over or access to elected officials." 558 U.S. 310, 359 (2010). This is because limits on speech that attempt to prevent "generic favoritism or influence" are "susceptible to no limiting principle." *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring)).

A few years later, the Supreme Court reinforced the idea that the potential for mere influence alone does not justify restrictions on political speech. *See McCutcheon*, 572 U.S. at 207. At issue in *McCutcheon* was a First Amendment challenge to FECA's "aggregate limits" on individual contributions, which capped the total amount a donor could contribute to all candidates. *Id.* at 192–93. In siding with the challengers, the Supreme Court held that only the prevention of quid pro quo corruption or its appearance could justify limits on political speech. *Id.* at 207. While "[t]he line between *quid pro quo* corruption and general influence may seem vague at

times," the Supreme Court emphasized that "the distinction must be respected in order to safeguard basic First Amendment rights." *Id.* at 209. And aggregate contribution limits, the Supreme Court held, could not be justified on the basis of guarding against corruption, as that concept was properly understood. *Id.* at 210–18. Justice Breyer confirmed these understandings in his dissenting opinion. Making a point our concurring colleague fails to acknowledge, Justice Breyer recognized that the definition of "corruption" adopted in *McCutcheon* was "inconsistent with the Court's prior case law," including *Colorado II*, which "upheld limits imposed upon coordinated expenditures among parties and candidates because it found they thwarted corruption and its appearance, again understood as including 'undue influence' by wealthy donors." *Id.* at 235, 240 (quoting *Colorado II*, 533 U.S. at 441)). *But see* Stranch Concurring Op. at 50 n.2 (suggesting that Justice Breyer's dissent "never asserted that *Colorado II* turned on the broader understanding" of corruption).

Any ambiguity on this point was wiped away in *Cruz*. There, the Supreme Court struck down a restriction on the amount candidates may raise after election day to repay loans they made directly to their own campaigns. 596 U.S. at 313. In so doing, it reaffirmed that the prevention of quid pro quo corruption or its appearance was the lone government interest warranting a restriction on political speech. *Id.* at 305. What is more, in both *McCutcheon* and *Cruz*, the Supreme Court went so far as to suggest that strict scrutiny may be the proper lens through which such restrictions are analyzed. *See McCutcheon*, 572

U.S. at 199; *Cruz*, 596 U.S. at 305. And even in applying "closely drawn" scrutiny, in each instance the Supreme Court saw fit to strike down restrictions on political spending. *See, e.g.*, *McCutcheon*, 572 U.S. at 199.

Having made clear that only fears of quid pro corruption may justify infringements on political speech, the Supreme Court also refined what that manner of corruption entails under federal law, further antiquating *Colorado II*. Borrowing from case law in the criminal context, *McCutcheon* understood quid pro quo corruption narrowly as "a direct exchange of an official act for money." 572 U.S. at 192 (citing *McCormick v. United States*, 500 U.S. 257, 266 (1991)) (recognizing as a subset of such corruption "dollars" for official acts); *see also id.* at 239 (criticizing the plurality's importation of "corruption" from federal criminal law as "flatly inconsistent" with *Buckley*) (Breyer, J., dissenting). Other jurisprudential developments have narrowed what constitutes an "official act." The leading example is *McDonnell v. United States*. There, the government prosecuted the former Governor of Virginia for arranging meetings, hosting events, and contacting officials allegedly in return for loans and gifts. 579 U.S. 550, 555–56 (2016). From that collection of activity, the government argued that "nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*," that is, an official act by a public official. *Id.* at 575. The Supreme Court rejected that expansive view. It defined quid pro quo corruption as "the exchange of a thing of value for an 'official act.'" *Id.* at 574. And "an 'official act,'" the Supreme Court explained, "is a decision or action on a

'question, matter, cause, suit, proceeding or controversy,'" and "must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* A long line of other cases has similarly narrowed our understanding of public corruption as well as the ways in which lawmakers and law enforcers may regulate public conduct. *See, e.g.*, *Snyder v. United States*, 144 S. Ct. 1947, 1954 (2024) (holding that a federal statute does not criminalize state and local officials "accept[ing] gratuities for their past official acts"); *Percoco v. United States*, 598 U.S. 319, 330–31 (2023) (declaring as impermissibly vague a standard that extended a duty of honest services to private citizens who "dominated and controlled any governmental business" or were relied on by "people working in the government"); *Kelly v. United States*, 590 U.S. 391, 404 (2020) (holding that a scheme to reduce a town's access to the George Washington Bridge as political payback did not violate federal fraud laws because it "did not aim to obtain money or property").

Importing this understanding of quid pro quo corruption into the present setting, campaign finance regulations must narrowly target the exchange of money for an official's formal exercise of the powers of her office. *See McDonnell*, 579 U.S. at 574. Merely bestowing titles, access to top officials, or convention box seats to a donor, as just some examples, are not a "quo" that campaign finance laws can legitimately target in an effort to stamp out quid pro quo corruption or its appearance. *Cf.* Br. for Campaign Legal Ctr. & Citizens for Resp. and Ethics in Wash. as Amici Curiae Supporting Defendants at 24–25 (describing perks in

the form of titles, access to officials, and convention passes for big backers). The corruption targeted by regulators, in other words, must be concrete, not ephemeral in the ways envisioned by *Colorado II*. Again, *Colorado II*, embracing decisions that preceded it, recognized a notion of corruption encompassing mere "undue influence on an officeholder's judgment." 533 U.S. at 441 (citing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000)). That understanding reflected "a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink Mo.*, 528 U.S. at 389. But that far-reaching legal standard no longer governs. *See McCutcheon*, 572 U.S. at 208 ("[T]he Government may not seek to limit the appearance of mere influence or access.").

Judge Stranch views these developments in a different light. Her concurring opinion sees this legal evolution more as a coronation of *Colorado II* rather than an abdication. Why? Because *Colorado II*'s "discussion of party coordinated spending," to her eye, "focused explicitly on quid pro quo corruption." Stranch Concurring Op. at 50. A fair reading of *Colorado II* says otherwise. By and large, the Supreme Court spoke in broad conceptual points, nebulously invoking a fear of potential corruption tied to coordinated spending, without further explanation. *See, e.g.*, *Colorado II*, 533 U.S. at 460 ("If suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent [contribution limits] would almost certainly intensify."); *id.* at 464 ("Coordinated expenditures of money donated to a party are tailor-made to undermine contribution

limits."). When *Colorado II* spoke more concretely, it did not limit its focus to quid pro quo exchanges. *See, e.g.*, *id.* at 462 (worrying that candidates may give undue weight to "interests particular donors . . . seek[] to promote" (quotation omitted)). And when the decision identified specific examples of the harms the law was seeking to remedy, the list included things like increased donor influence at "special meetings and receptions" that political parties facilitate to afford "donors the chance to get their points across to the candidates" in the absence of coordinated expenditure limits. *Id.* at 461. *But see McConnell*, 540 U.S. at 297 (Kennedy, J., concurring) ("Favoritism and influence are not . . . avoidable in representative politics."). From every angle, in short, *Colorado II* turned on an expansive notion of corruption, not merely the perceived risk of quid pro quo arrangements, as our colleague's concurring opinion would have the reader believe. If one is looking for a writing that has veered into the forbidden territory of "seiz[ing] the prerogative of overturning Supreme Court precedent," Stranch Concurring Op. at 45, the concurring opinion's rewriting of *Colorado II* would be a good place to start.

Adding all of this together, *Colorado II* is not a decision that merely "appears to rest on reasons rejected in some other line of decisions"—its reasoning, rather, has been repeatedly and expressly rejected in the same precedential line. *See Rodriguez de Quijas*, 490 U.S. at 484.

2. Next, consider the changed statutory regime. Congress has amended FECA since the Supreme Court interpreted it in *Colorado II*. Today, FECA allows political parties to maintain "separate,

segregated account[s]" to cover expenses incurred for "a presidential nominating convention"; "the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party"; or "the preparation for and the conduct of election recounts and contests and other legal proceedings." 52 U.S.C. § 30116(a)(9). Notably, party expenditures from these accounts are exempted from the otherwise applicable coordinated expenditure limits. 52 U.S.C. § 30116(d)(5). That Congress has amended the Act in these ways fairly justifies a legal challenge, even against the background of a judicial interpretation of an earlier version of the statute. *See United States v. McNeil*, 362 F.3d 570, 574 (9th Cir. 2004) ("[W]hen Congress amends statutes, our decisions that rely on older versions of the statutes must be reevaluated in light of the amended statute."); *Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc.*, 331 F.3d 834, 840 (11th Cir. 2003) ("[A] clear change in the law by Congress could justify a panel of this court in not following an earlier panel's decision, where the prior panel's decision was based on legislation that had been changed or repealed." (cleaned up)). Indeed, it likely goes without saying that "stare decisis doesn't apply to statutory interpretation unless the statute being interpreted is the same one that was being interpreted in the earlier case." *See* Bryan A. Garner et al., *The Law of Judicial Precedent* 343 (2016). Otherwise, statutory amendments would be shielded from review so long as the revised law retained some semblance to a prior version. The same logic extends to constitutional challenges to a revised statute. *See Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429, 579 (1895) (declining to

resolve a constitutional challenge to a tax statute under decisions considering a different law); Stranch Concurring Op. at 52 (reexamining the statutory changes anew with an eye toward whether they "carry a lighter risk of quid pro quo corruption").

What is more, the nature of the statutory changes here confirms the need for judicial review. Congress exempted from the coordination limits expenses that, in many respects, have a less direct connection with speech, for example, building party headquarters. The remaining limits reveal Congress's and the FEC's target in a way not contemplated by *Colorado II*: political advertising coordinated by a party committee and its candidates. *See* 11 C.F.R. § 109.37. In other words, bedrock First Amendment activity. We owe it to the parties before us to address the constitutional significance of these statutory changes head on.

3. Nor can we overlook that the factual foundation underlying *Colorado II* hardly resembles current realities. *Colorado II* rested on the premise that "political parties are dominant players . . . in federal elections." 533 U.S. at 450 (citation omitted). However true that may have been at the turn of the century, it is far from true today. We have that on good authority. "The current mix of statutes, regulations, and court decisions has left a campaign finance system that reduces the power of political parties as compared to outside groups." *See Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 160 n.5 (D.D.C. 2010) (Kavanaugh, J.). One reason for the decline in party power is the passage of the Bipartisan Campaign Reform Act of 2002 (BCRA). Enacted just one year after *Colorado II*, BCRA prohibited national party committees from receiving

and spending "soft money," that is, money raised at the state and local levels that could nevertheless be used for "generic party advertising" to influence federal elections. *McConnell*, 540 U.S. at 115, 123; *see also* 52 U.S.C. § 30125(a). That ban, upheld by the Supreme Court in *McConnell*, 540 U.S. at 161, resulted in political contributions being directed away from parties and into Super PACs. *See* Sarah Isgur et al., *Restoring the Guardrails of Democracy Project: Report by Team Conservative*, Nat'l Const. Ctr. (July 2022), https://perma.cc/SV4C-ZPNM ("Instead of getting money out of politics, [BCRA] simply transferred power away from the political parties."); Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 Hous. L. Rev. 845, 866 (2017); Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 Sup. Ct. Rev. 175, 188 (2014) ("Money is the oxygen of campaign politics, and it is plainly flowing toward the shadow parties, not the official ones.").

These developments cannot be understated. As the record certified by the district court reflects, Super PAC expenditures for federal elections now far exceed those of political parties. R. 49-1 at 40 ¶ 171 PageID 5535. This reality is impacting all levels of the electoral system, including the grassroots—aided, perhaps ironically, by the FEC. That agency recently issued an advisory opinion instructing that FECA's limits on coordinated communications do not apply to door-to-door canvassing activities undertaken by Super PACs. FEC, Advisory Op. 2024-01 (2024). As a result, campaigns may now effectively delegate on-the-ground political operations—once a staple of the

political party apparatus—to Super PACs, leaving even less room for party influence over the political process. *See* Theodore Schleifer, *Trump Gambles on Outside Groups to Finance Voter Outreach Efforts*, N.Y. Times (Aug. 14, 2024), https://www.nytimes.com/2024/08/14/us/politics/trump-voter-outreach-super-pacs.html; Scot J. Zentner, *Revisiting* McConnell*: Campaign Finance and the Problem of Democracy*, 23 J. L. & Pol. 475, 510 (2007) (noting that parties focus on raising and spending for "get-out-the-vote efforts, precinct canvassing, and independent campaign advocacy").

We cannot turn a closed eye to these drastic shifts in the landscape of electoral politics. Yet that is the approach our concurring colleague, in "explain[ing] why" this opinion "is wrong," embraces. Stranch Concurring Op. at 45. She views Super PACs as confined to independent expenditures only, *see id.* at 53, a notion that would no doubt come as a surprise to the FEC.

B. Even if one thought that a facial challenge to FECA was not in order, plaintiffs also challenge FECA's coordination limits as applied to party coordinated communications. First Br. at 48–49. While *Colorado II* rejected a facial challenge to the coordination rule, that resolution does not control later as-applied challenges. *See, e.g.*, *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411–12 (2006) (per curiam) ("In upholding [the statute] against a facial challenge, we did not purport to resolve future as-applied challenges."); *United States v. Rahimi*, 144 S. Ct. 1889, 1910 (2024) (Gorsuch, J., concurring) (warning that "future litigants and courts" should not "read any more into" a decision on a facial challenge

than its limited holding that the law has some "lawful scope"). *Colorado II*, in fact, envisioned as much. It expressly left open whether a future as-applied challenge might succeed. *See* 533 U.S. at 456 n.17 ("Whether a different characterization, and hence a different type of scrutiny, could be appropriate in the context of an as-applied challenge focused on application of the limit to specific expenditures is a question that . . . we need not reach in this facial challenge."). Because we are "confronted with a . . . different legal argument[]" today, nothing prevents us from taking up plaintiffs' as-applied challenge. *McCutcheon*, 572 U.S. at 203.

Indeed, plaintiffs' as-applied attack on the coordination limits leaves room for a narrower resolution than in *Colorado II*. There, the Supreme Court upheld the facial challenge by pointing to permissible limits on de facto "contributions" directly by a party committee to a candidate, that is, instances where "political parties would simply foot the candidate's bills." *In re Cao*, 619 F.3d 410, 437 (5th Cir. 2010) (en banc) (Jones, C.J., dissenting in part, joined by Smith, Clement, Elrod, and Haynes, JJ.) (describing the holding in *Colorado II*); *see also Colorado II*, 533 U.S. at 464 ("There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate."). But a party committee and its candidates may coordinate in ways that fall well short of that threshold. As then–Chief Judge Jones put the question in *In re Cao*, "[a]t what point does 'coordination' between a candidate and a political party transform the party's communicative speech

into a mere 'contribution' subject to strict dollar limits?" 619 F.3d at 436.

I agree that this question "was left open by the Supreme Court" in *Colorado II*, *id.*, which recognized the reality that "[c]oordinated spending by a party . . . covers a spectrum of activity." *Colorado II*, 533 U.S. at 445; *see also id.* at 467 (observing that coordinated spending "covers a broad array of conduct, some of which is akin to an independent expenditure") (Thomas, J., dissenting). To be sure, a candidate could create and produce an advertisement before handing it off to a party committee for publication and payment, leaving the committee in essence to foot the candidate's bill. But coordination between a party and its candidate may well occur in more mundane ways. It seems equally likely that a party committee itself would produce, place, and fund ads supporting its candidates, with the candidate merely offering input as to matters like the advertisement's content (national security or the economy?), tone (positive or negative?), or timing (early voting period or near election day?). And even when such input is sought, a candidate "cannot be certain that the party will heed his advice." *In re Cao*, 619 F.3d at 448 (Jones, C.J., dissenting). In the end, these modest efforts at coordination do not resemble the party simply reimbursing its candidate for campaign expenses. At the very least, then, whether a party committee can coordinate with a candidate in more limited respects is fairly before us for resolution.

* * *

All things considered, it becomes abundantly clear that we may review the constitutionality of FECA's

limitations on coordinated party expenditures. In *McCutcheon*, the Supreme Court declined to follow *Buckley*'s conclusion that aggregate limits on contributions were constitutional. 572 U.S. at 200–03. That was because *McCutcheon* "confronted" the Supreme Court "with a different statute and different legal arguments, at a different point in the development of campaign finance regulation." *Id.* at 203. Here, those same markers, from statutory changes to the declining influence of political parties to the Supreme Court's evolving campaign finance jurisprudence, together indicate that, in the words of the esteemed Judge Friendly, this is the rare instance where "opinions already delivered [by the Supreme Court] have created a near certainty that only the occasion is needed for the pronouncement of the doom" of the outdated *Colorado II* decision. *Salerno v. Am. League of Pro. Baseball Club*s, 429 F.2d 1003, 1005 (2d Cir. 1970) (Friendly, J.). Perhaps a change in either the controlling law, statutory regime, or factual foundation for an earlier decision would not justify revisiting the matter. But with all three factors calling *Colorado II* into deep question, we are remiss not to do so. In this instance, "it remains our role to decide whether a particular legislative choice is constitutional." *Cruz*, 596 U.S. at 313. Failing to do so "is to apply the dead, not the living, law." *Norris v. United States*, 687 F.2d 899, 904 (7th Cir. 1982) (Posner, J.).

II.

Measured by the Supreme Court's modern campaign finance jurisprudence, the FEC's coordination restrictions on party committees violate

the First Amendment. *Colorado II* examined coordination limits under the "closely drawn" standard. 533 U.S. at 456. More recently, the Supreme Court has invigorated that measure, even suggesting that the proper lens might be strict scrutiny. *See McCutcheon*, 572 U.S. at 199; *Cruz*, 596 U.S. at 305. Either way, the party coordination restrictions at issue here fail. Following *McCutcheon*, we ask two questions. 572 U.S. at 197. First, has the government identified a sufficiently important interest served by the coordination limits? *Id.* Today, that means only quid pro quo corruption or its appearance. *See Cruz*, 596 U.S. at 305; *McCutcheon*, 572 U.S. at 207. And quid pro quo corruption, in turn, "must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee," not merely the ordinary acts of a politician in consulting, honoring, or representing their supporters. *McDonnell*, 579 U.S. at 574. Second, are the limits closely drawn means to achieve that interest? *McCutcheon*, 572 U.S. at 197. Recent decisions give teeth to that standard as well, examining restrictions on political speech under a "rigorous" standard of review that requires the limitations be "narrowly tailored" to the government's professed interest. *See McCutcheon*, 572 U.S. at 199, 218 (cleaned up). Otherwise, there is a "mismatch between the Government's stated objective and the means selected to achieve it." *Id.* at 199.

A. The restraints at issue here come up short in each respect. Begin with the FEC's failure to demonstrate a sufficient governmental interest justifying restrictions on coordinated speech between

party committees and their candidates. There is no denying that the coordination ban limits political speech. Above relatively low limits, party committees are forced to decide how to support their candidates without input from the candidate herself, even when all involved share the same goal. These rules are the equivalent of prohibiting communication between a coach and quarterback late in a tied game. Not only that, but the restraints also seemingly raise the cost of permissible party committee speech. *See, e.g.,* R. 49-1 at 16–17 ¶ 75, PageID 5511–12. Simply put, the prohibitions are significant. So too, then, must be the government's justification.

To set the regulatory stage, as it stands today, FECA imposes several contribution limits. First, it caps direct individual contributions to federal candidates at $3,300 per election, indexed to inflation. 52 U.S.C. § 30116(a)(1)(A), (c)(1)(B). Second, it restricts direct individual contributions to national party committees at $41,300 per year. *Id.* § 30116(a)(1)(B). Taking these restrictions together in the context of Senate elections, an individual donor can donate just a few thousand dollars to individual Senate candidates, and just over $40,000 to a party's senatorial committee.

That donor limits are relatively higher when it comes to party committees does not soften FECA's bite. FECA limits direct party committee contributions to candidates at $5,000 per election. 52 U.S.C. § 30116(a)(2)(A). So a party committee is limited in the direct help it can provide a candidate. Were there concern that a party committee's coordination process might be co-opted by a committee donor, FECA prohibits a donor's contributions from

being "earmarked or otherwise directed through an intermediary or conduit to [a particular] candidate." *Id.* § 30116(a)(8). The Act also includes public disclosure provisions requiring political committees to file detailed reports of receipts and disbursements. *See id.* § 30104.

Yet the FEC demands more. On top of this mountain of regulation, the FEC seeks to limit a party committee's expenditures coordinated with its own candidates. It justifies these speech restraints as a necessary means to combat the risk of quid pro quo corruption or its appearance. Without the coordination limits, the FEC worries, parties could spend unlimited funds in direct coordination with candidates, resulting in large expenditures "indistinguishable" from direct contributions to party nominees.

1. At the outset, it is difficult to see how a party committee itself could corrupt its own candidates. Parties, of course, have influence over their candidates, just as candidates have influence over their parties. That is by design. Coordination, in fact, is the essence of the party system in our representative democracy. *See Colorado I*, 518 U.S. at 630 (Kennedy, J., concurring in part) ("We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity . . . ."). Parties work with their candidates to pursue favored policies. *See id.* at 646 (Thomas, J., concurring in part) ("The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes."). Candidates, in turn, sway their party, pushing it in one direction or the other on issues of the day. Each,

in other words, influences the other. But influence alone does not risk corruption. Nor does coordination, the primary role parties seek to play in working with their candidates. That desire arises from the "practical identity of interests between the two entities during an election," not a nefarious intent to instigate a wave of quid pro quo corruption. *Id.* at 630 (Kennedy, J., concurring in part). Against this backdrop, it is difficult to see the necessity of prohibiting a party committee from coordinating with players on its own team.

Even were party committees prime vehicles for fueling such corruption, a committee faces deep practical limits in directing their candidates and the political process more broadly. As any political science student would recognize, parties desire to maximize their election victories and achieve functioning legislative majorities. *See* Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 Colum. L. Rev. 274, 300 (2001) (describing "the conception of politics as a contested terrain in which political actors seek to devise a winning coalition strategy for electoral success"). In theory, that would mean promoting candidates with the best odds of winning an election. *Id.* Yet parties are often unable to achieve that result. Today, the political process is increasingly dominated by candidates with more extreme views, both making those candidates' election odds longer and often bringing consternation to their party. *See generally* Stephen Yang & Baozhong Yang, *Endogenous Fracturing under Partisan Voting* (October 23, 2023), https:/ /perma.cc/857D-FDZB; *see also* Isgur et al., *supra* (noting that candidates are

incentivized "to build support with the most extreme factions of voters"). Just ask former House Speaker Kevin McCarthy, among others. As his abbreviated tenure as speaker reflects, one major party could barely elect its own legislative leader, let alone retain him for a full term. *See* Aaron Zitner & Lindsay Wise, *How Polarization Sent Washington to the Brink of a Shutdown*, Wall St. J. (Sept. 30, 2023), https://www.wsj.com/politics/policy/how-polarization-sent-washington-hurtling-into-a-shutdown-83d806c?reflink=desktopwebshare. It is difficult to imagine that same party devising an intricate plan to corrupt the legislative process. In short, in an age where parties increasingly face frayed relationships with their candidates, it becomes even less likely that party committee support will "be given as a quid pro quo for improper commitments from the candidate." *McCutcheon*, 572 U.S. at 208 (citation omitted).

2. That leaves one final target for the FEC: individual donors. The FEC warns that a party committee's donors, absent limits on coordinated party expenditures, can act through the committee to corrupt a party's candidates. Without those limits, the FEC contends, individuals will circumvent the base limit on individual candidate contributions by donating amounts above that threshold to the candidate's party committee. The committee, in turn, can coordinate its expenditure of those funds with the candidate, making the donations, in the FEC's mind, "indistinguishable from contributions made directly to the candidate."

Setting aside the fact that donors are prohibited from "earmarking" their party committee contributions to a specified candidate, 52 U.S.C.

§ 30116(a)(8), the FEC's argument likewise sidesteps the obvious point that contributions to a party are not contributions to a candidate. "When an individual contributes to . . . a party committee, . . . the individual must by law cede control over the funds." *See McCutcheon,* 572 U.S. at 210–11. Once received, the party controls when, how, and where the money is spent, curtailing the risk of quid pro quo corruption. *See id.* at 210. In *McCutcheon*, in fact, the FEC conceded that should a third party's funds be "subsequently re-routed to a particular candidate, such action occurs at the initial recipient's discretion—not the donor's." *Id.* at 211. That remains true today, with party committees "retain[ing] final approval" over how its funds are spent. R. 49-1 at 10 ¶ 53 PageID 5505.

What is more, party committees, at day's end, are rational actors. Above all else, they value winning. *See* Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 3 Perspectives on Pol. 571, 571–72 (2012). So when it comes to spending critical campaign dollars, it is fair to expect that parties will use these sums to help the candidates that will benefit most, regardless of perceived donor preference. As even the FEC acknowledges, parties divert funds to candidates in close races rather than padding campaign coffers in easily won contests. *See* Second Br. at 38 (noting that "[c]ampaign spending has become highly concentrated in a limited number of decisive races").

True, on the margins, a party committee might feel some pressure to honor a donor's assumed preferences. That is human nature. Donation recipients of all

types, from politicians to non-profits, would likely acknowledge as much. But recognizing a donor's interests is not illegal. Nor is taking them into consideration. *See McCutcheon*, 572 U.S. at 192 ("[A] central feature of democracy" is "that constituents support candidates who share their beliefs and interest, and candidates who are elected can be expected to be responsive to those concerns."). The touchstone, remember, is express quid pro quo corruption (or its appearance). And the FEC's theory falls well short of that high bar.

The FEC responds by invoking *Colorado II* and its warning about the corruptive influence of donors who contribute to party committees. Two flaws in the FEC's position are readily apparent. One, the Supreme Court, it bears repeating, has wholly rejected the FEC's theory of corruption in the years since *Colorado II*. "Of course," the Supreme Court more recently observed, "a candidate would be pleased with a donor who contributed not only to the candidate himself, but also to other candidates from the same party . . . [and] to party committees." *Id.* at 225. But that is far afield from contributions to the candidate herself, where the recipient might feel "obligated" in one sense or another to the donor. *Id.* For donations to party committees and beyond, on the other hand, the candidate at most has a sense of "gratitude." *Id.* at 226. Characterizing that gratitude as tantamount to quid pro quo corruption stretches the notion beyond recognition. Remember, quid pro quo corruption as it is now understood requires a direct exchange of money for an official's "formal exercise of governmental power." *McDonnell*, 579 U.S. at 574. We should not accept the FEC's invitation to relax those standards.

Doing so would not only ignore the Supreme Court's direction on what amounts to actionable corruption, but it would also be a vehicle for "dramatically expand[ing] government regulation of the political process." *McCutcheon*, 572 U.S. at 226.

Two, the FEC's theory is mismatched with *Colorado II*'s underpinnings. In *Colorado II*, the government highlighted a concern about "tallying" used by the Democratic Senatorial Campaign Committee. 533 U.S. at 459; *see also* Stranch Concurring Op. at 59. In effect, a donor would contribute money to a party committee at the direction of the party's candidate, with an implicit understanding that the party would then direct that contribution back to the candidate through coordinated expenditures, leaving the committee as little more than a pass through. *Id.* Yet that is not how the FEC justifies the coordination ban today. Instead, it argues that the concentration of campaign spending in a small number of decisive contests risks "donors seeking to extract official action from various candidates for party contributions supporting candidates in competitive races that determine Congress's balance of power." Second Br. at 38. The FEC seemingly fears that a candidate in a safe seat will direct a donor to contribute to the candidate's party committee, with the committee then funneling that contribution to a candidate in a tight race, allowing the donor to curry favor with both potential officeholders. *See id.* at 39 ("[L]arge 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."). But under this construct, a candidate's theoretical quo (the official action) is far more attenuated from a donor's quid (the contribution) than before. *Colorado II*, again, targeted a direct relationship, one where a candidate instructs a donor to contribute to a party committee in anticipation of the donation's direct return.

The FEC's premise that most party committee contributions are spent in close races places yet another hurdle in its way. If this assumption is correct, any chance that one contributor (or even a group of contributors) will have a corrupting influence all but fades away. Generally speaking, "the influence of any one person or the importance of any single issue within a political party is significantly diffused." *Colorado I*, 518 U.S. at 647 (Thomas, J., dissenting). That is particularly true the more contributions a candidate receives, as any single contributor will be "significantly diluted by all the contributions from others." *McCutcheon*, 572 U.S. at 212. The donor's "salience as a . . . supporter" of the candidate in a tight race thus "has been diminished, and with it the potential for corruption." *Id.* This much the FEC all but concedes. *See* Fourth Br. at 13 ("[A] greater number of donors in a jurisdiction enables greater coordinated spending before rising to a level risking corruption."). And that is all the more true when one remembers that contributors face a cap on the amount they can donate to a party committee. 52 U.S.C. § 30116(a)(1)(B). "[A]s long as . . . those limits are uniform as to all donors, . . . there is little risk that an individual donor could use a party as a conduit for bribing candidates." *Colorado I*, 518 U.S. at 647 (Thomas, J., dissenting).

In practice, donors enjoy a far better vehicle for influencing a candidate: independent, expenditure-only political action committees, or Super PACs. In large part creatures of judicial decisions, "Super PACs were officially born when the FEC handed down a pair of advisory opinions" in 2010. Richard Briffault, *Super PACs*, 96 Minn. L. Rev. 1644, 1645, 1665 (2012); *see also* FEC, Advisory Op. 2010-09 (2010); FEC, Advisory Op. 2010-11 (2010). A Super PAC's defining feature is the ability to raise unlimited sums of money from individuals for independent expenditures. *See SpeechNow.org v. FEC*, 599 F.3d 686, 690, 696 (D.C. Cir. 2010) (en banc). The allowance of unlimited contributions to these entities means that motivated donors can choose Super PACs as the "better vehicle for channeling campaign finances." Issacharoff, *Outsourcing Politics*, *supra*, at 861. And choose they have. In 2023, for example, Super PACs far outpaced national party committees in receipts, with Super PACs raising roughly $957,100,000 compared to parties' $572,100,000 in contributions. *See Statistical Summary of 12-Month Campaign Activity of the 2023-2024 Election Cycle*, Fed. Election Comm'n (Apr. 2, 2024), https://perma.cc/SH37-DX6Z; R. 49-1 at 40 ¶ 171 ("[C]ontributions from political action committees to federal campaigns ha[ve] consistently exceeded the contributions and expenditures made by party-affiliated committees to federal campaigns."). Oftentimes, Super PAC donors let it be known who they are helping, and in what amounts. *See* Ryan Mac & Lisa Lerer, *The Right's Would-Be Kingmaker*, N.Y. Times, Feb. 14, 2022 (reporting that Peter Thiel wrote "$10 million checks to PACs supporting [J.D.] Vance and [Blake] Masters"); Christopher Cadelago et al.,

Bloomberg Pumps $10 Million More into House Campaigns as Red Wave Looms, Politico, Oct. 26, 2022 (describing a donation of $10 million to the "House Majority PAC"). If one is worried about the potential for quid pro quo corruption in politics, Super PACs present an inviting target. Yet the FEC zeroes in on donations to party committees—capped at $41,300 per year—which, it bears repeating, both may not be earmarked for particular candidates and are subject to the party committee's independent allocation decisions.

3. Given the FEC's big swing, one would expect it to offer a wave of evidence justifying the need to restrict party committee coordination. It is well understood that the government "must point to record evidence or legislative findings demonstrating the need to address a special problem." *Cruz*, 596 U.S. at 307 (cleaned up). But the record here reveals very little in that regard. At the FEC's request, the district court allowed the parties to engage in discovery. Yet what did the FEC's efforts produce? It points to nothing in the certified record demonstrating quid pro quo corruption tied to donations to party committees. At best, it gestures to newspaper articles and items it submitted unsuccessfully to the district court for inclusion as record evidence. *See* Second Br. at 40–43. And even as to those disallowed items, an expert for the FEC acknowledged that evidence of quid pro quo corruption in this context is scant, admitting that "scandals specifically involving coordinated federal expenditures have not been . . . common." R. 36-1, PageID# 411. For example, the FEC highlights tax cuts enacted by Congress in 2017, which the agency posits followed from "Republican party donors

conditioning further party contributions on that legislation." R. 43, ¶ 126, PageID# 5165; *see* Second Br. at 41. It likewise points to Sam Bankman-Fried's donations to Democratic party committees, contributions that purportedly "appeared to obtain a favorable regulatory environment." R. 43, ¶ 139, PageID# 5170; *see* Second Br. at 41. At most, these hazy illustrations reflect the "appearance of mere influence or access," well short of outright quid pro quo corruption. *McCutcheon*, 572 U.S. at 208.

Nor, it bears adding, has the absence of coordination limits at the state level led to an avalanche of quid pro quo corruption. Far from it, in fact. As summarized by the Institute for Free Speech, most states do not bar coordination between political parties and their candidates. Br. for Inst. for Free Speech as Amicus Curiae Supporting Plaintiffs at 5. Yet examples of quid pro quo corruption involving parties' coordinated expenses in those jurisdictions are all but absent as well. *Id*. at 5–7. At day's end, "mere conjecture" supported by "a handful of media reports and anecdotes" is inadequate to meet the FEC's evidentiary burden. *Cruz*, 596 at 307 (citation omitted).

All things considered, the FEC fails to show a sufficiently important government interest justifying the coordinated party expenditure limits. With no evidence of genuine quid pro quo corruption, the FEC cannot explain how "parties . . . would dramatically shift their priorities" if the limits were removed. *McCutcheon*, 572 U.S. at 220. Either way, party committees will spend money to elect their candidates. Were those committees and their candidates allowed to coordinate their efforts, they could act in more

informed, presumably mutually beneficial ways. But otherwise, the process would go on as it has, with parties and candidates working to achieve shared electoral goals. The First Amendment well tolerates those full-throated efforts.

B. Nor are the coordination limits "closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 197 (quoting *Buckley*, 424 U.S. at 25). Here, we require a fit between means and ends "that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* at 218 (cleaned up).

The FEC fails in this respect too. One, recall that FECA was amended in 2014 to allow unlimited coordinated expenditures to cover expenses for presidential nominating conventions, the construction of a party headquarters, and certain legal proceedings, such as election recounts. *See* 52 U.S.C. § 30116(a)(9), (d)(5). These exemptions render the statute underinclusive for the government's professed purpose of limiting quid pro quo corruption. If, as the FEC believes, a donor can corrupt a candidate through party committee contributions later spent on coordinated advertising supporting the candidate, it is unclear why these same concerns would not attend donations supporting the candidate's party's convention or a candidate's legal fees. *See Cruz*, 596 at 306 (explaining the government's argument that post-election contributions "raise a heightened risk of corruption" if the contributor has good reason to believe the recipient "will be in a position to do him

some good"). For instance, the whole point of a political convention is to advertise party and candidate political messages to voters. *See* Aaron Johnson, *Interning Dissent: The Law of Large Political Events,* 9 Duke J. Const. L. & Pub. Pol'y 87, 89–90 (2013) ("Modern major political conventions are not debates—they are publicity extravaganzas, devoted to promoting the platform and candidate of a dominant political party."). Why contributions supporting those coordinated advertising expenses would create less of an appearance of corruption goes largely unexplained. This manner of "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011); *see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 773–75 (2018) (recognizing that a law's exceptions can show the law is not "sufficiently drawn to achieve" the purported governmental interest).

Two, that the FEC advances a "prophylaxis-upon-prophylaxis" approach "requires that we be particularly diligent in scrutinizing the law's fit." *McCutcheon*, 572 U.S. at 222–23 (citation omitted). The vast realm of campaign finance regulations obviates the need for further restrictions on party committee spending as a means for targeting quid pro quo corruption. The base limits on individual contributions to both candidates and parties go a long way in curtailing any fear of an individual donor's corruptive influence over a candidate or a party. *See McCutcheon*, 572 U.S. at 209 ("[B]ase limits remain the primary means of regulating campaign contributions."). As these limits themselves are "a prophylactic measure," they undermine the need for

further prophylactic measures "layered on top." *Id.* at 221.

Beyond the base limits on contributions, striking down the coordination restrictions would not touch FECA's earmarking rule. That rule, it bears repeating, subjects donations to an intermediary earmarked for "a particular candidate" to the limits on individual contributions. *See* 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(b)(1) (defining "earmarking" as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee"). These limitations seemingly already prohibit the hypothetical sketched out by the FEC of a donor attempting to circumvent the base contribution limits through party committee contributions. *See McCutcheon,* 572 U.S. at 222–23.

And then there are the disclosure provisions requiring political committees to file detailed reports of receipts and disbursements. *See* 52 U.S.C. § 30104. Those requirements further deter corruption "by exposing large contributions and expenditures to the light of publicity." *McCutcheon*, 572 U.S. at 223 (citation omitted). Although they burden speech, "they do not impose a ceiling on" expressive conduct as do the coordination limits before us today. *Id.* And the disclosure rules, all of which would remain in place were coordination limits eased, represent a less restrictive alternative to the coordination restrictions.

Finally, were Congress still concerned about donors using parties as conduits for quid pro quo corruption

despite these extensive regulations, it could resort to a much simpler measure: reducing the base limits on individual contributions to party committees. That solution, it bears noting, seemingly is one plaintiffs would prefer over the significant coordination restrictions they now confront. *See* Third Br. at 18–19. Many donors may feel the same. A party's influence grows when its candidates hold a legislative majority. And so many donors may have more interest in seeing their preferred party gain a majority in Congress than seeing any particular candidate hold one of those seats. Such donors may contribute to party committees rather than particular candidates, allowing the party to decide how best to allocate funds to win a majority. Yet FECA's limits on coordinated spending inhibit a party committee's ability to disburse money in the most efficient manner and, as a result, the party's chances to secure a majority. *See* R. 49-1 at 19–20 ¶¶ 85–86, PageID 5514–15 (noting the efficiencies of coordinated spending compared to independent expenditures). In the end, the FEC's enforcement efforts disfavor donors who trust party committees over individual candidates to best navigate the election process.

* * * * *

Much more could be said on the poor fit between the FEC's enforcement efforts and the narrow goal of preventing quid pro quo corruption. *See generally, e.g.*, Thapar Concurring Op.; Bush Concurring Op. For today's purposes, an amicus party may have summed up the matter best. The coordinated party expenditure limits "fight against a harm that either does not exist, or that is effectively managed by other more narrowly drawn rules." Br. for Inst. for Free

Speech as Amicus Curiae Supporting Plaintiffs at 2. For all of these reasons, the challenged limits on political speech fail the "closely drawn" standard. Were my colleagues to reach the merits of that question, I suspect many would agree.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-3051

NATIONAL REPUBLICAN SENATORIAL COMMITTEE;
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE JAMES D. VANCE, Senator; STEVE CHABOT, former Representative,

Plaintiffs - Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Defendants - Appellees.

Before: SUTTON, Chief Judge; MOORE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE, STRANCH, THAPAR, BUSH, LARSEN, NALBANDIAN, READLER, MURPHY, DAVIS, MATHIS, and BLOOMEKATZ, Circuit Judges.

JUDGMENT

On Certification of a Question of Constitutional Law

The United States District Court for the Southern District of Ohio transmitted this matter to the En Banc Court of the Sixth Circuit Court of Appeals.

UPON CONSIDERATION of the district court's record and the briefs and arguments of counsel,

IT IS THE JUDGMENT of the En Banc Court of the Sixth Circuit that the Federal Election Campaign Act's limits on coordinated campaign expenditures do not violate the First Amendment.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Case No. 1:22-cv-639

JUDGE DOUGLAS R. COLE

OPINION AND ORDER

The National Republican Senatorial Committee (NRSC), along with the National Republican Congressional Committee (NRCC), Senator J.D. Vance, and former Representative Steve Chabot, have moved to certify the following constitutional question to the en banc court of the United States Court of Appeals for the Sixth Circuit: "Whether the limits on coordinated party expenditures in 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." (Doc. 20, #215). For the reasons stated

more fully below, the Court **GRANTS** Plaintiffs' Motion to Certify Question to the En Banc Court of Appeals (Doc. 20).

BACKGROUND

Plaintiffs sued the Federal Election Commission and each of its Commissioners in their official capacities (collectively, the FEC) seeking to enjoin the FEC from enforcing the provisions found in § 315 of the Federal Election Campaign Act of 1971 (FECA), as amended, 52 U.S.C. § 30116. These challenged provisions limit a party committees' campaign expenditures made in coordination with political candidates who are associated with the political party. According to Plaintiffs, this limitation on their coordinated expenditures unconstitutionally abridges their First Amendment rights. (Compl., Doc. 1). Review of Plaintiffs' cause of action is governed by § 310 of the FECA, 52 U.S.C. § 30110:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

After this lawsuit was filed, the FEC moved to dismiss or to transfer the case on the basis of an improper venue, (Doc. 10), which motion the Court

ultimately denied. (Doc. 18). Following the determination that the case was properly docketed in this Court, Plaintiffs moved to certify their First Amendment challenge to the en banc court of the United States Court of Appeals for the Sixth Circuit pursuant to § 310 of the FECA. (Doc. 20). In support of their motion, Plaintiffs argued that their proposed constitutional question was not an insubstantial or wholly frivolous legal question. (Doc. 21, #226–27). They acknowledged that the Supreme Court sustained the coordinated expenditure limits against a First Amendment challenge—the constitutional challenge Plaintiffs mount today—in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* (*Colorado II*), 533 U.S. 431 (2001). (Doc. 21, #227). But they contend that *Colorado II* is distinguishable and that even if it did govern this dispute, its reasoning is undermined by subsequent Supreme Court precedent. (*Id.* at #227–30). In support of their motion for certification, Plaintiffs attached a proposed set of undisputed facts for the Court to certify as part of the record the Sixth Circuit would review. (Doc. 21-1).

The FEC at first opposed this motion in full. Citing relevant examples from other courts, the FEC argued, in relevant part, that although § 310 of the FECA required "immediate[]" certification of all constitutional questions, the Court was required to permit the parties to engage in discovery to develop a complete record for the Sixth Circuit's review. (Doc. 26, #315–20). Responsive to the FEC's concerns, the Court held a telephone status conference with the parties on August 1, 2023, to discuss issues related to discovery. (8/1/23 Min. Entry). Based on this

conference, the Court proposed an expedited discovery schedule, which would permit the parties to develop the record and to produce experts and expert reports before the Court ruled on the pending motion to certify. (8/1/23 Not. Order).

After the parties conducted discovery, they each filed dueling proposed findings of fact. The FEC's 339-paragraph proposed findings of fact (Doc. 43) relied on 178 exhibits filed with this Court, which span nearly 4,000 pages, (Docs. 36–40, 42). As explained further below in the Court's discussion of the factual record it is certifying to the Sixth Circuit, *see infra* Part D, the vast majority of these proposed findings of "fact" actually involve legal conclusions, quotations from historical sources that are editorialized, and citations to other public news or book sources. Plaintiffs, on the other hand, expanded the scope of their initial proposed findings of fact, adding some 81 paragraphs and additional citations to 12 exhibits of materials that were produced during the expedited discovery—materials spanning over 800 pages. (Doc. 44, #5245). Similar to the FEC's proposed findings, Plaintiffs' additional proposed findings of fact largely state legal conclusions and incorporate policy arguments that support their legal position here.

Concerned about the type of "facts" the parties requested the Court to certify, the Court held a telephone status conference on November 30, 2023. (11/30/23 Min. Entry). During this status conference, the Court shared its concerns about the legal conclusions and argumentation in the parties' filings, and the evidentiary issues, such as hearsay, occasioned by many of the sources the parties quoted as the basis for their "facts." (*Id.*). Due to such

concerns, the Court requested supplemental briefing from the parties. The parties were asked to provide simultaneous supplemental briefing regarding the appropriate scope of the factual record the Court was to certify, and that responded directly to the opposing side's proposed findings of fact. (*Id.*) The parties filed their briefs in response to this request on December 15, 2023. (Docs. 46, 47).

At the November 30, 2023, conference, the Court also requested that the FEC provide an updated response to the motion to certify now that expedited discovery had been completed, with Plaintiffs to file any reply thereafter. (11/30/23 Min. Entry). The FEC responded in partial opposition to the motion to certify. (Doc. 45). Although the FEC no longer opposes certification, it argues that the Court should dismiss Chabot for want of Article III jurisdiction, strike the portion of Plaintiffs' proposed certification question that purportedly challenges an FEC's regulation as outside the scope of § 310 of the FECA, and narrow the scope of the certified question by adding a qualifier—"as a matter of Sixth Circuit law"—to the proposed constitutional question. (*Id.* at #5293, 5297–98, 5303–04). Plaintiffs then replied. (Doc. 48).

The matter is now ripe for the Court's review.

LEGAL STANDARD

As noted, Plaintiffs' motion is governed by § 310 of the FECA, 52 U.S.C. § 30110. Under the plain text of that provision, this Court "immediately shall certify all questions of constitutionality of th[e] [FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." But there are limits on the immediacy of this mandate. As

with any other case that comes before an Article III court, there must be a 'case' or 'controversy' for the Court to adjudicate. *Cal. Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 192 n.14 (1981) ("A party seeking to invoke [§ 310 of the FECA] must have standing to raise the constitutional claim."). A district court presented with a question for certification also must evaluate whether the question raises a "frivolous" issue or poses a "purely hypothetical application[] of the statute." *Id.* In making its assessment of the proposed constitutional questions to certify, the Court is also "[em]power[ed], and apparently [has] the duty, to identify the constitutional issues and to reframe the question as necessary so that any proper non-frivolous question is certified to the en banc Court of Appeals." *Libertarian Nat'l Comm., Inc. v. Fed. Election Comm'n*, 930 F. Supp. 2d 154, 168–69 (D.D.C. 2013) (collecting appellate caselaw approving of district courts' reframing constitutional questions). Finally, the Court must establish an adequate factual record on which the court of appeals may rely when evaluating the constitutional question certified. *Cal. Med. Ass'n*, 453 U.S. at 192 n.14.

LAW AND ANALYSIS

The Court proceeds as follows. First, it turns to whether Plaintiffs have standing to bring this First Amendment challenge to the FECA's limits on coordinated party expenditures—a necessary prerequisite to reaching the other issues raised by their motion to certify as it implicates the Court's subject matter jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). Concluding that the Plaintiffs indeed do have standing, the Court

next turns to the proposed question to be certified to evaluate whether it raises a frivolous issue. This is the logical next step, as the Court need not evaluate any other questions if there is no need to certify the question to the Sixth Circuit—a finding against Plaintiffs would dispose of their motion. Because the Court finds Plaintiffs raise a non-frivolous constitutional question, the Court next evaluates the FEC's arguments that the question should be modified or narrowed. And finally, after conducting that analysis, the Court then turns to the question of the factual record to be delivered with the certified constitutional question to the en banc court. This is the proper concluding step because, once the Court has the legal issues properly framed, it may make an informed decision about what adjudicatory facts are relevant and should form the basis of the factual record to be delivered to the Sixth Circuit sitting en banc.[1] *Libertarian Nat'l Comm.*, 930 F. Supp. 2d at 171.

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[1] Contrary to the FEC's intimation that a factual record must be established prior to evaluating frivolousness, (see Doc. 26, #314–15; Doc. 45, #5291), there is no such required order of operations in the caselaw. *Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975) (en banc) (per curiam) (directing the district court to "[i]dentify [the] constitutional issues" *prior to* "[m]ak[ing] findings of fact with reference to those issues"); *Mariani v. United States*, 212 F.3d 761, 767 (3d Cir. 2000) (en banc) (noting that the district court evaluated frivolousness before making findings of fact); *Libertarian Nat'l Comm.*, 930 F. Supp. 2d at 171 (certifying the proposed constitutional question before making "findings of fact, limited to those facts potentially relevant to the question certified" (emphasis added)). Certainly, findings of fact might be relevant to assess whether a constitutional challenge is frivolous if the challenge relates to "unanticipated variations [in the

A. Standing

As standing implicates the Court's subject matter jurisdiction over this case under Article III § 2 of the Constitution, the Court starts there. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). To demonstrate standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Id.* Both parties seemingly agree that three Plaintiffs, Senator Vance and the two committee plaintiffs, have standing to prosecute this suit. (Doc. 45, #5302; Doc. 48, #5446). They just dispute whether Chabot has standing to sue. (*Compare* Doc. 45, #5293–97, *with* Doc. 48, #5447). But, as standing is jurisdictional, the parties' agreement as to standing is irrelevant—the Court has an independent obligation to assure itself it has subject matter jurisdiction over the dispute. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Here, it is clear at least one individual plaintiff and one party committee has standing to sue. *Nat'l Rifle Ass'n of Am.*

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factual landscape that] may deserve the full attention of the appellate court" even after "a core provision of [the] FECA has been reviewed and approved by the courts." *Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990). But seeing as the Court finds the relevant change in the landscape permitting this constitutional challenge to be certified is purely legal—shifts in the Supreme Court's analysis of what is a proper justification for campaign finance laws and recent amendments to § 315 of the FECA—a factual record is not necessary here to assess frivolousness. *See infra* Part B. Moreover, as noted, the Court can make informed findings of fact only once it has determined what question is being certified to the Sixth Circuit.

v. Magaw, 132 F.3d 272, 278 n.4 (6th Cir. 1997) (explaining that while only one plaintiff with standing is necessary for justiciable claims to proceed, that applies solely to plaintiffs whose "position[s] [are] identical" with respect to their claimed injury in fact, and analyzing distinct sets of plaintiffs grouped based on their alleged injuries in fact (quoting *Sec'y of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984)).

For the individual plaintiffs, consider Senator Vance's standing. He is a current sitting Senator who has expressed intent to run for re-election in 2028 and has started to raise campaign contributions in support of that run. (Doc. 41-6, #4715). Senator Vance declares that the legal threat imposed by FECA's coordinated expenditure limits has led to his campaign's limited interaction with the Republican Party as a whole and that without such limits he would "work[] in greater cooperation with the NRSC … to make more efficient and effective use of party resources in support of Vance's campaign." (Doc. 41-6, #4717). For example, he would in the future "work with his party in furtherance of a greater number of coordinated public communication advertisements supporting his campaign." (*Id.* at #4717–18). Namely, the evidence shows that Senator Vance is preparing for a 2028 election run and that but for the coordinated expenditure limits he would organize his campaign to work in greater cooperation with the NRSC. (*Id.* at #4713–14). This constitutes a concrete injury in fact: Senator Vance has materially changed his behavior because of the FECA's coordinated expenditure limits that, if his First Amendment analysis is correct, "ha[s] restricted … [his] political activities … and has limited [his] ability

to associate" with political parties and their committees in the manner he wishes. *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014); *Magaw*, 132 F.3d at 279 (holding that an injury sufficient to maintain an action for declaratory relief exists "when a statute imposes costly, self-executing compliance burdens or … chills protected First Amendment activity" (cleaned up)).

In addition, because the FEC can enforce these provisions under § 306 of the FECA, 52 U.S.C. § 30106(b)(1), Senator Vance's injury is fairly traceable to the FEC's actions.[2] (Doc. 41-6, #4713 (noting "the risk of enforcement for a violation of th[e FECA's] limits" as the reason for Senator Vance's change in behavior)). And a judicial ruling sustaining Senator Vance's First Amendment challenge would certainly redress his injury as it would permit him to take the desired actions currently forbidden by existing law. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992) (When "the plaintiff is himself an objection of the action … at issue[,] … there is ordinarily little question that the action … has caused him injury, and that a judgment preventing … the action will redress it."). So Senator Vance has

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[2] *See, e.g.*, First General Counsel's Report, MUR 7826 – Iowa Democratic Party & Theresa Greenfield for Iowa, MUR 7862 – Iowa Democratic Party & Rita Hart for Iowa, Federal Election Commission 16–19, 22 (June 16, 2021), https://perma.cc/D4LW-9FQG (discussing the investigation and analysis leading the FEC's General Counsel's Office to recommend that the FEC find that two candidates' campaign committees knowingly accepted monies exceeding the FECA's coordinated party expenditure limits during the 2020 election cycle).

established standing to prosecute this First Amendment challenge to the FECA.

For the committee plaintiffs here, take the NRSC. Discovery demonstrates that the NRSC makes coordinated party expenditures up to the FECA's limit but has a desire to expend more monies in support and in conjunction with senatorial candidates in excess of those limits. (Doc. 41-1, #4040–44). The NRSC also declares that it has self-limited its coordinated expenditures below the FECA's express limit to avoid investigations and fines on account of unexpected costs arising at a later date. (*Id.* at #4041). And to ensure compliance with the FECA's limit, the NRSC has established a fire-walled independent expenditure unit that operates independent of the NRSC but diverts funding the NRSC declares it would have spent on other ventures—all but for the binding expenditure limits. (*Id.* at #4042–43). So the NRSC declares that the FECA's coordinated expenditure limits, which are enforced by the FEC under § 306 of the FECA, 52 U.S.C. § 30106(b)(1), (1) has caused it to suffer a pocket-book injury by expending financial resources in excess of what it would otherwise spend on setting up and funding an independent expenditure unit, and (2) has directly barred the NRSC from taking actions it otherwise would have taken (i.e., spending more money in coordination with specific senatorial candidates). The NRSC's pocket-book injury and that the FECA's limits prevent the NRSC from acting beyond its scope are clearly injuries that satisfy the injury-in-fact element of standing. *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (holding that an agency's action causing the petitioners to suffer a financial injury constitutes a "pocketbook injury [that] is a

prototypical form of injury in fact"); *Lujan*, 504 U.S. at 561–62.

And as noted above, the FEC is the exclusive enforcer of the FECA, which means the NRSC's injury in fact is self-evidently fairly traceable to the FEC's real threat of investigation and enforcement of the coordinated party expenditure limits.[3] (Doc. 41-1, #4047, 4051–52). And again, a judicial determination that the limits unconstitutionally impinge on NRSC's First Amendment rights would remedy this injury, as it would permit NRSC to engage in its desired actions that are currently forbidden by § 315 of FECA. *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 716 (6th Cir. 2015) ("It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of a suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC) Inc.*, 528 U.S. 167, 185–86 (2000))). Thus, NRSC has standing to bring this constitutional challenge to the FECA.

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[3] *E.g.*, Final Audit Report of the Commission on the Republican Party of Minnesota – Federal, Attachment to First General Counsel's Report in Audit Referral 22-01, Federal Election Commission, at 7, 30–36 (June 30, 2022), https://perma.cc/PH7R-CQDA (discussing an investigation into coordinated party expenditures alleged to be in excessive of the limits established by the FECA by the Minnesota Republican party to Minnesotan candidates for the United States House of Representatives in the 2018 election).

With that, the Court need not tread any further.[4] The other plaintiffs, Chabot and the NRCC, bring exactly the same legal challenge to § 315 of the FECA and are similarly situated with respect to the claimed injuries in fact. Both plaintiffs who were candidates for office were prevented from accepting monies in support of the campaign in excess of the FECA's limits as they wanted. (Doc. 41-6, #4713; Doc. 41- 7, #4746, 4750). And both political committees limited their coordination activities preventing them from expending more than the FECA's limits as they intended to do. (Doc. 41-1, #4050; Doc. 41-2, #4104). Under binding caselaw, "[w]hen one party has standing to bring a claim, the identical claims brought by other parties to the same lawsuit are justiciable." *Ne. Ohio Coal. For the Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 827 n.1 (2002) (agreeing with the district court that because the respondent "ha[d] standing, [the court] need not address whether [another party] also ha[d] standing"). The same rule applies when a defendant objects that the cause is moot with respect to one of the plaintiffs. *T.M. ex rel. H.C. v. DeWine*, 49 F.4th 1082, 1087 n.3 (6th Cir. 2022) ("But where, as here, at least one plaintiff remains with a justiciable claim, we need not settle the mootness question before the merits."). So, considering the Court's statutory

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[4] Although no party objected, the Court briefly notes that Plaintiffs all satisfy § 310's statutory standing requirement that the private parties bringing suit must either be "the national committee of any political party[ ] or an[] individual eligible to vote in any election for the office of President." (Doc. 1 ¶¶ 13–16, #5–7; Doc. 19-1, #174–75; Doc. 19-2, #184; Doc. 19-3, #194).

mandate to certify the constitutional issue to the Sixth Circuit "immediately" under § 310 of the FECA, 52 U.S.C. § 30110, the Court declines at this stage of the litigation to analyze whether the FEC is correct that Chabot lacks standing or, in the alternative, that his claim is moot.[5]

B. Frivolousness

Next, the Court must assess whether the proposed question to be certified to the court of appeals is frivolous. *Cal. Med. Ass'n*, 453 U.S. at 192 n.14. As a reminder, Plaintiffs request the Court certify the following question: "Whether the limits on coordinated party expenditures in 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." (Doc. 20, #215). The Supreme Court did not fully articulate the standard to use to assess frivolousness under § 310 of the FECA. But it cited with approval two cases applying slightly distinct frameworks.

The first case the Supreme Court cited employed the frivolousness standard applicable to in forma pauperis cases under the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(e). *Cal. Med. Ass'n*, 453 U.S. at 192 n.14 (citing *Gifford v. Cong.*, 452 F. Supp. 802, 804

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[5] Of course, the FEC is free to raise this jurisdictional issue in this Court once appellate review has been exhausted. The simple point is that a determination whether Chabot has standing to sue is not necessary at this time given that Senator Vance—a plaintiff in an "identical" position to Chabot with respect to the alleged injury in fact—has justiciable claims that can proceed to the merits. *Sec'y of Interior v. California*, 464 U.S. at 319 n.3.

(E.D. Cal. 1978)); *Mariani v. United States*, 212 F.3d 761, 769 (3d Cir. 2000) (en banc) ("The [*California Medical* Supreme] Court cited with approval a district court decision from an *in forma pauperis* action that employed the standard from the *in forma pauperis* statute, 28 U.S.C. § 1915(e)(2)(B), to determine whether a challenge to FECA was frivolous."). Under the PLRA standard, a legal issue is deemed to be frivolous if it lacks "an arguable basis either in law or in fact." *Williams v. Parikh*, No. 1:23-cv-167, 2023 WL 8824845, at *13 (S.D. Ohio Dec. 21, 2023) (citation omitted).

The other case the Supreme Court cited used the "substantial federal question" standard. *Cal. Med. Ass'n*, 453 U.S. at 192 n.14 (citing *Cal. Water Serv. Co. v. City of Redding*, 304 U.S. 252, 254–55 (1938)). That standard previously governed whether a three-judge district court had subject-matter jurisdiction to adjudicate a constitutional challenge to a state law under previous iterations of the Judiciary Act. *Cal. Water Serv. Co.*, 304 U.S. at 254. According to the Court, a case presents a substantial federal question unless the claim "is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." *Id.* at 255.

Although those standards are distinct, they both aim in the same direction: ascertaining whether the legal issues a case presents have arguable merit that warrants review by the court of appeals. And such arguable merit can exist even if the suit challenges existing Supreme Court precedent. *Holmes v. FEC*, 823 F.3d 69, 73–74 (D.C. Cir. 2016). The key then is for this Court to determine whether the challenge is

wholly baseless or whether it has some merit (even if the claim faces an uphill battle against existing precedent).

So what does that say about the proposed constitutional challenge at issue? Plaintiffs seek to challenge the FECA's coordinated expenditure limits, claiming they unconstitutionally infringe on their First Amendment rights. At first blush, this seems directly foreclosed by existing precedent—*Colorado II*. There, the respondents had "claim[ed] that *all limits* on expenditures by a political party in connection with congressional campaigns are facially unconstitutional and thus unenforceable even as to spending coordinated with a candidate"—a contention the Supreme Court "reject[ed]" because it found that "coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." 533 U.S. at 437, 465. The Supreme Court's rejection of that facial challenge in *Colorado II* would seem to dispose of what is essentially the same legal challenge here: Plaintiffs claim "any coordinated party expenditure limits … violate the First Amendment's guarantees of freedom of speech and freedom to associate with others," (Doc. 1 ¶ 99, #25). Plaintiffs, though, contend that *Colorado II* should not govern because the legal backdrop has changed and because they present new arguments not previously raised before the *Colorado II* court. (Doc. 21, #250–53).

Plaintiffs' attempt to get around *Colorado II* faces a significant uphill battle. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of th[e Supreme] Court has direct application in a case, yet appears to rest on reasons

rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). But regardless whether Plaintiffs ultimately succeed, the Court finds that Plaintiffs' constitutional challenge is non-frivolous even if *Colorado II* squarely applies. That is because Plaintiffs are correct to highlight the change in tide in First Amendment campaign finance caselaw since *Colorado II*.

The Supreme Court has narrowed its focus on the ends towards which Congress can act when enacting campaign finance laws: "the prevention of *quid pro quo* corruption or its appearance." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 305 (2022); *id.* ("We have consistently rejected attempts to restrict campaign speech based on other legislative aims," such as "reduc[ing] the amount of money in politics," "equalizing candidate resources," and "limit[ing] the general influence a contributor may have over an elected official."). This narrowing creates, at the very least, tension with *Colorado II*'s reasoning, which presumed that Congress could enact campaign finance laws to respond to political corruption "understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence." 533 U.S. at 441; *see McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 239–40 (2014) (Breyer, J., dissenting) (citing *Colorado II* and characterizing its definition of the type of corruption that can justify campaign finance regulations as "considerably broader" than just quid pro quo corruption). Because the *Colorado II* Court employed a broader definition, Plaintiffs are correct

that their challenge raises a serious legal question with arguable merit: the Supreme Court may reasonably reach a different result if presented with the same challenge to the coordinated expenditure limits but with its analysis narrowly focused on analyzing whether such limits are justified by combatting only quid pro quo corruption or its appearance.

In addition, legislative amendments since *Colorado II* could alter the scrutiny calculus the Supreme Court might employ to determine whether the limits are "closely drawn"—the fit between the law and its objective or, put differently, whether the law employs "a means narrowly tailored to achieve" its objective. *McCutcheon*, 572 U.S. at 218 (per curiam) (cleaned up). In 2014, Congress amended § 315 of the FECA to exempt "segregated account[s] of a national committee of a political party" from the coordinated expenditure limits when such accounts are used to "defray expenses incurred with respect to a presidential nominating convention, … the construction, purchase, renovation, operation, and furnishing of … headquarters buildings of the party, … [or] the preparation for and the conduct of election recounts and contests." 52 U.S.C. § 30116(a)(9), (d)(5). Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772–73, Div. N, § 101 (2014). This differential treatment between coordinated expenditures related to candidates for political office and coordinated expenditures spent on presidential nominations, election recounts, and a party's brick-and-mortar infrastructure implicates whether such a closely drawn fit exists. At the very least, the government

will need to explain the legally significant difference between the risk of quid pro quo corruption or its appearance when coordinated expenditures are spent on individual campaigns rather than, for example, election recounts and related legal proceedings for § 315 of the FECA to withstand scrutiny. As this exemption was not extant at the time the Supreme Court decided *Colorado II*, the new exemption is another variable that will need to play into the "closely drawn" scrutiny of these expenditure provisions. (Doc. 21, #251 (arguing that this added exception "render[s] FECA's coordinated party expenditure limits fatally underinclusive")).

Simply, the change in the legal landscape ensures Plaintiffs' challenge is not frivolous, even assuming *Colorado II* governs. The Supreme Court has narrowed the justifications the government can use to defend its limits. And Congress has altered the rules permitting additional exceptions to the expenditure limits that affect the narrow tailoring of the specific regulations currently in force. Essentially, Plaintiffs have highlighted legal changes that may affect the potential analysis of these provisions. As a result, their proposed constitutional issue is non-frivolous and based in an arguably meritorious challenge to the existing legal framework. *Holmes*, 823 F.3d at 74–76 (reversing the district court's denial of a motion to certify a First Amendment challenge to the FECA premised on the supposition that the issue was previously resolved by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), because the court of appeals found that *Buckley* had not addressed the issue at any serious length, which suggests that the issue had not been truly settled).

And though no party argued or suggested that this dispute raised a "purely hypothetical application[] of the statute," *Cal. Med. Ass'n*, 453 U.S. at 192 n.14, the Court notes, as is its duty, that this is not such a challenge. As detailed in the standing analysis above, Plaintiffs have put forward evidence that the committees have materially altered their behavior to ensure compliance with the coordinated expenditure limits but would exceed those limits if permitted. (Doc. 41-1, #4050; Doc. 41-2, #4104). And, at the very least, Senator Vance had put forward evidence that he would alter his campaign strategy for 2028 if permitted to coordinate on expenditures above the FECA's limit. (Doc. 41-6, #4713–14, 4717–18). Moreover, the FEC has a demonstrated history of, at a minimum, investigating these alleged violations, which raises the specter of penalties if the FEC decides to prosecute any alleged offense. *See supra* notes 2, 3. Given these tangible risks of harm and the resulting material change in Plaintiffs' position, the challenge is not hypothetical—it is very much concrete.

For these reasons, the question should be certified to the United States Court of Appeals for the Sixth Circuit sitting en banc.

C. The Question to Be Certified

Now, turn to the precise contours of the actual question to be certified. Plaintiffs ask that the certified question be framed as follows: "Whether the limits on coordinated party expenditures in 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." (Doc. 20, #215). The FEC raises two

challenges to the proposed question and suggests two corresponding revisions. (Doc. 45, #5285). First, quoting the relevant language from § 310 of the FECA authorizing "certif[ication] [of] all questions of constitutionality of th[e] [FECA]," 52 U.S.C. § 30110, the FEC argues that the Court should strike the second half of Plaintiffs' proposed certified question that references the FEC's implementing regulation defining "party coordinated communications." (Doc. 45, #5297–303). Second, the FEC contends that the Court should insert the caveat "as a matter of Sixth Circuit law" into the question so that the en banc court "address[es] only Sixth Circuit law" when evaluating the certified question. (Doc. 45, #5303–07). Take each in turn.

1. Regulatory Objection

The FEC first contends that Plaintiffs are trying to sneak a regulatory challenge into the certified question, which is beyond the scope of the FECA's judicial review provision.[6] The FEC is correct on the

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[6] Both parties appear to treat this provision as jurisdictional. (Doc. 45, #5299; *see* Doc. 48, #5448–49). The Court agrees that § 310 vests jurisdiction in "the appropriate district court" over "such actions … to construe the constitutionality of any provision of this Act." However, it is less clear that the portion of § 310 governing certification is also jurisdictional in nature. The certification provision is mandatory and is directed at the scope of the review of the en banc court of appeals. But neither feature is a distinctive mark of a jurisdictional provision. *Santos-Zacaria v. Garland*, 598 U.S. 411, 420 (2023). And the provision commands that the Sixth Circuit will "hear *the matter* sitting en banc." 52 U.S.C. § 30110 (emphasis added). The term "matter" does not clearly take the antecedent "all questions of constitutionality," as it could also take the broader antecedent "actions … to construe the constitutionality" of the FECA, which

law insofar as it argues that § 310 does not permit the district court to certify constitutional challenges to FEC *regulations* to the Sixth Circuit. The plain text of § 310 refers only to "questions of constitutionality of this Act"—the FECA—or "any provision" thereof. But that a question includes a reference to FEC regulations is not enough, in and of itself, to suggest that the challenge is not properly within the scope of the judicial review provision. *See In re Cao*, 619 F.3d 410, 418 (5th Cir. 2010) (analyzing a constitutional challenge to the coordinated expenditure limits by "read[ing the FECA] in light of the FEC regulations that implement the statute"). Rather, the dividing line between inappropriate and appropriate challenges is whether the challenge is "a consequence of the Commission's regulations" rather than the FECA itself. *Holmes*, 823 F.3d at 76.

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is located in the prior sentence in § 310. *Id.*; *cf. Gonzalez v. Thaler*, 565 U.S. 134, 145–48 (2012) (holding that a provision governing certificates of appealability over habeas decisions requiring the certificate to indicate those legal issues for which the petitioner had made a "substantial showing of the denial of a constitutional right" was a non-jurisdictional rule governing the scope of review even though the command was mandatory and directed at the courts and even though, under another provision in the same subsection, the issuance of a certificate was a jurisdictional prerequisite to the court of appeals' jurisdiction over a habeas appeal). But the Court need not answer that question today. Regardless whether certification of constitutional questions under § 310 of the FECA is jurisdictional or simply a mandatory rule governing only the scope of the en banc court of appeals' review, the FEC's regulatory objection is properly raised and will be addressed by the Court in this Section. *Gonzalez*, 565 U.S. at 146. And as the Court explains, the Court finds that the objection lacks merit.

Reviewing just the portion of Plaintiffs' proposed certified question referencing the FEC's regulations—that is to say, Plaintiffs' as-applied challenge—reveals that Plaintiffs are directing this constitutional challenge at *the FECA's* coordinated party expenditure limits, not any particular regulation. Plaintiffs' as-applied challenge asks the Sixth Circuit to resolve "[w]hether *the limits on coordinated party expenditures in 52 U.S.C. § 30116* violate the First Amendment … as applied to party spending in connection with 'party coordinated communications.'" (Doc. 20, #215 (emphasis added)). In other words, Plaintiffs challenge the FECA's imposition of limits on specific forms of communications that they believe unconstitutionally abridge their First Amendment rights. This constitutional challenge is squarely aimed at the statute itself.

What of the reference to 11 C.F.R. § 109.37 in the proposed certified question (omitted above to illustrate the focus of the legal question)? That regulation—entitled "What is a 'party coordinated communication'?"—helpfully (and unsurprisingly, given its title) defines a specific category of communications covered by the coordinated party expenditure limits. Naturally, Plaintiffs included the citation to define what is meant by the term "party coordinated communications." In fact, Plaintiffs made this point express by including "as defined in 11 C.F.R. § 109.37" in their proposed question. (Doc. 20, #215). But the citation to the regulations is not an indirect way to challenge constitutionality of the regulation itself. A different result may obtain if, for example, Plaintiffs were contending that the regulation is a content-based restriction on speech that fails strict

scrutiny because how 'party coordinated communication' is defined regulates expressive activity based on its subject matter. But that is not the challenge here. Instead, Plaintiffs merely reference a category of covered conduct that they claim cannot be restricted by the FECA's coordinated party expenditure limits consonant with the First Amendment. That is a constitutional challenge to the statute: the complained of restriction on Plaintiffs' actions—the limits on expenditures—is "traceable to the operation of [the] [FECA] itself." *Cruz*, 596 U.S. at 301–02 (holding that the special judicial review provisions of the Bipartisan Campaign Reform Act of 2002 were properly invoked because the constitutional challenged "the FEC's threatened enforcement of the [statute's] loan- repayment limitation, through its implementing regulation").

Moreover, while the FEC maintains that this is a regulatory challenge, it does not really explain *why* it believes so other than making conclusory assertions to that effect. (*E.g.*, Doc. 45, #5299 (asserting that "[P]laintiffs have unambiguously challenged the Commission's 'party coordinated communication' regulation.")). The force of its argument seems to be that because the certified question cites 11 C.F.R. § 109.37, it must be a regulatory, not a statutory, challenge. But as noted above, the reference to a regulation is not dispositive. *In re Cao*, 619 F.3d at 418 (relying on FEC regulations to reject a constitutional overbreadth challenge to the FECA). The closest the FEC comes to providing an actual reason the Court should agree with its position is the assertion that "[P]laintiffs make multiple arguments that are consistent with a separate regulatory

challenge independent of the FECA's text." (Doc. 45, #5300). But other than cherry-picking statements from Plaintiffs' Complaint and Motion to Certify that merely summarize Plaintiffs' understanding of how the regulations operate in this area (as opposed to arguments about the legal or constitutional validity of the regulations themselves), the FEC does not provide meaningful explanations why it believes that Plaintiffs' challenge, as made manifest in the proposed certified question, is to the constitutional infirmity of an FEC regulation. In fact, the FEC cites language from Plaintiffs' papers that suggests the exact opposite. For example, the FEC notes that "[P]laintiffs charge that 'more appropriately tailored alternatives to coordinated party expenditure *limits* exist'" and that "*the limits* are unconstitutional as applied to party spending in connection with 'party coordinated communications.'" (*Id.* (quoting Doc. 1 ¶ 102, #26 and Doc. 21, #33) (emphases added)). Both quotations reveal that Plaintiffs' claims go to the constitutional validity of the FECA's *limits*, not the FEC regulation that defines the term "party coordinated communications."

And that renders Plaintiffs' as-applied challenge here unlike the cases the FEC cites in which courts found the plaintiff to be raising purely regulatory challenges. (*Id.* at #5298, 5300–01). For example, *Holmes* involved Fifth Amendment challenges to the "timing" and "transfer" of campaign funds, which had to be purely regulatory challenges because "the Act [wa]s silent on both subjects." 823 F.3d at 75–76; *cf. McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 223 (2003) (noting that some of plaintiffs' claims "alleg[ing] constitutional infirmities [] found in the

implementing regulations" themselves "must be pursued in a separate proceeding" and were "not ripe"), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). And *Bluman* involved a purely regulatory challenge because the implementing regulation imposed its own "prohibit[ion on] specific types of election- related activities," which meant the plaintiff was challenging the validity of a legal restriction that did not stem from the operation of the statute. *Bluman v. Fed. Election Comm'n*, 766 F. Supp. 2d 1, 4 (D.D.C. 2011).

Here, the challenged limits—whether as applied to some or all forms of coordinated expenditures—are dictated by § 315 of the FECA. And as such, Plaintiffs' constitutional arguments (for both challenges) that those limits violate the First Amendment are properly understood as constitutional claims implicating the FECA. So the proposed question, even with its citation to a regulatory definition, is well within the bailiwick of the FECA's judicial review provision. That means there is no need to revise the proposed certified question in the first manner the FEC proposes.

2. The FEC's Proposed Caveat

Next, the FEC requests that the Court add a caveat to the certified question so that the Sixth Circuit answers whether "as a matter of Sixth Circuit law" the coordinated party expenditure limits are constitutional. (Doc. 45, #5303). The Court agrees with Plaintiffs—"[t]hat is a rather head-scratching request." (Doc. 48, #5450).

For starters, one could reasonably read the FEC's proposed caveat as attempting to limit the law that the Sixth Circuit should apply when it reviews this

constitutional challenge to just Sixth Circuit law. But that would be wholly impermissible as Plaintiffs' claims invoke the *First Amendment* and thereby call for an application of corresponding First Amendment jurisprudence. Accordingly, the Sixth Circuit should not be limited in what law it considers pertinent to the legal question—whether or not that law is set forth in Sixth Circuit decisions. Moreover, the Court is rather confused about the FEC's justification for the addition—that failing to add the requested caveat will permit the Sixth Circuit to "intrud[e] on the Fifth Circuit's power within its jurisdiction." (Doc. 45, #5306). To put it gently, the Court has no reason to believe the Sixth Circuit has gained authority over any of the courts under the Fifth Circuit's jurisdiction—let alone, the Fifth Circuit itself—or that this Court's framing of the question could somehow magically create such authority. To the contrary, however the question is worded, the Court is confident that the Fifth Circuit, and district courts located there, will feel free to treat the Sixth Circuit's analysis the same way they do, day-in and day-out, when parties cite out-of-circuit precedent for a given proposition. In sum, the FEC's proposed caveat is mere surplusage, has no legal significance, and could itself sow confusion rather than aid the Sixth Circuit. That is not the hallmark of a useful or important addition. And it would not be a proper "exercise [of the Court's] discretion in fashioning a question for the [Sixth] Circuit," as the FEC's proposed addition does not "more precisely capture[] the Constitutional difficulty raised by the [P]laintiffs' arguments." *Anh Cao v. Fed. Election Comm'n*, 688 F. Supp. 2d 498, 542 (E.D. La. 2010).

Finally, to the extent that the FEC raises (very valid) concerns about the scope of a district court's authority to grant *relief* that extends to parties beyond the parties to the instant action, (Doc. 45, #5304–06 (collecting cases questioning the propriety of nationwide *injunctions* that were entered by district courts)), *those* concerns, and the related legal arguments, are best raised at a later date. *E.g.*, *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 698 (D.C. Cir. 2010) (returning an answer to the certified question and leaving for the district court the determination of the proper remedies in light of the court's opinion); *cf. Bread Pol. Action Comm. v. Fed. Election Comm'n*, 678 F.2d 46 (7th Cir.) (mem) (remanding to the district court that had certified the initial constitutional question under § 310 of the FECA to implement the Supreme Court's opinion in the case), *on remand from* 455 U.S. 577 (1982). For present purposes, the concern is not with the relief available, but with the "immediate[] … certif[ication of] all questions of constitutionality of th[e] [FECA]" to the Sixth Circuit sitting en banc pursuant to § 310 of the FECA, so that it may analyze the merits of Plaintiffs' constitutional challenge expeditiously.

So the Court declines to include the second modification that the FEC requests.

* * *

Because neither proposed modification has merit, the Court **GRANTS** Plaintiffs' Motion to Certify (Doc. 20).[7] Accordingly, pursuant to § 310 of the Federal

[7] The Court makes a couple of non-substantive changes to the proposed question. First, it restyles the question as an interrogatory, rather than a declaratory statement as Plaintiffs

Election Campaign Act of 1971, the Court **CERTIFIES** to the United States Court of Appeals for the Sixth Circuit sitting en banc the following question:

> 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?

D. Factual Record

That leaves the Court with one remaining task—identifying the factual record that should be delivered with the above certified question. As noted above, the parties' submissions related to the proposed record have been voluminous. Combined, there are nearly 5,000 pages of proposed exhibits. The FEC filed a proposed findings of fact that is 127 pages long and includes 339 paragraphs (Doc. 43); Plaintiffs' is 35 pages and contains 136 paragraphs (Doc. 44). And although the Court stressed several times during the November 30, 2023, status conference that the parties *streamline* their supplemental briefing, the FEC filed a nearly line-by-line response to Plaintiffs' proposed findings of fact (despite the Court's express

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initially posed it. Second, the Court adds an FECA citation to the code compilation citation of the relevant provision, because Title 52 of the United States Code has not yet been enacted into positive law by Congress. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (citing 1 U.S.C. §§ 204(a), 112).

admonition not to provide such a response, (*see* Doc. 46, #5312 n.1)) that spanned 107 pages. (Doc. 47).

Despite the volume of these filings, the Court finds itself in the unenviable position of concluding, as explained further below, that the expedited discovery period the FEC requested was largely for naught. The central problem with the parties' proposed findings of fact based on those discovery materials remains the same as that which the Court (1) raised on the November 30, 2023, call, and (2) highlighted in its notation order issued the same day. The "facts" the parties ask the Court to find fall into several buckets that are not remotely close to adjudicative facts proper for certification: argumentation, statements of the law, quotations from historical documents, policy, descriptions of judicially noticeable materials, and evidentiary materials subject to exclusion under the Federal Rules of Evidence for, *inter alia*, containing hearsay statements. Even the experts retained by both parties do not fully provide expert opinion on financial matters, which would be directly relevant to how plaintiff committees structure and organize their campaign funding under the current framework. Rather, these experts engage in an academic debate about the health of political parties abstractly and discuss the legal and policy implications of the FECA's coordinated party expenditure limits.[8] (*Compare* Doc. 36-1, #413–14, *with* Doc. 41-3, #4130–34, 4148).

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[8] Admittedly, Plaintiffs' expert does go beyond providing more than just mere abstract policy assertions—adding charts and tables summarizing concrete financial data related to campaigns to illustrate his bottom-line conclusions. (*E.g.*, Doc. 41-3, #4136–39).

All this raises a question for the Court—do all of these "facts" have to be delivered along with the certified question found above? The FEC fervently argues yes. (Doc. 47, #5338–41). Plaintiffs, meanwhile, argue that the FEC's proposed findings should be disregarded—and even concede that the Court could reasonably decide to "adopt[] only Plaintiffs' Proposed Findings ¶¶ 1–55" (i.e., a small subset of the "facts" they have tendered). (Doc. 46, #5311, 5315). As explained below, the Court agrees that Plaintiffs have the stronger of the arguments and will certify the factual record that largely tracks a pared-down version of their proposed findings of fact (with additional findings of fact detailing campaign finance data drawn from the FEC's sworn declaration, which has a foundation in the declarant FEC employee's personal knowledge of the FEC's records, (Doc. 36-13, #1283–84)). *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 41 F. Supp. 2d 1197, 1200–01 (D. Colo. 1999) (explaining that the Court "ignore[d] the mass of irrelevant and/or inadmissible evidence in the record" because the parties had "lard[ed] the summary judgment record with voluminous documentation … without any attention to elementary evidentiary requirements"), *aff'd*, 213 F.3d 1221 (10th Cir. 2000), *rev'd*, *Colorado II*, 533 U.S. 431. Because of the prolixity with which the parties' proposed findings of fact were briefed, the Court will not engage in a granular analysis explaining why every proposed paragraph was included or rejected as outside the proper scope of the Court's fact-finding responsibility. Rather, the Court will explain why it is rejecting categories of proposed findings with examples. And it will attach an

appendix containing its factual findings to establish the record for this case.

The dividing line for the Court in what it chooses to certify as a "fact" or not is the crucial distinction between "adjudicative" and "legislative" facts. The former category relates to the "facts of the particular case." *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002) (quoting Fed. R. Evid. 201, advis. comm. note (1972 proposed rules)); *Qualley v. Clo-Tex Int'l, Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000) (describing adjudicative facts as those that concern "the activities or characteristics of the litigants" (citation omitted)). The latter refers to that which "ha[s] relevance to *legal reasoning* …, whether in the formulation of a legal principle or ruling by a judge … or in the enactment of a legislative body." *Id.* (quoting Fed. R. Evid. 201, advis. comm. note (1972 proposed rules)) (emphasis added). Because the Court is tasked with finding facts and not engaging with the merits of Plaintiffs' challenge, it would be improper for the Court to make findings of any legislative facts. *Rufer v. Fed. Election Comm'n*, 64 F. Supp. 3d 195, 205 (D.D.C. 2014). Section 310 of the FECA textually commits any determinations about the merits of the parties' legal positions to the en banc court of appeals, which means any legislative fact-finding necessitated by engaging with the merits are also textually committed to the en banc court of appeals. *See Athens Lumber Co. v. Fed. Election Comm'n*, 689 F.2d 1006, 1015 (11th Cir. 1982) (deciding to certify the constitutional question to the en banc court of appeals rather than to remand for additional factfinding because "the facts necessary to resolve the issues raised … are legislative as opposed to adjudicative"

and "[a]s such they are [] easily presented to the court of appeals en banc"); *Buckley v. Valeo*, 519 F.2d 817, 820 (D.C. Cir. 1975) (Bazelon, J., dissenting) ("At issue in this case is whether statutory prohibitions actually infringe upon constitutional rights. The facts bearing upon these questions are—we should assume absent specific evidence of particular adjudicatory disputes—legislative facts. In no way is the trial court better qualified than we to isolate and to decide those many questions whose resolution will turn on such legislative facts."); *cf. Teter v. Lopez*, 76 F.4th 938, 946–47 (9th Cir. 2023) (denying a motion to remand to apply the newly minted history-and-tradition test set forth in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* to the Second Amendment challenge at bar because the relevant historical evidence implicated legislative facts easily ascertainable on appeal).

Furthermore, any so-called findings of legislative facts that the Court could make here 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. *United States v. Miller*, 982 F.3d 412, 430 (6th Cir. 2020). Making such findings and parsing through the conflicting characterizations (and argumentation) regarding the relevance and importance of historical events or sources at this stage would be duplicative. And not only would it be largely wasted effort, but it would unnecessarily delay this proceeding. Such delay conflicts with the Court's statutory mandate to certify constitutional questions "immediately." For this reason, it is unsurprising that the D.C. Circuit's seminal discussion in *Buckley v. Valeo* of the procedure district courts should follow when certifying a question

under § 310 of the FECA instructs that district courts should "[t]ake … evidence—[but only] over and above submissions that may suitably be handled through judicial notice," such as "legislative facts." 519 F.2d at 818 (providing a standard for determining what is outside the scope of the district court's evidentiary mandate, which standard is materially similar to the current judicial notice standard set forth Rule 201(b)). So the Court will decline to find any legislative, rather than adjudicative, facts—the Sixth Circuit can take judicial notice of such legislative facts as it deems necessary to dispose of the certified question.

So what does that exclude here? Quotations from (and argumentation about) founding sources (*e.g.*, Doc. 43 ¶¶ 9–10, #5118–19)) are out—those are inherently tied to legal arguments about the application of the First Amendment to this dispute. *Cf. Teter*, 76 F.4th at 946–47. Summaries and excerpts drawn from caselaw (*e.g.*, (Doc. 43 ¶¶ 73–74, #5140; Doc. 44 ¶¶ 85, 106, #5265, 5272)) are self-evidently beyond the scope of the Court's fact-finding responsibility. References to historical or current events and public reporting on those matters (*e.g.*, Doc. 43 ¶ 85, #5143; Doc. 44 ¶ 118, #5275) are handled through judicial notice and are rarely useful for establishing adjudicative facts for a given case (especially considering the serious hearsay problems these sources raise, *Cary v. Cordish Co.*, 731 F. App'x 401, 405–07 (6th Cir. 2018)). *See Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1086 (2d Cir. 1982). So they will not form part of the record here. Equally inappropriate to form the basis of the factual record are citations to so-called factual findings in other cases and the related discovery materials that formed the record of *those* cases but

were not tested through discovery *here* (*e.g.*, Doc. 43 ¶ 67, #5138; Doc. 44 ¶ 79, #5264). *Athridge v. Aetna Cas. & Sur. Co.*, 474 F. Supp. 2d 102, 110 (D.D.C. 2007) (citing *United States v. Jones*, 29 F.3d 1549, 1554 (11th Cir. 1994)) ("Findings of fact by a judge are hearsay not subject to any exception enumerated by the Federal Rules of Evidence.").

Even more far afield from the category of adjudicative facts are matters of policy. *Qualley*, 212 F.3d at 1128, 1131–32 (explaining that matters of policy are legislative in nature because they factor into a court's legal analysis and involve activities beyond those specific to the parties to the suit); Wright & Miller, 21B Fed. Prac. & Proc. Evid. § 5103.2 (2d ed. 2023) (explaining that consultation of legislative facts in resolving matters of policy are better suited to judicial notice than adjudication through admissible evidence and are often more effectively presented on appeal than to the district court). Policy statements found in law review articles, treatises, and even the reports of the policy experts the parties have retained, which contain broad-sweeping arguments about the propriety or impropriety of certain legal positions, (*e.g.*, Doc. 43 ¶¶ 10, 45, 110, 160–61, #5119, 5131, 5155–56, 5179; Doc. 44 ¶¶ 62–66, 82, 84–85, 99, #5256–57, 5264–65, 5268), do "not [involve] the kind of facts that can be determined in a judicial forum on the basis of a cold paper record full of hearsay and opinion." *Speechnow.org v. Fed. Election Comm'n*, No. 08-0248, 2009 WL 3101036, at *1 (D.D.C. Sept. 28, 2009). And finally, summaries or quotations from statutes, regulations, and other legislative materials, such as legislative history, (*e.g.*, Doc. 43 ¶¶ 80–81, 86–87, 261–62, 309–14, #5141–44, 5213–14, 5231–32), are

well within the scope of judicial notice and beyond the Court's purview of making findings of adjudicative facts. *Oneida Indian Nation*, 691 F.2d at 1086; *Rufer*, 64 F. Supp. 3d at 205.

The FEC disagrees with this position by highlighting expansive records certified by a handful of other district courts and noting that some courts of appeals have remanded for additional factfinding in FECA cases. (Doc. 47, #5338–41). First, to the extent that the FEC contends district courts predominately certify legislative facts, it ignores district courts that have expressly rejected the notion that a district court should certify or find legislative facts under § 310 of the FECA. *Rufer*, 64 F. Supp. 3d at 205 (collecting cases). Second, while courts of appeals have remanded for additional factfinding, the examples cited involved records entirely devoid of facts, *Khachaturian v. Fed. Election Comm'n*, 980 F.2d 330, 332 (5th Cir. 1992) (per curiam), or required additional adjudicative facts to be developed, *Anderson v. Fed. Election Comm'n*, 634 F.2d 3, 5 (1st Cir. 1980). And contrary to the FEC's position, at least one circuit court went out of its way to chastise the corresponding district court for making "findings [that] are disputed, are unsupported by proper evidence, or go beyond appropriate fact finding … metamorphos[izing] into conclusions regarding the legal issues in this case." *Mariani*, 212 F.3d at 767. Finally, although findings of legislative facts are often considered in campaign finance and First Amendment cases, (Doc. 47, #5343–44, 5346–47), that is the nature of the legal analysis required under applicable precedent. But that courts, including appellate courts, engage with legislative materials and historical documents does not impose on the

district court an obligation to make findings of legislative facts. That inquiry would naturally and necessarily bleed into legal analysis, which is statutorily reserved for the courts of appeals. *See Mariani*, 212 F.3d at 767 (choosing not to credit the district court's findings of legislative facts). So the FEC's arguments fail to persuade.

Simply, given the defined and segregated responsibilities of the two courts, the Court follows the text of the FECA and adheres to its obligation to make findings of adjudicative facts only. And to the extent that the FEC is fearful that such findings' being absent from the record will not permit it to rely on any of these materials in the Sixth Circuit,[9] the Court's

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[9] The Court sincerely doubts that any such fear is well-founded. The FEC filed all this material on the Court's docket and presented its argumentation to this Court thereby preserving its legal arguments for the certification proceedings and protecting them against any claim of waiver or forfeiture. But even had the FEC not done so, there is no reason to think such arguments and proposed findings of legislative facts would be waived or forfeited. After all, under the plain text of § 310 of the FECA, any legal issues are textually reserved for and committed to the care of the Sixth Circuit sitting en banc. As a result, both parties had no reason to brief any legal issue—beyond whether Plaintiffs' challenge merits certification in the first instance—in this Court. Therefore, they would be more than justified to develop their arguments on the merits of Plaintiffs' claims in full for the first time on appeal without risking a waiver or a forfeiture. *See Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457, 469 n.15 (9th Cir. 2023) ("A party cannot forfeit what is not available because it never would have had an opportunity to raise that right in the first instance—hence the forfeiture caselaw's focus on whether an issue was timely asserted." (cleaned up)); *Shy v. Navistar Int'l Corp.*, 781 F.3d 820, 830 (6th Cir. 2015) (holding that a party had not waived its arbitration defense by developing it in full for the

declination to certify any legislative facts does not prejudice the FEC's (or Plaintiffs') ability to cite such sources and make the same legal arguments it (they) has (have) in its (their) proposed findings of fact.[10] *Rufer*, 64 F. Supp. 3d at 205 (The Court's "determination does not prejudice the FEC inasmuch as it may still cite … [these materials]—*e.g.*, legislative history, legal treatises, or media reports—in its appellate briefing." (citation omitted)).

With the dividing line between adjudicative and legislative facts drawn, there are two substantial remaining factual issues to resolve.[11]

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first time in a motion to compel—the primary mechanism used to invoke the defense—because its prior response to a motion to intervene was not inconsistent with that defense).

[10] Because the 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, the Court declines to grant Plaintiffs' request to strike a slew of exhibits the FEC has filed on the docket. (Doc. 46, #5323–29).

[11] Not surprisingly, given the FEC provided a near paragraph-by-paragraph response to Plaintiffs' proposed findings of fact (despite the Court's admonition not to file such a response), the FEC provided a slate of objections to Plaintiffs' proposals too numerous to address individually in this opinion. (*See* Doc. 47, #5364–442). Most of these objections are effectively handled by the Court's refusal to certify legislative facts. The rest largely fall into disagreements about framing (usually because the proposed findings are argumentative) or because the FEC contends that proposed facts lack a proper foundation (even though Plaintiffs cited to declarations and discovery responses supporting in part the proposed facts). If a proposed finding of fact needed to be reframed because it contains argument, the Court has done so. If the FEC's only objection is that the proposed fact is based on self-serving discovery responses or declarations, the Court has overruled that objection. *Camara v. Mastro's Rests. LLC*, 952

First, Plaintiffs highlight areas of noted disagreement between the parties' retained experts. (*See* Doc. 44 ¶¶ 98–99, 103–07, 116–18, #5268–75). But these disagreements strike the Court as a dispute about *policy* rather than a disagreement about adjudicative facts specific to the parties or this particular suit. (*E.g.*, *id.* ¶¶ 98–99, 103, #5268–69 (experts disagree whether coordinated expenditure limits constitute the best regulatory mechanism to limit quid pro quo corruption); *id.* ¶ 117, #5275 (experts disagree whether political parties "have prospered" or are "weak")). But as noted above, these types of legal and policy arguments are beyond the scope of this Court's responsibility. *Qualley*, 212 F.3d at 1128, 1131–32. And because these policy issues may be aired in connection with the parties' legal arguments about the merits of Plaintiffs' claims before the Sixth Circuit, *Rufer*, 64 F. Supp. 3d at 205, the Court need not (and does not) wade into evaluating the relative merit of the experts' proffered positions. That is for the en banc court.

F.3d 372, 374–75 (D.C. Cir. 2020) (explaining that uncontroverted self-serving evidence based in a party's personal knowledge is not objectionable just because it is self-serving—such evidence is "by [its] nature [] self-serving"). To the extent that the FEC's objection has not fallen into one of those camps or is not otherwise resolved by the Court's Opinion and Order, the Court has evaluated the FEC's objection, taken it into account in determining whether and what to certify, and has provided substantiation for its factual finding with a citation to the record—and the Court has erred on the side of caution by largely quoting from the original source to avoid inadvertently editorializing the fact at issue.

Second, the FEC directly challenges Plaintiffs' discovery responses, in which they label certain monies expended by the NRSC and NRCC during the 2022 election cycle as the costs of operating their respective independent expenditure units. (Doc. 43 ¶¶ 330–33, #5238–39; Doc. 47, #5359–63). This dispute is the rare instance here where the parties raise a disagreement of *adjudicative* fact that is properly within the purview of this Court.[12] *Qualley*, 212 F.3d at 1128. Essentially, the FEC argues the NRCC's and NRSC's claimed operating expenses for running their "firewalled" independent expenditure unit—the organizational structure created by the committees to avoid flouting the coordinated party expenditure limits—of $92.4 million and $38 million, respectively, are inflated.

The FEC claims that (1) documentary evidence tends to prove that the costs of running an independent expenditure unit are lower than Plaintiffs contend, (2) expenses related to advertising borne by the independent expenditure units do not constitute operating costs because such expenditures would have been made by the committees regardless "whether [it was] coordinated or independent," and (3)

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[12] For the same reason that the financials submitted by the NRSC and the NRCC describe the "activities [and] characteristics of the litigants," the financial information drawn from the FEC's own records detailing campaign finance data, as submitted in the FEC's employee's sworn declaration, (*see* Doc. 36-13, #1283–84), also speaks to adjudicative facts within this Court's fact-finding bailiwick. *Qualley*, 212 F.3d at 1128. So the Court will rely on that sworn declaration to make findings of adjudicative fact regarding campaign finance data as set forth in the Appendix attached to this Opinion and Order.

Plaintiffs have not proffered evidence that, in the counterfactual world where parties can spend as much as they want on coordinated expenditures, they would not have "incurred specific costs" (e.g., polling data) that are currently borne by the independent expenditure units. (Doc. 47, #5360–62). Plaintiffs disagree. They contend that "advertising [costs] are properly considered among the[] total operating expenses" because the NRSC and NRCC would have "allocated [such monies] toward other party activities"; "[i]t is not clear what evidence the FEC would expect NRSC or NRCC to maintain to establish th[e] counterfactual [it demand Plaintiffs prove]"; and that such proof is unnecessary because "the record shows that forcing NRSC and NRCC to dedicate scarce party resources toward establishing and maintaining separate [independent expenditure] units results in an inefficient split in the party operations." (Doc. 46, #5321–22).

Part of the disagreement is about the exact numbers reflected in the evidence. (*Compare* Doc. 40-7, #3889, 3900, *and* Doc. 40-11, #3930, *with* Doc. 44 ¶ 75e, #5261). When Plaintiffs overstate the numbers found in the record evidence, the Court will cite just to the record evidence itself and not defer to Plaintiffs' characterization. But another dimension to this disagreement is about the use of the term "operate" and whether it takes the colloquial meaning as Plaintiffs suggest, (Doc. 46, #5321), or the statutory meaning as the FEC argues, (Doc. 47, #5360–61). That strikes the Court as a dispute that would require dipping one's toes ever so slightly into the merits of the case. As a result, rather than conclude that advertising expenditures made by plaintiff

committees' independent expenditure units are properly labelled operational, the Court will take up the FEC's suggestion: it will "differentiate 'administrative' expenses from independent expenditures on political advertising, which is a more accurate representation of this data and will be more useful for the Court of Appeals." (*Id.* at #5361).

Finally, what is the Court to do about the parties' disagreement as to what extent the NRSC's and the NRCC's balance sheets would look different in a counterfactual world without any coordinated party expenditure limits? To begin, the Court notes that the NRSC and the NRCC submitted sworn declarations and interrogatory responses containing non-conclusory statements detailing the problems with an organizational structure that bars the flow of information about how to avoid duplicative advertising and to streamline spending on candidates. (Doc. 19-1 ¶¶ 19–23, #179–80; Doc. 19-2 ¶¶ 19–23, #189–90; Doc. 41-1, #4034, 4038–39, 4044, 4052; Doc. 41-2, #4089–90, 4093–94, 4102, 4106–07). As repeat players that engage with candidates and observe the effect of campaign expenditures on voters, these uncontroverted statements about duplication of resources and risks of harmful campaign advertising without proper coordination are well within the personal knowledge of the NRSC and the NRCC. *See Camara v. Mastro's Rests. LLC*, 952 F.3d 372, 374–75 (D.C. Cir. 2020) (explaining that self-serving evidence that is within a party's personal knowledge is not objectionable just because it is self-serving). The Court acknowledges Plaintiffs' contention that the FEC's demand for proof of a counterfactual is a tall ask. But, even so, the Plaintiffs have identified at

least one concrete area in which one can credit their narrative that they have incurred extra expenses because of the coordinated expenditure limits: the payment for separate facilities and employees to avoid cross over between independent expenditure units and those committee officials that might engage in coordinated expenditures. (Doc. 40-6, #3886; Doc. 40-7, #3888–89; Doc. 41-1, #4036–37; Doc. 41-2, #4092–93).

The FEC really does not contest this point—suggesting only that the regulations do not require creation of a separate independent expenditure unit. (*See* Doc. 47, #5373–75). But that the regulations do not *require* an independent expenditure unit does not mean the NRSC and the NRCC lack the personal knowledge or the foundation to establish that creating independent expenditure units is how they have sought to comply with the FECA while still engaging in campaign speech. As the NRSC and the NRCC have placed uncontroverted evidence on the record tying these units and their costs solely to the coordinated party expenditure limits, (Doc. 41-1, #4036–37; Doc. 41-2, #4092–93), it is well within the Court's discretion to find as a matter of fact that plaintiff committees have incurred costs (in the order of millions of the dollars, (Doc. 43 ¶¶ 331, 333, #5238–39 (the FEC's acknowledgment that the NRCC expended over $5 million and that the NRSC expended over $2 million on separate facilities for their respective independent expenditure units)) that are attributable to the coordinated expenditure units. *Camara*, 952 F.3d at 375. Now, whether such costs (or the risk of duplicative or harmful advertising and the bar on complete coordination among political parties, their

committees, and the candidates) constitute a "substantial burden" on Plaintiffs' free speech rights is a merits question beyond the scope of the Court's mandate. All the Court finds at this stage in the litigation is that Plaintiffs have proffered evidence identifying those costs and risks as the result of the FECA's coordinated party expenditure limits.

With that, the Court has resolved the parties' legal disputes over the scope of the factual record it is to certify. To recap: The Court will certify only adjudicative facts in line with its explanation above. In addition, the Court will not delve into the dueling policy experts' academic dispute because they raise issues properly addressed in connection with an analysis of the merits Plaintiffs' constitutional claims. And the Court will avoid characterizing advertising costs incurred by the plaintiff committees' independent expenditure units as "operational." But it will find that Plaintiffs have identified examples of costs and burdens the coordinated expenditure limits have imposed on the NRSC and the NRCC. Finally, as noted above, the Court has read and will resolve any line-item objections that the FEC provided in its paragraph-by- paragraph response (if the other pronouncements do not obviate the objections) in the reframed findings of fact provided in the Appendix.

CONCLUSION

As stated more fully above, the Court determines that at least one individual and one committee plaintiff has standing to bring suit and that Plaintiffs raise a non- frivolous constitutional challenge to the coordinated party expenditure limits found in the FECA. And the Court finds that the FEC's objections

to Plaintiffs' framing of the proposed certified question lack merit. Thus, the Court **GRANTS** Plaintiffs' Motion to Certify Question to the En Banc Court of Appeals (Doc. 20). Accordingly, the Court **CERTIFIES** to the United States Court of Appeals for the Sixth Circuit sitting en banc the following question:

> 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?

And the Court delivers the Appendix attached to this Opinion and Order to the United States Court of Appeals for the Sixth Circuit sitting en banc as the record in this case containing the Court's findings of adjudicative fact.

The Court **DIRECTS** the Clerk to **TRANSMIT** forthwith to the United States Court of Appeals for the Sixth Circuit a copy of this Opinion and Order and the attached Appendix.[13]

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[13] Because the Court certifies the above constitutional question to the United States Court of Appeals for the Sixth Circuit sitting en banc under § 310 of the FECA, "the matter" is now before the court of appeals. 52 U.S.C. § 30110. Accordingly, the Court **STAYS** further proceedings in this Court pending a decision of the en banc court of the United States Court of Appeals for the Sixth Circuit on the Court's certified question and, if a petition for a writ of certiorari is timely filed with the Supreme Court of the United States, the disposition of such a petition. In the event such a timely filed petition for a writ certiorari is granted, the stay shall continue until further order of this Court, but it shall

SO ORDERED.

January 19, 2024
DATE

DOUGLAS R. COLE
UNITED STATES DISTRICT JUDGE

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not terminate before the sending down of the judgment of the Supreme Court. The Court will resume control over the matter and the certified question upon receiving the decision and mandate from the Sixth Circuit and, as applicable, from the Supreme Court. The parties are ordered to file a joint status report every six months, or more frequently if circumstances warrant, to inform the Court of the status of the certification proceedings.

APPENDIX

FINDINGS OF ADJUDICATIVE FACT

I. Parties

a. Plaintiffs

i. National Republican Senatorial Committee

1. The National Republican Senatorial Committee (NRSC) is a "national committee" of the Republican Party, as the term is defined by § 301 of the Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. § 30101(14), that is registered with the Federal Election Commission and acts as the Republican Party's senatorial campaign committee. (Doc. 1 ¶ 13, #5–6; Doc. 36-13, #1283–84; Doc. 40-4, #3873; Doc. 40-5, #3878).

2. The NRSC's principal place of business is located at 425 2nd Street N.E., Washington, D.C. 20002. (Doc. 19-1, #174; Doc. 40-5, #3878).

3. The NRSC's stated purpose is to "promote the election of Republican candidates for the United States Senate." (Doc. 40-4, #3873; Doc. 40-5, #3878).

4. The NRSC, which was first organized in 1916, "was established by Republican Members of the United States Senate." (Doc. 40-12, #3934).

5. The United States Senate Republican Conference "advises the [NRSC] Board of Directors" regarding NRSC matters and "elect[s] the Chairman" of the NRSC. (Doc. 40-5, #3879–80).

6. The Chairman "appoint[s] the Executive Director [of the NRSC]," who "supervise[s] and control[s] all of the affairs of the [NRSC] and oversee[s] the

management of the [NRSC]." (Doc. 40-5, #3880; Doc. 40-12, #3936).

7. Members of the NRSC "are appointed by the Senate Republican Conference Committee." (Doc. 40-12, #3934).

8. The current Executive Director, who has served in that role since January 2023, is Jason Thielman, who previously worked "as the Chief of Staff to Senator Steve Daines of Montana, the NRSC's current Chairman," as well as on federal and state election campaigns. (Doc. 19-1, #174).

ii. National Republican Congressional Committee

9. The National Republican Congressional Committee (NRCC) is a "national committee" of the Republican Party, as the term is defined by § 301 of the FECA, 52 U.S.C. § 30101(14), that is registered with the Federal Election Commission and acts as the Republican Party's congressional campaign committee for elections to the United States House of Representatives. (Doc. 1 ¶ 14, #6; Doc. 36-13, #1283–84; Doc. 40-3, #3857).

10. The NRCC's principal place of business is located at 320 First Street S.E., Washington, D.C. 20003. (Doc. 19-2, #184; Doc. 40-3, #3857).

11. "The NRCC exists for the purpose of electing Republicans to the United States House of Representatives." (Doc. 40-3, #3857).

12. The NRCC "acts as counsel and advisor to the House Republican Conference." (*Id.* at #3857).

13. The United States House Republican Conference, which is made up of "Republican members of the

United States House of Representatives during the [relevant] two-year Congressional cycle," selects the Chairman of the NRCC. (*Id.* at #3861, 3863).

14. The House Republican Conference can also remove the Chairman, ratify his appointments to the NRCC's Executive Committee, and dissolve the NRCC by a majority vote. (*Id.* at #3863).

15. The NRCC's Board of Directors "must be Members of the House Republican Conference." (*Id.* at #3858).

16. The NRCC's Executive Committee "must be members of the U.S. House of Representatives in the Republican Party." (*Id.* at #3864).

17. The Executive Committee, which has the "authority [to] govern[] and [to] manag[e] the political affairs" of the NRCC is "composed of at least 38 members, [which] includ[es] the Speaker (when Republicans constitute a majority in the House), the Republican Leader, the Republican Whip, the [House Republican] Conference Chairman, the NRCC Chairman, the Policy Chairman, the [House Republican] Conference Vice Chairman, and the [House Republican] Conference Secretary." (*Id.*).

18. The NRCC Executive Director is appointed by the NRCC Chairman, who is "act[s] as a professional advisor of the Board of Directors on all aspects of the organization's activities," "oversee[s] the day-to-day operations of the organization … [and] the planning, implementation and evaluation of the organization's activities." (*Id.* at #3861–62).

19. The current Executive Director, who has served in that role since January 2023, is Christopher Winkelman, who previously practiced election law and served as outside counsel to the NRCC as a partner at a law firm. (Doc. 19-2, #184).

iii. James David Vance

20. James David ("J.D.") Vance is a United States Senator, who has represented the State of Ohio since January 3, 2023, after being elected in the 2022 General Election. (Doc. 19-3, #194).

21. Senator Vance is a member of the Republican Party. (*Id.*).

22. He was the 2022 Republican Party nominee for the United States Senate in Ohio. (*Id.*).

23. He is eligible to vote in any election for the office of the President of the United States. (*Id.*).

24. He intends to run for federal office again, which intention he has demonstrated by filing a statement of candidacy and making periodic disclosure reports reflecting his campaign's raising contributions for his anticipated 2028 campaign. (Doc. 41-6, #4711, 4715).

iv. Steven Joseph Chabot

25. Steven Joseph Chabot is a former United States Congressman, who had represented Ohio's First Congressional District in the United States House of Representatives. (Doc. 1 ¶ 16, #6–7).

26. He is eligible to vote in any election for the office of the President of the United States. (*Id.*).

27. He lost re-election to the United States House of Representatives in the 2022 General Election. (Doc. 36-31, #1541).

28. He does not intend to run for federal office again in the future having filed "to terminate his campaign committee, which has raised no funds toward any future election" and having taken no further actions revealing an intention to run for federal office again. (*Id.* at #1541–42).

b. Defendants

29. The Federal Election Commission (FEC) was established by the FECA, *see* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1280 (1974), and is the independent federal agency of the United States with exclusive jurisdiction over the administration and civil enforcement of the FECA. (Doc. 1 ¶ 17, #7; Doc. 24 ¶ 17, #280).

30. Defendant Shana M. Broussard is a commissioner of the FEC. As a commissioner, she is responsible for administering and enforcing FECA. She is sued in her official capacity. (Doc. 1 ¶ 20, #7; Doc. 24 ¶ 20, #280).

31. Defendant Sean J. Cooksey is a commissioner and the Chair of the FEC. As a commissioner, he is responsible for administering and enforcing FECA. He is sued in his official capacity. (Doc. 1 ¶ 21, #7; Doc. 24 ¶ 21, #280).

32. Defendant Allen J. Dickerson is a commissioner of the FEC. As a commissioner, he is responsible for administering and enforcing FECA. He is sued in his official capacity. (Doc. 1 ¶ 18, #7; Doc. 24 ¶ 18, #280).

33. Defendant Dara Lindenbaum is a commissioner of the FEC. As a commissioner, she is responsible for administering and enforcing FECA. She is

sued in her official capacity. (Doc. 1 ¶ 19, #7; Doc. 24 ¶ 19, #280).

34. Defendant James E. Trainor, III is a commissioner of the FEC. As a commissioner, he is responsible for administering and enforcing FECA. He is sued in his official capacity. (Doc. 1 ¶ 22, #7; Doc. 24 ¶ 22, #280).

35. Defendant Ellen L. Weintraub is a commissioner and the Vice Chair of the FEC. As a commissioner, she is responsible for administering and enforcing FECA. She is sued in her official capacity. (Doc. 1 ¶ 23, #7; Doc. 24 ¶ 23, #280).

II. Procedural Background

36. Plaintiffs brought this lawsuit on November 4, 2022, in which suit they challenge the FECA's coordinated party expenditure limits as an unconstitutional abridgment of their First Amendment rights. (Doc. 1, #1–5).

37. Plaintiffs' Complaint raises two claims for relief. The first challenges the coordinated party expenditure limits as facially unconstitutional. (*Id.* at #24–25). The second challenges those limits as unconstitutional as applied to "party coordinated communications," as the term is defined in 11 C.F.R. § 109.37. (*Id.* at #26).

38. For these alleged violations, Plaintiffs demand declaratory and injunctive relief barring the FEC's enforcement of the coordinated party expenditure limits either *in toto* or as applied to party coordinated communications. (*Id.* at #26–27). And they request costs and fees as appropriate. (*Id.* at #27).

39. On January 9, 2023, Defendants moved to dismiss the Complaint or, in the alternative, to change the venue of this suit. (Doc. 10, #81–82). The motion to dismiss became ripe on February 13, 2023. (*See* Doc. 15).

40. On May 9, 2023, the Court denied Defendants' Motion to Dismiss, including denying the request to transfer venue. (Doc. 18).

41. On May 17, 2023, Plaintiffs moved to certify their facial and as-applied constitutional challenges to the United States Court of Appeals for the Sixth Circuit sitting en banc pursuant to § 310 of the FECA. (Doc. 20, #215).

42. On May 23, 2023, Defendants answered the Complaint denying Plaintiffs' entitlement to relief and reserving as its only affirmative defense a challenge to the Court's subject matter jurisdiction over "a plaintiff[]" (who was not explicitly named but was suggested to be Chabot). (Doc. 24, #280, 283, 291).

43. On June 7, 2023, Defendants opposed Plaintiffs' motion to certify arguing that certification was premature because discovery had not been conducted. (Doc. 26, #307–08).

44. On August 1, 2023, the Court met with the parties to discuss the pending motion and the scope of the requested discovery. (8/1/23 Min. Entry).

45. The same day, the Court issued a notation order setting an expedited briefing schedule permitting the parties to conduct limited discovery and to develop the factual record to be delivered to the

Sixth Circuit if the Court ultimately granted Plaintiffs' motion. (8/1/23 Not. Order).

46. Discovery closed on October 31, 2023. (*Id.*). On November 17, 2023, the parties tendered their respective proposed findings of fact for the Court's consideration. (Docs. 43–44). These proposed findings of fact relied on nearly 5,000 pages of exhibits filed on the Court's docket. (Docs. 19, 36–42).

47. The Court met with the parties on November 30, 2023, to discuss the parties' proposed findings of fact. (11/30/23 Min. Entry). The parties were ordered to file a response to each other's proposed findings of fact. (*Id.*). And Defendants were ordered to file an updated response to the motion to certify with Plaintiffs' reply to be filed thereafter. (*Id.*). The supplemental briefing was completed on December 20, 2023. (*See* Doc. 48).

48. As detailed in the Court's Opinion and Order, pursuant to § 310 of the FECA, the Court certifies to the United States Court of Appeals for the Sixth Circuit sitting en banc the following question:

> 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?

And in addition to this question, the Court delivers this Appendix with the Court's findings

of adjudicative fact to the United States Court of Appeals for the Sixth Circuit sitting en banc to serve as the record in this case.

III. Coordinated Party Expenditure Limits and Their Effects on Plaintiffs

49. Plaintiffs' prior and future campaign activities are governed by the contribution and expenditure limits and rules set by the FECA and its implementing regulations. (Doc. 19-3, #194–95; Doc. 40-3, #3857, Doc. 40-4, #3873; *see generally* Doc. 41-7 (discovery requests and Chabot's answers reflecting the parties' unanimous belief that Chabot's former campaign activities were governed by the FECA and its implementing regulations)).

50. Under its authority to implement and to enforce the FECA, the FEC regularly publishes the applicable limits on contributions and coordinated expenditures with which Plaintiffs are required to comply for any given election cycle. *See Contribution Limits*, Fed. Election Comm'n (Feb. 2023), https://perma.cc/QBZ7-SZEH; *Coordinated Party Expenditure Limits*, Fed. Election Comm'n (Feb. 2, 2023), https://perma.cc/FZQ2-AGBV.

51. So long as the coordinated party expenditure limits remain in place, Plaintiffs will comply with those limits. (Doc. 19-3, #197; Doc. 41-1, #4043–44, 4048, 4053; Doc. 41-2, #4099, 4107; Doc. 41-6, #4714, 4721).

52. Under its FECA investigation and enforcement authorities, the FEC has a demonstrated history of investigating and enforcing the coordinated

expenditure limits: instances of violations of the coordinated party expenditure limits have been brought to the FEC's attention, investigated, and enforced via civil proceedings. *E.g.*, Final Audit Report of the Commission on the Republican Party of Minnesota – Federal, Attachment to First General Counsel's Report in Audit Referral 22-01, Federal Election Commission, at 7, 30–36 (June 30, 2022), https://perma.cc/PH7R-CQDA (discussing an investigation into coordinated party expenditures alleged to be in excessive of the limits established by the FECA by the Minnesota Republican party to Minnesotan candidates for the United States House of Representatives in the 2018 election); First General Counsel's Report, MUR 7826 – Iowa Democratic Party & Theresa Greenfield for Iowa, MUR 7862 – Iowa Democratic Party & Rita Hart for Iowa, Federal Election Commission 16–19, 22 (June 16, 2021), https://perma.cc/D4LW-9FQG (discussing the investigation and analysis leading the FEC's General Counsel's Office to recommend that the FEC find that two candidates' campaign committees knowingly accepted monies exceeding the FECA's coordinated party expenditure limits during the 2020 election cycle); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n* (*Colorado I*), 518 U.S. 604, 612–13 (1996) (per curiam) (procedural history explaining that the FEC brought an enforcement action against the petitioner for alleged violations of the coordinated party expenditure limits).

a. The NRSC's and the NRCC's Coordinated Expenditures

53. When the NRSC and the NRCC engage in coordinated expenditures with specific candidates under the FECA (i.e., when they pay for goods or services in coordination with candidates for the latter's benefit), the NRSC and the NRCC do not give money to candidates, do not relinquish ownership of the funds, and retain final approval over how such monies will be spent. (Doc. 19- 1, #176–77; Doc. 19-2, #187–88; Doc. 41-1, #4039–41; Doc. 41-2, #4096).

54. When engaging in coordinated expenditures, the NRSC and the NRCC accept and account for the suggestions and recommendations of the relevant candidates regarding the end to which such coordinated expenditures should be put. (Doc. 41-1, #4039–41; Doc. 41-2, #4096).

i. Plaintiffs' Coordinated Expenditures for the 2022 Election

55. Senator Vance declares that in 2022, "NRSC's staff consulted [his] campaign staff about how the NRSC should spend its money on [coordinated] advertising to best support [his] candidacy." (Doc. 19-3, #196). He states that the coordinated expenditures paid for by the NRSC included an August 2022 television advertisement, "live and automated get-out-the-vote telephone" calls, and peer-to-peer "get-out-the-vote text messages." (Doc. 41-6, #4716).

56. The NRSC approved an August 2022 television advertisement as a coordinated expenditure on behalf of Senator Vance's 2022 campaign after

being presented with a largely finished proposed advertisement. (Doc. 40-9). Senator Vance states that with respect to the television advertisement, his campaign "suggested the use of a draft television script," which led to "the NRSC['s] [use of] … a common vendor for the production and distribution of the advertisement." (Doc. 41-6, #4716). He declares he understood that the "approval of the advertisement and the decision to pay for it were all made at the sole discretion and authority of the NRSC and its staff." (*Id.*).

57. Vance similarly states that his campaign staff and the NRSC staff "discussed the messaging of the[] [coordinated telephone calls and coordinated peer-to-peer text messages] … but [that the] approval of these communications and [the] decision to pay for them also were all at the sole discretion and authority of the NRSC and its staff." (*Id.*).

58. In the 2022 election cycle, the NRSC "spent the full amount of the coordinated spending authority delegated to it" ($1,991,800) on Senator Vance's 2022 general election campaign. (Doc. 19-1, #178). The Ohio Republican Party had assigned all its coordinated expenditure authority ($1,008,400) to the NRSC for the 2022 senate election in Ohio. (Doc. 39-40, #3838). The Republican National Committee (RNC) assigned $983,400 in coordinated expenditure authority to the NRSC for the 2022 Senate election in Ohio. (Doc. 40-2, #3855).

59. Chabot states that the coordinated expenditure made by the NRCC during his 2022 campaign

was spent on a television advertisement "targeting voters in Ohio's [First] Congressional District, in the Cincinnati market, supporting Chabot's election and opposing the election of his opponent, Greg Landsman," which advertisement aired in September 2022. (Doc. 41-7, #4748).

60. Chabot states that "agents of his campaign requested or suggested the use of a draft television script and media plan to NRCC staff for use in a coordinated party communication, and the NRCC utilized the services of common vendor for the production and distribution of the advertisement." (*Id.*). The completed television advertisement and media plan for Chabot's 2022 campaign was presented to the NRCC in August, which then led to the latter's approval of a coordinated expenditure worth $103,000 for the advertisement's airing in September. (Doc. 40-8).

61. Chabot states he understood that the "approval of the advertisement script, copy, media plan, and decision to pay for the advertisement were all at the sole discretion and authority of the NRCC and its staff." (Doc. 41-7, #4748). His campaign "paid for a further distribution of the advertisement" that was not part of the NRCC's coordinated party expenditure. (*Id.*).

62. In the 2022 election cycle, the NRCC "spent $103,000 of its delegated coordinated spending authority on advertisements … supporting former Congressman Chabot's general election candidacy, [and] le[ft] $2,000 in reserve to ensure the NRCC's compliance with the coordinated

party expenditure limits in the event of an unexpected cost becoming known after the election." (Doc. 19-2, #188). The Ohio Republican Party assigned $55,000 in coordinated expenditure authority to the NRCC for the 2022 general election for Ohio's First Congressional District. (Doc. 39-39, #3836). The RNC assigned $50,000 in coordinated expenditure authority to the NRCC for the 2022 general election for Ohio's First Congressional District. (Doc. 40-1, #3853).

ii. Data on Plaintiff Committees' Coordinated Expenditures

63. The NRSC receives assignments of expenditure authority that come from the RNC and Republican state party committees, which assignments increase the amount of money the NRSC may dedicate toward coordinated party expenditures. (Doc. 19-1, #177).

64. "Based on [] assignments of spending authority [eventually executed] during the 2021-2022 election cycle, the NRSC spent over $15.5 million on coordinated party expenditures with the campaigns of Republican Senate nominees" across 17 electoral races. (*Id.*; Doc. 36-13, #1287).

65. Based on reporting to the FEC, the NRSC spent over $9.7 million total on coordinated expenditures across 14 electoral races during the 2020 election. (Doc. 36-13, #1287).

66. The NRSC states that it "often spends the full amount of any coordinated party expenditure authority assigned to it in competitive Senate races." (Doc. 19-1, #178).

67. The NRCC receives assignments of expenditure authority that come from the RNC and Republican state party committees, which assignments increase the amount of money the NRCC may dedicate toward coordinated party expenditures. (Doc. 19-2, #187).

68. "Based on [] assignments of spending authority [eventually executed] during the 2021–2022 election cycle, the NRCC spent over $8.3 million on coordinated party expenditures with the campaigns of Republican House nominees" across 80 electoral races, which included "over $400,000 on four Ohio House races." (Doc. 19-2, #187; Doc. 36-13, #1287). The NRCC notes that requests for assignment authority from other party committees are "typically honor[ed] … within a matter of days." (Doc. 41-2, #4100–01).

69. Based on reporting to the FEC, the NRCC spent over $5.5 million total on coordinated expenditures across 58 electoral races during the 2020 election. (Doc. 36-13, #1287).

70. The NRSC and the NRCC declare that "[c]oordinated spending [from segregated accounts exempted from the coordinated party expenditure limits] on legal proceedings directly involving or requested by [congressional] candidates or campaigns have become particularly common since 2014." (Doc. 19-1, #178; Doc. 19-2, #188). They further declare that they "defrayed hundreds of thousands of dollars in legal costs at the request of 2022 [federal] campaigns" using these accounts. (Doc. 19-1, #178; Doc. 19-2, #188).

b. The NRSC's and the NRCC's Independent Expenditure Units

71. Based on the NRSC's and the NRCC's stated desire to avoid entanglement with an FEC enforcement action by accidentally flouting the coordinated party expenditure limits, they have erected "firewalls" between the main operations of the committees and their self-styled "independent expenditure units" or "IE units." (Doc. 19-1, #178–79; Doc. 19-2, #188–89; Doc. 41-1, #4034, 4036; Doc. 41-2, #4090, 4092).

72. The NRSC's and the NRCC's IE units' operations are separated from the main operations of the NRSC and the NRCC, which results in the IE units' making messaging and spending decisions independent of the NRSC and NRCC leadership. (Doc. 19-1, #179; Doc. 19-2, #189).

73. Though independent, the NRSC and the NRCC allocate funds from their general operating accounts to fund their IE units. (Doc. 41-1, #4042; Doc 41-2, #4097–98; Doc. 40-6, #3886; Doc. 40-7, #3888–89). Both the NRSC and the NRCC declare that they would put such funding toward other uses, including expenditures made in coordination with candidates, if they did not feel compelled to create the IE units to ensure compliance with the FECA's coordinated party expenditure limits. (Doc. 41-1, #4042–43; Doc 41-2, #4097–99).

74. Creation of an independent operation unit translates into the NRSC's and the NRCC's payment for separate facilities and employees for their IE units to avoid cross over between the

units and those committee officials that might engage in coordinated expenditures. (Doc. 41-1, #4036–37; Doc. 41-2, #4092–93).

75. The NRSC and the NRCC report that because their respective IE units are not "candidate-sponsored advertisements" and therefore do not qualify for the regulatorily mandated "lowest-unit advertising" when the IE units purchase advertising time, the NRSC and the NRCC have incurred increased advertising costs by running these IE units. (Doc. 41-1, #4037; Doc. 41-2, #4093; *see* Doc. 47, #5362 (FEC's acknowledgment that "broadcast stations [a]re not legally obligated to provide [the] NRSC and [the] NRCC['s] [IE units] the lowest unit rate[s]")). This is because they declare that they would have dedicated such money to additional coordinated expenditures for advertising spots that qualify for the best rates were they permitted to engage in additional coordinated expenditures and thus did not feel compelled by the coordinated expenditure limits to set up and to operate fire-walled IE units. (Doc. 41-1, #4047–48; Doc. 41-2, #4106–07). But the record does not reveal specific expenses or dollar amounts the NRSC's and the NRCC's IE units have incurred as a result of not receiving the benefit of the legally mandated lowest-unit advertising rates to substantiate the magnitude of those added costs.

i. Data on the NRSC's Independent Expenditures

76. For the 2022 election cycle, the NRSC's IE unit incurred actual expenses that totaled $37,379,382. (Doc. 40-11, #3930). The IE unit paid over $300,000 toward employee salaries, over $250,000 toward employee benefits and taxes, and nearly $450,000 on consultants. (*Id.*). Over $34 million of those expenses was spent on media and advertising. (*Id.*; *see also* Doc. 36-13, #1288). And the IE unit spent approximately $1.5 million on polling and research related expenses. (Doc. 40-11, #3930; Doc. 41-1, #4037). Over $164,000 of the monies expended by the IE unit went toward its offices—rent, furnishings, and related expenses. (Doc. 40-7, #3888; Doc. 41-1, #4037). For the 2022 election cycle, the IE unit made disbursements totaling over $36,401,000. (Doc. 40-7, #3888–89).

77. The NRSC's draft organizational charts that were produced during discovery in October 2023 lists one individual in the NRSC's own corporate structure as being explicitly associated with its IE unit. (Doc. 40-10, #3920; Doc. 40-13).

78. Based on its self-reporting to the FEC for the last five election cycles (2014, 2016, 2018, 2020, and 2022 elections), the NRSC spent between 99.7% and 100% of all its independent expenditures on expenses that it categorized as "MEDIA" or "MEDIA BUY" expenditures. (Doc. 36-13, #1289; Doc. 41-1, #4034 (describing the 2022 election cycle IE unit expenditures as having been spent "mostly on television advertising")).

79. Based on reporting to the FEC, the NRSC's over $34 million in independent expenditures during the 2022 election were spent on 10 electoral races. (Doc. 36-13, #1288). Approximately $33.9 million of these expenditures was spent on electoral races in Arizona, Georgia, Nevada, New Hampshire, North Carolina, Pennsylvania, and Wisconsin. (*Id.* at #1308).

80. Based on reporting to the FEC, the NRSC spent over $120.6 million in independent expenditures on 12 electoral races during the 2020 election. (*Id.* at #1288).

ii. Data on the NRCC's Independent Expenditures

81. For the 2022 election cycle, the NRCC's IE unit incurred actual expenses that totaled $92,364,793.51. (Doc. 40-6, #3886; Doc. 41-2, #4092). The IE unit paid over $830,000 related payroll for employees and over $1 million on consultants. (Doc. 40-6, #3886; Doc. 41-2, #4092–93). Over $87 million of those expenses was spent on media and advertising. (Doc. 41-2, #4093; *see also* Doc. 36-13, #1288). And the IE unit spent approximately $4.4 million on polling and research related expenses. (Doc. 40-6, #3886; Doc. 41-2, #4092). Over $265,000 of the monies expended by the IE unit went toward its offices—rent, furnishings, and related expenses. (Doc. 40-6, #3886; Doc. 41-2, #4093).

82. Based on its self-reporting to the FEC for the last five election cycles (2014, 2016, 2018, 2020, and 2022 elections), the NRCC spent between 96.5% and 100% of all its independent expenditures on

expenses that it categorized as "MEDIA" or "MEDIA BUY" expenditures. (Doc. 36-13, #1289; Doc. 41-2, #4090 (describing the 2022 election cycle IE unit expenditures as having been spent "mostly on television advertising")).

83. Based on reporting to the FEC, the NRCC's over $87 million in independent expenditures during the 2022 election were spent on 36 electoral races. (Doc. 36-13, #1288).

84. Based on reporting to the FEC, the NRCC spent over $80.6 million in independent expenditures on 37 electoral races during the 2020 election. (*Id.*).

c. The Effect of the Coordinated Expenditure Limits on Plaintiffs

i. The NRSC and the NRCC

85. The NRSC and the NRCC have found, in their respective experiences, that engaging in both coordinated and firewalled independent expenditures (1) results in redundancies in spending and advertising, (2) is an inefficient means to promote the success of specific candidates the committees wish to sponsor, and (3) has created a material risk that the IE units will "disseminat[e] advertisements that are unhelpful to, if not entirely disfavored by, the candidate the party supports," which stems from their campaign experiences finding that "voters … do not recognize [the] meaningful distinction[s] [among] a party's general operation, its IE unit, [and] the supported candidate." (Doc. 19-1, #179–80; Doc. 19-2, #189–90; Doc. 41-1, #4034, 4038–39, 4044, 4052; Doc.

41-2, #4089–90, 4093–94, 4102, 4106–07; *see also* Doc. 42-1, #4867–68 (deposition testimony from Krasno, the FEC's expert, that "from the standpoint of a voter … [parties and candidates] are … a big blur" so it is "probably fair" to say that "most constituents don't realize … that there are differences between the party and the candidate")).

86. The NRSC and the NRCC find coordinated expenditures to be more "efficient and effective" as compared to independent spending. (Doc. 41-1, #4039; Doc. 41-2, #4095). That is because, in their experiences, they have found that coordinated expenditures allow "the party and candidate [to] work together, [which makes] the party's speech becomes more focused, understandable, and effective, based on the known goals of the candidate on the ground." (Doc. 41- 1, #4038; Doc. 41-2, #4094). And in their experiences, they have found that coordinated expenditures "allow[] the party to spend its resources on a unified message with its candidates," which thereby avoids any "counterproductive" spending. (Doc. 41-1, #4038–39; Doc. 41-2, #4093–95).

87. Because of the coordinated expenditure limits, the NRSC and the NRCC will again institute IE units, as they have done before, to avoid violating the coordinated expenditure limits and will incur the attendant costs (tangible and intangible) detailed above. (Doc. 19-1, #179; Doc. 19-2, #189; Doc. 41-1, #4042; Doc. 41-2, #4097–98). The NRSC and the NRCC would not establish IE units and incur the attendant costs but for the

limits on coordinated party expenditures. (Doc. 41-1, #4036–37, 4043–44; Doc. 41-2, #4092–93, 4099). The NRSC and the NRCC declare that any money they would save for not erecting and operating IE units would be put to other party activities, such as more coordinated party communications. (Doc. 41-1, #4047–48, 4052; Doc. 41-2, #4102, 4106–07).

88. Because of the coordinated expenditure limits, the NRSC states that it "regularly makes the risk assessment that it is best to forego spending the full amount of any assigned coordinated spending authority on party speech and reserve a portion to ensure the NRSC's compliance with the coordinated party expenditure limits in the event of an unexpected cost becoming known after the election." (Doc. 41-1, #4041; *see* Doc. 19-1, #178).

89. Based on the NRSC's experiences, those entities that assign coordinated expenditure authority to the NRSC also make similar decisions to stop short of the expenditure limits—the NRSC notes that "assigning committee [will] often prophylactically withhold[] some portion of its coordinated party expenditure authority to … avoid entanglement in an enforcement action." (Doc. 41-1, #4041). For example, the RNC withheld from the NRSC $25,000 of the RNC's coordinated expenditure authority when it delegated its expenditure authority to the NRSC—$25,000 the NRSC asserts it would have expended in coordination with Senator Vance's 2022 campaign. (*Id.* at #4026). Although the NRSC did not list any specific costs incurred to obtain assignments from these entities, it does

declare that "NRSC staff had to devote time to attend meetings … [to] engage in follow-up discussions," which "divert[ed] [] party resources away from other activities." (*Id.* at #4044–45).

90. The NRSC also declares that it has felt compelled by the coordinated party expenditure limits to restrict itself by "limit[ing] interactions" with candidates, which "leads to less collaboration between the party and candidate." (*Id.* at #4039).

91. Based on the uncontroverted evidence in the record founded on its personal experiences with these limits, the NRSC has avoided "fully associating with and advocating for" candidates for federal office as it desires to do because of the coordinated party expenditure limits. (*Id.* at #4040).

92. And based on the uncontroverted evidence in the record founded on its personal experiences with these limits, the NRSC would, during the 2022 election cycle and in the future, engage in greater cooperation with electoral candidates and "make coordinated party expenditures, including for party coordinated communications, in excess of [the] FECA's coordinated party expenditure limits, and without any assignment authority from any other [entity]," but for those limits. (*Id.* at #4040, 4043, 4047, 4051–52; *see* Doc. 19-1, #181; *see also* Doc. 42-1, #4896–98 (deposition testimony from Krasno, the FEC's expert, that absent coordinated expenditure limits, party committees would engage in more coordinated expenditures); Doc. 43, #5190, 5196, 5207–08 (The FEC's requested findings of fact

acknowledging that without coordinated expenditure limits, the party committees would engage in further coordinated spending and cooperation with candidates.)).

93. The NRSC declares that based on its experience, the greater cooperation without the coordinated expenditure limits would result in added cost savings because it would enable the NRSC "to receive its candidates' input on how best to utilize the party's resources to win elections." (Doc. 41-1, #4034, 4048, 4052).

94. Because of the coordinated expenditure limits, the NRCC states that it "regularly foregoes spending the full amount of any assigned coordinated spending authority … to ensure the NRCC's compliance with the coordinated party expenditure limits." (Doc. 41-2, #4097; *see* Doc. 19-2, #188).

95. Based on the NRCC's experiences, those entities that assign coordinated expenditure authority to the NRCC also make similar decisions to stop short of the expenditure limits—the NRCC notes that "assigning committee [will] often prophylactically withhold[] some portion of its coordinated party expenditure authority to … avoid entanglement in an enforcement action." (Doc. 41-2, #4097). For example, the RNC withheld from the NRCC $5,000 of the RNC's coordinated expenditure authority when it delegated its expenditure authority to the NRCC—$5,000 the NRSC asserts it would have expended in coordination with Chabot's 2022 campaign (as well as in other House campaigns

where similar amounts were withheld by the RNC). (*Id.* at #4105). Although the NRCC did not list any specific costs incurred to obtain assignments from these entities, it does declare that "NRCC staff had to devote time to requesting assignments … diverting [] party resources away from other activities." (Doc. 41-2, #4100).

96. The NRCC also declares that it has felt compelled by the coordinated party expenditure limits to restrict itself by "limit[ing] interactions" with candidates, which "leads to less collaboration between the party and candidate." (*Id.* at #4095).

97. Based on the uncontroverted evidence in the record founded on its personal experiences with these limits, the NRCC has avoided "fully associating with and advocating for" candidates for federal office as it desires to do because of the coordinated party expenditure limits. (*Id.* at #4096).

98. And based on the uncontroverted evidence in the record founded on its personal experiences with these limits, the NRCC would, during the 2022 election cycle and in the future, engage in greater cooperation with electoral candidates and "make coordinated party expenditures, including for party coordinated communications, in excess of [the] FECA's coordinated party expenditure limits, and without any assignment authority from any other [entity]," but for those limits. (*Id.* at #4096, 4098, 4101–02, 4104–07; *see* Doc. 19-2, #191; *see also* Doc. 42-1, #4896–98 (deposition testimony from Krasno, the FEC's expert, that absent coordinated expenditure limits, party

committees would engage in more coordinated expenditures); Doc. 43, #5190, 5196, 5207–08 (The FEC's requested findings of fact acknowledging that without coordinated expenditure limits, the party committees would engage in further coordinated spending and cooperation with candidates.)).

99. The NRCC declares that based on its experience, the greater cooperation without the coordinated expenditure limits would result in added cost savings because it would enable the NRCC "to receive its candidates' input on how best to utilize the party's resources to win elections." (Doc. 41-2, #4090, 4102, 4107).

ii. Senator Vance and Chabot

100. Senator Vance declares that his campaign limited its interactions with the NRSC and the Republican Party during the 2022 election cycle, "particularly on matters relating to the party's public advertising in support of his campaign, to ensure his campaign committee and the party did not violate the limits on coordinated party expenditures." (Doc. 19-3, #196; Doc. 41-6, #4713–14, 4720–21).

101. Based on the uncontroverted evidence in the record founded on his personal campaign experience, Senator Vance declares that but for the FECA's coordinated party expenditure limits, he would, during the 2022 election cycle and in the future, accept coordinated expenditures on behalf of his candidacy in excess of the statutory limits. (Doc. 19-3, #196; Doc. 41-6, #4713–14, 4721).

102. Senator Vance also states that he would work in greater cooperation with the NRSC "to make more efficient and effective use of party resources in support of Vance's campaign" in the absence of the coordinated party expenditure limits. (Doc. 41-6, #4717). He states that he would direct such cooperation to "work [on] … a greater number of coordinated public communication advertisements supporting his campaign, similar to those that were made in coordination with the NRSC in 2022." (*Id.* at #4717–18).

103. Chabot states that he would have desired to work in greater cooperation with the NRCC during his 2022 campaign on additional coordinated public communication advertisements supporting his campaign in the absence of the FECA's coordinated party expenditure limits. (Doc. 41-7, #4746, 4750, 4752). Chabot notes that this would have included "cooperation with the NRCC staff on the [over $1.8 million] in media advertising the NRCC disseminated as independent expenditures in connection with the 2022 general election for Ohio's First Congressional District." (*Id.*).

IV. Campaign Expenditures Reported to the FEC

a. Coordinated Expenditures

104. The FEC reports that in 2022 election cycle, the Democratic Senatorial Campaign Committee (DSCC) (the Democratic counterpart to the NRSC) spent over $8.8 million total on coordinated expenditures across 8 electoral races during the 2022 election. (Doc. 36-13, #1287).

Based on reporting to the FEC, the DSCC spent over $15.3 million total on coordinated expenditures across 15 electoral races during the 2020 election. (*Id.*).

105. The FEC reports that in 2022 election cycle, the Democratic Congressional Campaign Committee (DCCC) (the Democratic counterpart to the NRCC) spent over $6.2 million total on coordinated expenditures across 87 electoral races during the 2022 election. (*Id.*). Based on reporting to the FEC, the DCCC spent over $7.3 million total on coordinated expenditures across 121 electoral races during the 2020 election. (*Id.*).

106. In the 2022 election cycle, the Republican committees (national, state, and local) made coordinated expenditures in 126 congressional races. (*Id.* at #1292). In the 2020 election cycle, the Republican committees (national, state, and local) made coordinated expenditures in 103 congressional races. (*Id.*).

107. In the 2022 election cycle, the Democratic committees (national, state, and local) made coordinated expenditures in 128 congressional races. (*Id.*). In the 2020 election cycle, the Democratic committees (national, state, and local) made coordinated expenditures in 164 congressional races. (*Id.*).

108. In the 2022 election cycle, Republican committees (national, state, and local) combined spent above 95% of the authorized coordinated expenditure limits in 9 Senate races—6 races of which received over $1 million. (*Id.* at #1293). In the 2020 election cycle, Republican committees

(national, state, and local) combined spent above 95% of the authorized coordinated expenditure limits in 5 Senate races—3 races of which received over $1 million. (*Id.* at #1296).

109. Based on reporting to the FEC, in the 2022 election cycle, Democratic committees (national, state, and local) combined spent above 95% of the authorized coordinated expenditure limits in 4 Senate races—3 races of which received over $1 million. (*Id.* at #1295). In the 2020 election cycle, Democratic committees (national, state, and local) combined spent above 95% of the coordinated expenditure limit in 7 Senate races—2 races of which received over $1 million. (*Id.* at #1297).

110. In the 2022 election cycle, Republican committees (national, state, and local) combined spent above 95% of the authorized coordinated expenditure limits in 73 House races. (*Id.* at #1293–95). In the 2020 election cycle, Republican committees (national, state, and local) combined spent above 95% of the coordinated expenditure limit in 37 House races. (*Id.* at #1296–97).

111. Based on reporting to the FEC, Democratic committees (national, state, and local) combined spent above 95% of the authorized coordinated expenditure limits in 7 House races in the 2022 election cycle. (*Id.* at #1295). In the 2020 election cycle, Democratic committees (national, state, and local) combined spent above 95% of the authorized coordinated expenditure limits in 9 House races. (*Id.* at #1297).

112. In the 2022 election cycle, the Republican committees (national, state, and local) made coordinated expenditures equal to the applicable limit for 8 congressional candidates. (*Id.* at #1292). In the 2020 election cycle, the Republican committees (national, state, and local) made coordinated expenditures equal to the applicable limit for 5 congressional candidates. (*Id.*).

113. In the 2022 election cycle, the Democratic committees (national, state, and local) made coordinated expenditures equal to the applicable limit for 6 congressional candidates. (*Id.*). In the 2020 election cycle, the Democratic committees (national, state, and local) made coordinated expenditures equal to the applicable limit for 6 congressional candidates. (*Id.*).

114. Based on reporting to the FEC, the RNC spent approximately $5,000 on coordinated expenditures in two electoral races during the 2022 election. (*Id.* at #1287).

115. Based on reporting to the FEC, Democratic National Committee (DNC) (the Democratic counterpart to the RNC) spent approximately $713,000 on coordinated expenditures in one electoral race during the 2022 election. (*Id.*).

116. Based on reporting to the FEC, the RNC spent approximately $25.4 million on coordinated expenditures in four electoral races during the 2020 election. (*Id.*).

117. Based on reporting to the FEC, the DNC spent over $17.1 million on coordinated expenditures in one electoral race during the 2020 election. (*Id.*).

118. Based on reporting to the FEC, coordinated expenditures during the 2022 election made by all Republican committees (national, state, and local) amounted to over $25.8 million. (*Id.* at #1305).

119. Based on reporting to the FEC, coordinated expenditures during the 2020 election made by all Republican committees (national, state, and local) amounted to over $46.2 million. (*Id.*).

120. Based on reporting to the FEC, coordinated expenditures during the 2022 election made by all Democratic committees (national, state, and local) amounted to over $17.9 million. (*Id.*).

121. Based on reporting to the FEC, coordinated expenditures during the 2020 election made by all Democratic committees (national, state, and local) amounted to over $40.6 million. (*Id.*).

122. Based on reporting to the FEC during the last five election cycles (2014, 2016, 2018, 2020, and 2022), coordinated expenditures from the Republican national party committees have ranged from approximately $11.5 million during the 2014 election cycle to approximately $40.7 million during the 2020 election cycle. (*Id.* at #1287). When factoring in coordinated expenditures from state and local Republican party committees, Republican coordinated expenditures have ranged from approximately $14.6 million during the 2014 election cycle to approximately $46.3 million during the 2020 election cycle. (*Id.* at #1305).

123. Based on reporting to the FEC during the last five election cycles (2014, 2016, 2018, 2020, and

2022), coordinated expenditures from the Democratic national party committees have ranged from approximately $7.7 million during the 2014 election cycle to approximately $39.8 million during the 2020 election cycle. (*Id.* at #1287). When factoring in coordinated expenditures from state and local Democratic party committees, Democratic coordinated expenditures have ranged from approximately $13.2 million during the 2014 election cycle to approximately $40.6 million during the 2020 election cycle. (*Id.* at #1305).

b. Independent Expenditures

124. Based on reporting to the FEC, the DSCC spent over $49.4 million in independent expenditures on 6 electoral races during the 2022 election. (*Id.* at #1288). Approximately $33.38 million of these expenditures was spent on electoral races in Arizona, Georgia, Nevada, New Hampshire, Pennsylvania, and Wisconsin. (*Id.* at #1308).

125. Based on reporting to the FEC, the DSCC's spent over $91.2 million in independent expenditures were spent on 8 electoral races during the 2020 election. (*Id.* at #1288).

126. Based on reporting to the FEC for the last five election cycles (2014, 2016, 2018, 2020, and 2022 elections), the DSCC spent 66.3% of all its independent expenditures in the 2022 election and 100% of all its independent expenditures in the other four election cycles on expenses that it categorized as "MEDIA" or "MEDIA BUY" expenditures. (*Id.* at #1289).

127. Based on reporting to the FEC, the DCCC's spent over $96.4 million in independent expenditures on 45 electoral races during the 2022 election. (*Id.* at #1288).

128. Based on reporting to the FEC, the DCCC's over $90.8 million in independent expenditures were spent on 53 electoral races during the 2020 election. (*Id.*).

129. Based on reporting to the FEC for the last five election cycles (2014, 2016, 2018, 2020, and 2022 elections), the DCCC spent between 96.6% and 100% of all its independent expenditures on expenses that it categorized as "MEDIA" or "MEDIA BUY" expenditures. (*Id.* at #1289).

130. Based on reporting to the FEC, the RNC spent approximately $1.2 million on independent expenditures in one electoral race during the 2022 election. (*Id.* at #1288).

131. Based on reporting to the FEC, the RNC spent approximately $7.1 million on independent expenditures in one electoral race during the 2020 election. (*Id.*).

132. Based on reporting to the FEC, the DNC spent no money on independent expenditures in either the 2020 or the 2022 election. (*Id.*).

133. Based on reporting to the FEC, independent expenditures during the 2022 election made by all Republican committees (national, state, and local) amounted to over $124.2 million. (*Id.* at #1305).

134. Based on reporting to the FEC, independent expenditures during the 2020 election made by

all Republican committees (national, state, and local) amounted to over $209.2 million. (*Id.*).

135. Based on reporting to the FEC, independent expenditures during the 2022 election made by all Democratic committees (national, state, and local) amounted to over $146.5 million. (*Id.*).

136. Based on reporting to the FEC, independent expenditures during the 2020 election made by all Democratic committees (national, state, and local) amounted to over $183.4 million. (*Id.*).

137. Based on publicly disclosed campaign finance data, independent expenditures made by non-party entities has increased from $14.7 million in 2004 to $1.678 billion in 2020. (Doc. 41-3, #4150).

c. Other Campaign Finance Data

138. Based on reporting to the FEC, the Republican national party committees' total contributions to federal candidates amounted to $1,495,800 for the 2022 election cycle and $1,251,057 for the 2020 election cycle. (Doc. 36-13, #1290). When factoring in contributions from state and local Republican party committees, total Republican contributions to federal candidates amounted to $1,783,668 for the 2022 election cycle and $1,461,839 for the 2020 election cycle. (*Id.* at #1305).

139. Based on reporting to the FEC, the Democratic national party committees' total contributions to federal candidates amounted to $1,252,842 for the 2022 election cycle and $1,420,939 for the 2020 election cycle. (*Id.* at #1290). When factoring in contributions from state and local Democratic party committees, total Democratic

contributions to federal candidates amounted to $1,755,663 for the 2022 election cycle and $1,809,209 for the 2020 election cycle. (*Id.* at #1305).

140. Based on a subset of the data reported to the agency for the 2020 election cycle, the FEC reports 8 examples of 2020 senatorial races in which an individual candidate received more than $50,000 in contributions from his or her party (combining all national, state, and local contributions). (*Id.* at 1299).

141. Based on a subset of the data reported to the agency for the 2022 election cycle, the FEC reports 11 examples of 2022 senatorial races in which an individual candidate received more than $50,000 in contributions from his or her party (combining all national, state, and local contributions). (*Id.* at #1298).

142. Based on a subset of the data reported to the agency for the 2020 election cycle, the FEC reports 2 examples of 2020 races in which a House candidate received more than $25,000 in contributions from his or her party (combining all national, state, and local contributions). (*Id.* at #1300).

143. Based on a subset of the data reported to the agency for the 2022 election cycle, the FEC reports 4 examples of 2022 races in which a House candidate received more than $25,000 in contributions from his or her party (combining all national, state, and local contributions). (*Id.*).

144. Based on reporting to the FEC, the NRSC spent a total of $256,279,028 during the 2022 election

cycle. (*Id.*). And the NRSC's expenditures that the FEC does not code as independent expenditures, coordinated expenditures, or contributions amounted to $154,257,232 during the 2022 election cycle. (*Id.* at #1301).

145. Based on reporting to the FEC, the NRCC spent a total of $285,469,165 during the 2022 election cycle. (*Id.* at #1300). And the NRCC's expenditures that the FEC does not code as independent expenditures, coordinated expenditures, or contributions amounted to $130,377,109 during the 2022 election cycle. (*Id.* at #1301).

146. Based on reporting to the FEC, the DSCC spent a total of $289,027,976 during the 2022 election cycle. (*Id.*). And the DSCC's expenditures that the FEC does not code as independent expenditures, coordinated expenditures, or contributions amounted to $151,381,249 during the 2022 election cycle. (*Id.*).

147. Based on reporting to the FEC, the DCCC spent a total of $367,701,788 during the 2022 election cycle. (*Id.*). And the DCCC's expenditures that the FEC does not code as independent expenditures, coordinated expenditures, or contributions amounted to $198,353,141 during the 2022 election cycle. (*Id.*).

148. Based on financial disclosures to the FEC, approximately half of the total direct contributions, coordinated expenditures, and independent expenditures made by the national Republican party and its committees in the 2022 election for seats in the United States House of

Representatives were spent in 11 congressional districts. (*Id.* at #1302).

149. Based on financial disclosures to the FEC, approximately half of the total direct contributions, coordinated expenditures, and independent expenditures made by the national Republican party and its committees in the 2020 election for seats in the United States House of Representatives were spent in 12 congressional districts. (*Id.*).

150. Based on financial disclosures to the FEC, approximately half of the total direct contributions, coordinated expenditures, and independent expenditures made by the national Democratic party and its committees in the 2022 election for seats in the United States House of Representatives were spent in 17 congressional districts. (*Id.*).

151. Based on financial disclosures to the FEC, approximately half of the total direct contributions, coordinated expenditures, and independent expenditures made by the national Democratic party and its committees in the 2020 election for seats in the United States House of Representatives were spent in 18 congressional districts. (*Id.*).

152. Based on financial disclosures to the FEC, the non-inflation adjusted total amount of funding the Republican national party committees raised during the 1992 election cycle was $245,608,214 ($194,530,781 constituted "hard money" or monies raised that were subject to limits under the then-applicable FECA statutory regime; the

remainder raised constituted "soft money" not subject to limits under the then-applicable FECA statutory regime).[1] (Doc. 36-13, #1306).

153. Based on financial disclosures to the FEC, the total amount of funding the Republican national party committees raised during the 2000 election cycle was $619,744,718 ($361,558,430 constituted "hard money"; the remainder raised constituted "soft money"). (*Id.* at #1285).

154. Based on financial disclosures to the FEC, the total amount of funding the Republican national party committees raised during the 2002 election cycle was $602,908,687 ($352,876,067 constituted "hard money"; the remainder raised constituted "soft money"). (*Id.*).

155. Based on financial disclosures to the FEC, the total amount of funding the Republican national party committees raised during the 2014 election cycle was $476,627,510: the RNC raised $194,861,133; the NRSC raised $128,278,255; and the NRCC raised $153,488,122. (*Id.*).

156. Based on financial disclosures to the FEC, the total amount of funding the Republican national party committees raised during the 2016 election cycle was $652,349,694: the RNC raised

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[1] Since the passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), national party committees and federal candidates have been prohibited from raising "soft money." Pub. L. No. 107-155, Title I § 101, 116 Stat. 82 (amending the FECA to add § 323. 52 U.S.C. § 30125). The Supreme Court has found that this ban withstands constitutional challenge. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 188–89 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

$343,371,200; the NRSC raised $138,376,518; and the NRCC raised $170,601,976. (*Id.*).

157. Based on financial disclosures to the FEC, the total amount of funding the Republican national party committees raised during the 2018 election cycle was $682,183,239: the RNC raised $324,836,805; the NRSC raised $151,570,520; and the NRCC raised $205,775,914. (*Id.*).

158. Based on financial disclosures to the FEC, the total amount of funding the Republican national party committees raised during the 2020 election cycle was $1,509,714,293: the RNC raised $890,538,963; the NRSC raised $338,263,383; and the NRCC raised $280,911,947. (*Id.*).

159. Based on financial disclosures to the FEC, the total amount of funding the Republican national party committees raised during the 2022 election cycle was $874,555,820: the RNC raised $335,196,209; the NRSC raised $250,044,900; and the NRCC raised $289,314,711. (*Id.*).

160. Based on financial disclosures to the FEC, the non-inflation adjusted total amount of funding the Democratic national party committees raised during the 1992 election cycle was $140,348,570 ($104,057,403 constituted "hard money"; the remainder raised constituted "soft money"). (*Id.* at #1307).

161. Based on financial disclosures to the FEC, the total amount of funding the Democratic national party committees raised during the 2000 election cycle was $469,864,075 ($212,880,651 constituted "hard money"; the remainder raised constituted "soft money"). (*Id.* at #1286).

162. Based on financial disclosures to the FEC, the total amount of funding the Democratic national party committees raised during the 2002 election cycle was $408,386,152 ($162,325,003 constituted "hard money"; the remainder raised constituted "soft money"). (*Id.*).

163. Based on financial disclosures to the FEC, the total amount of funding the Democratic national party committees raised during the 2014 election cycle was $538,435,215: the DNC raised $163,319,917; the DSCC raised $168,323,305; and the DCCC raised $206,791,993. (*Id.*).

164. Based on financial disclosures to the FEC, the total amount of funding the Democratic national party committees raised during the 2016 election cycle was $755,302,343: the DNC raised $354,610,726; the DSCC raised $179,800,229; and the DCCC raised $220,891,388. (*Id.*).

165. Based on financial disclosures to the FEC, the total amount of funding the Democratic national party committees raised during the 2018 election cycle was $620,891,026: the DNC raised $175,769,640; the DSCC raised $148,698,958; and the DCCC raised $296,422,428. (*Id.*).

166. Based on financial disclosures to the FEC, the total amount of funding the Democratic national party committees raised during the 2020 election cycle was $1,141,395,183: the DNC raised $491,727,344; the DSCC raised $303,883,335; and the DCCC raised $345,784,504. (*Id.*).

167. Based on financial disclosures to the FEC, the total amount of funding the Democratic national party committees raised during the 2022 election

cycle was $966,596,028: the DNC raised $306,790,180; the DSCC raised $296,838,737; and the DCCC raised $362,967,111. (*Id.*).

168. Based on financial disclosures to the FEC, state and local Republican party committees have raised the following "hard money" amounts for the last five election cycles: $189,752,802 during the 2014 election; $317,045,586 during the 2016 election; $205,114,861 during the 2018 election; $560,859,122 during the 2020 election; and $244,430,946 during the 2022 election. (*Id.* at #1304).

169. Based on financial disclosures to the FEC, state and local Democratic party committees have raised the following "hard money" amounts for the last five election cycles: $272,480,105 during the 2014 election; $547,451,981 during the 2016 election; $327,992,371 during the 2018 election; $662,831,271 during the 2020 election; and $440,556,460 during the 2022 election. (*Id.*).

170. Based on financial disclosures to the FEC, Republican and Democratic state and local party committees have raised a total of $42,636,070 in "Levin funds" and have made a total of $43,380,090 "Levin-funds" disbursements from January 1, 2009, through December 31, 2022.[2] (*Id.* at #1306).

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[2] State and local party committees, which can raise soft money for non-federal elections without facing FECA limits, must comply with the limits found in § 323(b) of FECA, 52 U.S.C. § 30125(b) (added by BCRA), when using such soft money in connection with federal elections. *McConnell*, 540 U.S. at 122, 161–62. But Levin funds are an exception to the hard limits as

171. Based on publicly disclosed campaign finance data for elections from 1980 until 2020, contributions from political action committees to federal campaigns has consistently exceeded the contributions and expenditures made by party-affiliated committees to federal campaigns. (Doc. 41-3, #4150).

V. Additional Findings of Adjudicative Fact

172. During discovery, the parties retained policy experts. The experts' reports detailing their respective policy views on the FECA's coordinated party expenditure limits and the propriety of ruling for or against Plaintiffs based on their policy expertise were filed on the Court's docket. (Docs. 41-3, 41-8). The parties also filed transcripts of the depositions taken of each of their policy experts on the Court's docket. (Docs. 41-4, 41-5).

173. Defendants' expert, Jonathan Krasno, is a professor of political science at Binghamton University in Binghamton, New York, who was designated as an expert witness in other campaign finance cases. (Doc. 36-1, #397, 399). In each case, he had been retained by the governmental entity to provide his opinion in defense of the campaign finance regulations. (*Id.* at #400). Krasno was the FEC's designated

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they permit state and local party committees to pay for specified federal election activities using "an allocated ratio of hard money and 'Levin funds.'" *Id.* at 162–63 (citing § 323(b)(2) of the FECA and noting that Levin funds may be spent on "voter registration activity, voter identification drives, GOTV drives, and generic campaign activities").

expert in *FEC v. Colorado Republican Federal Campaign Committee* (*Colorado II*), 533 U.S. 431 (2001), in which case he co-authored a report in support of upholding the FECA's coordinated party expenditure limits. (Doc. 36-1, #399–400). Krasno has published several articles and books, which academic works cover topics including campaign finance laws and American political parties. (*Id.* at #416–19).

174. Plaintiffs' expert, Raymond La Raja, is a professor of political science and Associate Dean at the University of Massachusetts, Amherst, who previously served as the designated expert for the plaintiffs in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), *overruled in part by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). (Doc. 41-3, #4123–24, 4172). La Raja has published several articles and books, which academic works cover topics including campaign finance laws and American political parties. (*Id.* at #4162–65, 4166–69). La Raja also has served on a couple of task forces related to election matters, in which he has focused on campaign finance reform. (*Id.* at #4171–72; Doc. 41-5, #4672–73).

175. Neither the NRSC nor the NRCC have personal knowledge of what they understand to be instances of donors' seeking to use contributions to the committees to facilitate a quid pro quo arrangement with an elected official or candidate for office. (Doc. 19-1, #176; Doc. 19-2, #186).

176. Both Senator Vance and Chabot have declared that they have "no knowledge" of the party's

"sources of funding used to engage in coordinated expenditures in support of" their respective 2022 campaigns. (Doc. 41-6, #4720; Doc. 41-7, #4752).

177. Neither Senator Vance nor Chabot or their agents identified any documents responsive to the FEC's requests for production relating to their knowledge of the sources of funding for coordinated party expenditures or communications with party donors concerning expectations of "legislative action or inaction." (Doc. 41-6, #4726–28; Doc. 41-7, #4757–59).

178. Neither the NRSC nor the NRCC identified any documents responsive to the FEC's requests for the production of documents relevant to establishing a connection between (1) contributions to the party committees and donor expectation about legislation action, (2) the amount of money the party committee expended on a candidate and the amount the latter raised for the party committee, and (3) the amount of money a candidate raised and his committee assignment once in office. (Doc. 41-1, #4057–58, 4061–62; Doc. 41-2, #4112–13, 4116–17).

APPENDIX C

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

52 U.S.C. § 30101.

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;

* * *

(ix) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That–

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

* * *

(xi) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That–

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates;

* * *

(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

* * *

(viii) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs)

used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That–

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That–

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates;

* * *

APPENDIX E

52 U.S.C. § 30110.

Judicial review

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

APPENDIX F

52 U.S.C. § 30116.

Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) Except as provided in subsection (i) and section 30117 of this title, no person shall make contributions–

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $25,000, or, in the case of contributions made to any of the accounts described in paragraph (9), exceed 300 percent of the amount otherwise applicable under this subparagraph with respect to such calendar year;

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000; or

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

(2) No multicandidate political committee shall make contributions–

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000, or, in the case of contributions made to any of the accounts described in paragraph (9), exceed 300 percent of the amount otherwise applicable under this subparagraph with respect to such calendar year; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than–

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section

30103 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that (A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts; (B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and (C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on

contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of Title 26. In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection–

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in

cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

(iii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and [1]

(C) if–

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 30104(f)(3) of this title); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and

(D) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for

election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(9) An account described in this paragraph is any of the following accounts:

(A) A separate, segregated account of a national committee of a political party (other than a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses, except that the aggregate amount of expenditures the national committee of a political party may make from such account may not exceed $20,000,000 with respect to any single convention.

(B) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to the construction, purchase,

renovation, operation, and furnishing of one or more headquarters buildings of the party or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses (including expenses for obligations incurred during the 2-year period which ends on December 16, 2014).

(C) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.

(b) Dollar limits on expenditures by candidates for office of President of United States

(1) No candidate for the office of President of the United States who is eligible under section 9003 of Title 26 (relating to condition for eligibility for payments) or under section 9033 of Title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of--

(A) $10,000,000, in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e)), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection–

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by–

(i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) Increases on limits based on increases in price index

(1)(A) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period.

(B) Except as provided in subparagraph (C), in any calendar year after 2002–

(i) a limitation established by subsections (a)(1)(A), (a)(1)(B), (a)(3), (b), (d), or (h) shall be

increased by the percent difference determined under subparagraph (A);

(ii) each amount so increased shall remain in effect for the calendar year; and

(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.

(C) In the case of limitations under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), increases shall only be made in odd-numbered years and such increases shall remain in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the amount is increased and ending on the date of the next general election.

(2) For purposes of paragraph (1)–

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items--United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means–

(i) for purposes of subsections (b) and (d), calendar year 1974; and

(ii) for purposes of subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), calendar year 2001.

(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).

(e) Certification and publication of estimated voting age population

During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) Prohibited contributions and expenditures

No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation

imposed on contributions and expenditures under this section.

(g) Attribution of multi-State expenditures to candidate's expenditure limitation in each State

The Commission shall prescribe rules under which any expenditure by a candidate for presidential nominations for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) Senatorial candidates

Notwithstanding any other provision of this Act, amounts totaling not more than $35,000 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

(i) Increased limit to allow response to expenditures from personal funds

(1) Increase

(A) In general

Subject to paragraph (2), if the opposition personal funds amount with respect to a candidate for election to the office of Senator exceeds the threshold amount, the limit under subsection (a)(1)(A) (in this subsection referred to as the "applicable limit") with respect to that candidate shall be the increased limit.

(B) Threshold amount

(i) State-by-State competitive and fair campaign formula

In this subsection, the threshold amount with respect to an election cycle of a candidate described in subparagraph (A) is an amount equal to the sum of–

(I) $150,000; and

(II) $0.04 multiplied by the voting age population.

(ii) Voting age population

In this subparagraph, the term "voting age population" means in the case of a candidate for the office of Senator, the voting age population of the State of the candidate (as certified under subsection (e)).

(C) Increased limit

Except as provided in clause (ii), for purposes of subparagraph (A), if the opposition personal funds amount is over–

(i) 2 times the threshold amount, but not over 4 times that amount–

(I) the increased limit shall be 3 times the applicable limit; and

(II) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to a candidate if such contribution is made under the increased limit of subparagraph (A) during a period in which the candidate may accept such a contribution;

(ii) 4 times the threshold amount, but not over 10 times that amount–

(I) the increased limit shall be 6 times the applicable limit; and

(II) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to a candidate if such contribution is made under the increased limit of subparagraph (A) during a period in which the candidate may accept such a contribution; and

(iii) 10 times the threshold amount–

(I) the increased limit shall be 6 times the applicable limit;

(II) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to a candidate if such contribution is made under the increased limit of subparagraph (A) during a period in which the candidate may accept such a contribution; and

(III) the limits under subsection (d) with respect to any expenditure by a State or national committee of a political party shall not apply.

(D) Opposition personal funds amount

The opposition personal funds amount is an amount equal to the excess (if any) of–

(i) the greatest aggregate amount of expenditures from personal funds (as defined in section 30104(a)(6)(B) of this title) that an opposing candidate in the same election makes; over

(ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

(E) Special rule for candidate's campaign funds

(i) In general

For purposes of determining the aggregate amount of expenditures from personal funds under subparagraph (D)(ii), such amount shall include the gross receipts advantage of the candidate's authorized committee.

(ii) Gross receipts advantage

For purposes of clause (i), the term "gross receipts advantage" means the excess, if any, of–

(I) the aggregate amount of 50 percent of gross receipts of a candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held, over

(II) the aggregate amount of 50 percent of gross receipts of the opposing candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held.

(2) Time to accept contributions under increased limit

(A) In general

Subject to subparagraph (B), a candidate and the candidate's authorized committee shall not accept

any contribution, and a party committee shall not make any expenditure, under the increased limit under paragraph (1)–

(i) until the candidate has received notification of the opposition personal funds amount under section 30104(a)(6)(B) of this title; and

(ii) to the extent that such contribution, when added to the aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits under this subsection for the election cycle, exceeds 110 percent of the opposition personal funds amount.

(B) Effect of withdrawal of an opposing candidate

A candidate and a candidate's authorized committee shall not accept any contribution and a party shall not make any expenditure under the increased limit after the date on which an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate.

(3) Disposal of excess contributions

(A) In general

The aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the increased limit under paragraph (1) and not otherwise expended in connection with the election with respect to which such contributions relate shall, not later than 50 days after the date of such election, be used in the manner described in subparagraph (B).

(B) Return to contributors

A candidate or a candidate's authorized committee shall return the excess contribution to the person who made the contribution.

(j) Limitation on repayment of personal loans

Any candidate who incurs personal loans made after the effective date of the Bipartisan Campaign Reform Act of 2002 in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO CINCINNATI DIVISION

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	No. 1:22-cv-639 Hon. Douglas R. Cole

EXPERT REPORT OF RAYMOND J. LA RAJA

I. QUALIFICATIONS

My name is Raymond J. La Raja, I am over the age of 18, and I suffer no disability that would preclude me from giving this expert report.

I am a professor of political science at the University of Massachusetts, Amherst, where I have taught since 2002 and served as an Associate Dean for the past three years. My research and teaching focus on American political parties, elections, and campaign finance. I received my bachelor's degree from Harvard University in 1987, and a Master in Public Policy from Harvard's Kennedy School of Government in 1992. I was also a Coro Fellow in Public Affairs in 1988 in California, where I gained political experience through internships for a labor union, the public affairs division of a Fortune 500 company, a not-for-profit organization, and a congressional campaign.

I began studying campaign finance and political parties as a graduate student at the University of California, Berkeley, where I earned my Ph.D. in political science in 2001. My doctoral dissertation, entitled "American Political Parties in the Era of Soft Money," examined how political parties spent non-federal funds (so-called "soft money") during the 1990s.

Based on my research, I have published four books, two of which have been specifically about the impact of campaign finance laws on American political parties: *Small Change: Money, Political Parties and Campaign Finance Reform* (2008),[1] and *Campaign*

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[1] Raymond J. La Raja, *Small Change: Money, Political Parties, and Campaign Finance Reform* (Univ. of Michigan Press 2008).

Finance and Political Polarization: When Purists Prevail (2015).[2] The 2015 book, which I co-wrote, won the American Political Science Association's prestigious 2016 Virginia Gray Award, awarded to the best book on U.S. state politics or policy published in the preceding three calendar years. The opinions I offer in this report emerge from these two books, as well as at least a dozen peer-reviewed articles I have written about the dynamics of campaign finance in the United States. I have also contributed a featured co-authored article to *The Atlantic* (2019) describing the parlous state of American political parties, and the consequences for U.S. politics.

I have been a past President of the Political Organizations and Parties Section of the American Political Science Association (2015-2017), co-founder and past co-editor of *The Forum: A Journal of Applied Research in Contemporary Politics*, and co-founder and co-director of the UMass Poll, which regularly conducts national surveys on U.S. politics. I also served for many years on the Academic Advisory Board for the *Campaign Finance Institute,* a Washington, D.C., non-partisan think tank for evaluating and recommending policies related to campaign finance. Based on my doctoral dissertation research, I previously authored an expert report on behalf of the plaintiffs in *McConnell v. Federal Election Commission*, Civ. No. 02-874 (D.D.C. 2002).

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[2] Raymond J. La Raja & Brian F. Schaffner, *Campaign Finance and Political Polarization: When Purists Prevail* (Univ. of Michigan Press 2015).

Finally, I have served on several committees organized by academics to address issues in the campaign finance system, contributing, for example, to the Bipartisan Policy Center's major report, *The State of Campaign Finance in the U.S.* (2018).[3] Most recently I was asked to serve on the steering committee of a national task force led by Ned Foley (The Ohio State University), Larry Diamond (Stanford University), and Richard Pildes (NYU) aimed at making electoral reform recommendations to improve political representation and governing. In this task force, I also lead a working group of intellectually diverse scholars on matters of campaign finance reform.

My academic record, publications, and work experience are detailed further in a copy of my curriculum vitae which is attached at the end of this document as Exhibit A.

II. SCOPE OF ENGAGEMENT

I have been retained by Jones Day on behalf of their clients, plaintiffs National Republican Senatorial Committee ("NRSC"), National Republican Congressional Committee ("NRCC"), Senator James David Vance, and former Congressman Steven Chabot, to provide my expert opinions on the activities and importance of political parties to American democracy and how campaign finance reforms—

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[3] Nathaniel Persily, Robert F. Bauer & Benjamin L. Ginsberg, *Campaign Finance in the United States: Assessing an Era of Fundamental Change* 34 (Bipartisan Policy Center 2018), *available at* https://bipartisanpolicy.org/report/the- state-of-campaign-finance.

particularly the Federal Election Campaign Act's ("FECA") limits on coordinated expenditures by political parties in support of their candidates, 52 U.S.C. § 30116(d)—have undermined and weakened political parties. I also have been asked to review and opine on the opinions expressed in the expert report submitted on September 15, 2023, by Professor Johnathan Krasno, the expert for defendant Federal Election Commission ("FEC"). I have been retained and am being compensated for this work at the rate of $800 per hour. I will receive the same amount regardless of the outcome of this litigation or the substance of my opinions.

In reaching my opinions set forth below, I have relied on data from the FEC, Campaign Finance Institute, Adam Bonica (Stanford University), and OpenSecrets; my own prior research, books, and other publications regarding campaign finance and political parties; the political science literature, including the various sources cited herein; filings in this case, including declarations from the NRSC's and NRCC's Executive Directors submitted by plaintiffs; and certain media reports.

III. THE FRAGILE PLACE OF POLITICAL PARTY COMMITTEES IN U.S. DEMOCRACY TODAY

It is an understatement to say that political parties are important to democracy. They are indeed essential. I doubt any political scientist could conceive how our mass democracy could function without

them.[4] In fact, recent work makes a strong argument that when parties are weak "democracies die."[5]

But American political parties have become very weak, even though partisanship in the electorate is strong.[6] While parties vote more uniformly in Congress than in previous eras, the many recent obstacles in passing budgets to avoid government closure is evidence that collective action in government has been undermined due to the state of our weak political parties.

A key component of this weakness is that parties have lost much of their capacity to shape elections through their control over financial resources. As a result of the campaign finance laws, parties have become nothing but one among many committees in an increasingly fragmented marketplace.[7] This fragmentation gives unusual power to narrow interests and extremist candidates backed by unique

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[4] On this point, see E. E. Schattschneider, *Party Government*, American Government in Action Series (Transaction Publishers 2009) (1942).

[5] Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (Crown 2018).

[6] Julia Azari, *Weak Parties and Strong Partisanship Are a Bad Combination*, Vox (Nov. 3, 2016), https://www.vox.eom/mischiefs-of-faction/2016/11/3/13512362/weak-parties-strong-partisanship-bad-combination.

[7] *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 Yale L.J. 804, 809 (2015) (describing "the external diffusion of political power away from the political parties as a whole and the internal diffusion of power away from the party leadership to individual party members and officeholders").

"Super PACs" (independent expenditure-only committees) and an army of small donors who are unreflective of the American electorate.[8] In other words, as I will describe below, parties have become diminished actors in the campaign environment, competing with an array of lightly regulated single-issue groups that lack the accountability of parties because they are neither transparent nor rooted in institutions of government.[9]

Among the many problems of the prevailing campaign finance system is that parties lack the capacity to work closely and collaboratively with their own candidates, especially on public advertising campaigns—perceived as the most valuable form of political speech. Instead, if they wish to engage robustly in advocacy for their candidates, they increasingly must do so through independent expenditures, establishing administratively costly firewalled units that amount to separate entities divorced from the party's main operation. This causes an unnatural and inefficient separation in party activity from candidate campaigns: the parties are

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[8] Zachary Albert & Raymond La Raja, *Small Donors in US Elections*, 35 *Politique Aaméricaine* 15 (2020), *available at* https://doi.org/10.3917/polam.035.0015.

[9] *See generally* Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-out Political Parties*, 54 Hous. L. Rev. 845, 845-80 (2017); La Raja & Schaffner, *supra* note 2; Cory Manento, *Party Crashers: Interest Groups as a Latent Threat to Party Networks in Congressional Primaries*, 27 Party Politics 137, 137-48 (2021); Stan Oklobdzija, *Dark Parties: Unveiling Nonparty Communities in American Political Campaigns*, American Political Science Review 1, 1-22 (April 5, 2023).

forced to operate like interest groups, disrupting their natural association and identity of interests with their own candidates and losing out on the strategically effective benefits of close communications with them—not to mention, lower costs available for candidate-sponsored advertising. My colleagues who study politics in other established democracies are perplexed when I explain to them that American political parties must declare their independence from their own candidates if they wish to support them vigorously in elections. Political parties and candidates are inextricably bound together in ways that promote collective action and mutual accountability. Separating them through such a highly unusual arrangement defies common sense and undermines coherent electoral politics.

At the federal level, the problem has its roots in a series of "good government" reforms to the campaign finance system starting with Congress's 1974 amendments to FECA, which I will discuss momentarily. The combination of such anti-party reforms and court decisions has pushed money and clout away from political parties and into non-transparent, unaccountable venues, increased the influence of wealthy interests, and rendered the situation more difficult for parties to manage their brand by providing robust support to their candidates. This has become increasingly true over the last two decades, following Congress's enactment of the Bipartisan Campaign Reform Act of 2002, commonly referred to as "McCain-Feingold" after the bill's sponsors, which removed soft money from the political parties. These anti-party reforms have institutionalized pathologies in the electoral system,

in which parties must set up independent operations to robustly advocate for their candidates. As a consequence, contrary to Professor Krasno's claim, since the 1974 campaign finance reforms, the political parties (including plaintiffs NRSC and NRCC) have done anything but "prosper[] beyond their wildest dreams."

IV. WHY POLITICAL SCIENTISTS ARE STRONG SUPPORTERS OF POLITICAL PARTIES

The most important feature of political parties in a mass democracy is that they allow for accountable collective action via elections. In the classic formulation, a party creates a policy agenda with its activists and officials; candidates link themselves to this agenda when bearing the party label (with variations depending on the local context); parties mobilize voters based on their policies and candidates; and once in office, the party pursues its agenda. If the party fails to deliver, they lose seats and majorities. In a two-party system this compels them to rethink their policies and strategies in response to the preferences of a broad electorate.

A political party can only act responsibly when legislative leaders have the resources necessary to punish and reward party members to help forge coalitions on legislation that supports the party's brand. When parties build a consensus and act on it, the voters can connect their votes to policies pushed by the parties. According to Stanford University political scientist Morris Fiorina, "[t]he only way collective responsibility has ever existed, and can exist given our institutions, is through the agency of the political

party; in American politics, responsibility requires cohesive parties."[10] Fiorina's description is the ideal, but it is farther from reality than it should be thanks to many anti-party electoral reforms. In the realm of campaign finance reform, the significant constraints on political party resources and the ability of parties to work closely with their candidates has rendered them less able to shape their identities and forge collective action.

One of the most prominent analysts of political parties, Julia Azari, a political scientist at Marquette University, worries that parties have little influence over candidates and officeholders because they do not have as much to offer them. I agree. Most critically, this means the party elites cannot coordinate to advance the best quality candidates, or hold together coalitions in the task of governing. As Azari writes: "The defining characteristic of our moment is that parties are weak while partisanship is strong.... The [p]arties have been stripped (in part by their own actions) of their ability to coordinate and bargain….bargaining breaks down when no one has anything that anyone else wants.[11] In a recent column in *The New York Times* by Thomas Edsall, Yphtach Lelkes, a political scientist at the University of Pennsylvania, also attributed the divisiveness and polarization in the U.S. to weak political parties. Like Azari, Lelkes says, "while partisanship is very strong, parties are very weak. Models show that when parties

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[10] Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, 109 *Daedalus* 25, 26 (1980).

[11] Azari, *supra* note 6.

are strong, and leaders can impose discipline on their members, the parties will converge on the median voter, who is far more moderate than the median politician."[12]

Many other top experts agree with my opinion that party organizations are too weak for the tasks before them. As noted earlier, for more than a year I have been a member of a steering committee for a national task force of experts to recommend electoral reforms. The academics who comprise the task force are leading political scientists and legal scholars, with perspectives across the ideological spectrum. We have different preferences on the mix of reforms, but one theme stands out clearly: scholars overwhelming believe the political parties need to be strengthened in the U.S. system, ranging from changes to candidate nominations to campaign finance, in addition to other institutional shifts.

V. HOW CAMPAIGN FINANCE REFORMS HAVE UNDERMINED AND WEAKENED POLITICAL PARTIES

As mentioned at the outset, I have written two books that illustrate how campaign finance reforms have undermined the functioning of political parties and how party-centered rules improve the political system. The first book, *Small Change: Money, Political Parties and Campaign Finance Reform* (2008), predicted how the soft-money reforms in

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[12] Thomas Edsall, Opinion, *A Perfect Storm for the Ambitious, Extreme Ideologue*, N.Y. Times (Sept. 20, 2023) (quoting Lelkes), https://www.nytimes.com/2023/09/20/opinion/populism-polarization-trump-europe.html.

McCain-Feingold would deteriorate functional relationships between national and state parties, weaken the parties relative to narrowly based advocacy groups, and lead to immense spending by non-party groups with opaque sounding names.[13] Regrettably, these predictions all turned out to be true.

In removing party soft money, McCain-Feingold made it more difficult for political parties to perform vital integrative functions. Instead of encouraging parties, candidates, and allied groups to campaign collectively in elections, the laws give these groups incentives to campaign independently of each other. This dynamic stimulates a kind of fragmented campaigning that reduces political accountability, allowing candidates to distance themselves from the negative campaigns waged against their opponents by political parties or interest groups. It also allowed interest groups, such as Swift Boat Veterans for Truth or MoveOn.org, to influence electoral outcomes in their own right, even though most of the public has no idea what these groups stand for and who supports them.

While it is constitutional and perfectly reasonable—indeed vital to democratic politics—for political groups to criticize or show support for government leaders, the electoral system would benefit to the degree that rules encouraged diverse partisans to form coalitions and pool resources under the banner of a political party. Such arrangements would nurture a politics of compromise rather than factional confrontation, while providing the voters with a relatively clear

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[13] La Raja, *supra* note 1.

understanding of the policy differences between the major parties. Instead, we have a system that abets polarization between the parties because political factions—often amorphous and transient—have strong incentives to mobilize adherents on hot-button issues and force candidates to focus on narrowly-based moral agendas.

Today more than ever, existing American campaign finance laws, which limit how much political parties and candidates can work together, have encouraged the parties to institutionalize the practice of independent campaigning. In other words, parties run campaigns separately and in parallel with candidates. This strategy allows candidates to benefit from party campaigns while claiming they cannot control what the party does. Thus, the bonds of accountability have become weaker in the U.S. campaign finance system through laws that limit party and candidate coordination. While the weak condition of American political parties relative to those in other democracies cannot be attributed solely to campaign finance laws, these regulations have played no small part in preventing parties from becoming more robust institutions, mainly by unrealistically limiting the size of political contributions and their capacity to work closely with their own candidates.

My second book on campaign finance and parties, *Campaign Finance and Political Polarization: When Purists Prevail* (2015), sought to understand whether campaign finance laws in the American states might be contributing to polarization.[14] The basic premise

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[14] La Raja & Schaffner, *supra* note 2.

was that states with laws constraining the political parties—including limits on party-candidate coordination—were more likely to result in polarized legislatures compared to states with laws allowing parties to robustly support their candidates. My co-author, Brian Schaffner, and I viewed the parties as relatively pragmatic players in the political system who look to recruit candidates who reflect the preferences of the district as a way of maximizing the chances of winning the seat. In contrast, we viewed activist groups and their donors as seeking out ideologues to push their issues, even if at odds with the representation of the district.

Our analysis showed that political parties are indeed more likely to provide financial support to moderate candidates in competitive seats, and further, American states with party-supportive laws tend to be less polarized. We do not attribute polarization simply to money in politics, but we believe it sustains and accelerates these trends. The book's conclusion is that financially strong party committees, unfettered from restrictions on candidate financial support, are able to temper excessive polarization and help their party build broader coalitions to win elections.

I have also written more than a dozen articles on related subjects. One article, *Why Super PACs: How the American Party System Outgrew the Campaign Finance System* (2013), explains how campaign finance laws have been squeezing money and power from political parties precisely at a time of heightened

stakes for control of the U.S. Congress.[15] In this context, the limits on party spending in the form of coordinated expenditures (from the 1974 reforms) proved to be exceptionally harmful and ungenerous, especially as the cost of elections mounted. Partisans had strong incentives to coordinate and organize in pursuit of majorities. But, following the court decisions in *Citizens United v. FEC*, 558 U.S. 310, 360 (2010), and *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), the significant restrictions on the political parties—both the base limits on contributions to parties and on the parties' financial support of their candidates through contributions and party coordinated expenditures—incentivized partisans to create Super PACs, which lack the fundraising constraints. "Given the favorable regulatory status of non-party organizations compared to party organizations," I wrote, "it is not surprising that partisans are putting more reliance on campaign vehicles such as Super PACs."[16] My research for this article found a declining importance of political parties in financing elections beginning with the 2004 elections, in the wake of McCain-Feingold, as non-party spending on media had begun surging. This has only become starker over the last decade.[17] The consequences have been a fragmented campaign environment with multiple committees (mostly

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[15] Raymond J. La Raja, *Why Super PACs: How the American Party System Outgrew the Campaign Finance System*, 10 The Forum 91 (2013).

[16] *Id. at* 101.

[17] *Id. at* 101-02.

unrecognizable among the public), diminished accountability, and increased campaign costs.

There are many scholars who share my views about how the campaign finance laws are anti-party. Nathaniel Persily, a top expert on election law and law professor at Stanford University, concurs that the current campaign finance system "move(s) money from accountable actors, the political parties, to unaccountable groups." As Persily puts it, "The parties are accountable not only because of more stringent contribution disclosure requirements but also by their role in actual governance with their ties to congressional and executive branch officials and their involvement with legislative decision making."[18] Another top expert, Sam Issarachoff, explains how parties have lost the ability to control critical organizational functions, leaving many partisans to instead "buy not make" essential party activities. He writes, "in the absence of the coordinating role of the party, politics becomes more atomized, rhetoric hardens, and governance becomes more complicated."[19] I agree.

Even the progressive reform organization, The Brennan Center for Justice, has rightfully acknowledged in the aftermath of the McCain-Feingold reforms, which they championed, that more attention should be paid to the health of political

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[18] Thomas B. Edsall, Opinion, *For $200, a Person Can Fuel the Decline of Our Major Parties*, N.Y. Times (Aug. 30, 2023) (quoting Nathaniel Persily), https://www.nytimes.com/2023/08/30/opinion/campaign-finance-small- donors.html.

[19] Issacharoff, *supra* note 9, at 846.

parties in our campaign finance system. In a blog post they wrote that "the rise of powerful independent organizations has weakened political parties, leading to circumvention of campaign finance regulation and fewer points of entry into the political process by the party faithful."[20] They followed up with a report linking stronger parties to stronger democracy, although they did not go far enough in recommending removing many of the chief burdens on party finances, including low limits on coordinated expenditures.[21]

VI. WHY FECA'S LIMITS ON COORDINATED PARTY EXPENDITURES BURDEN POLITICAL PARTY COMMITTEES

In my view there is little doubt that limits on coordinated expenditures impose a severe burden on political party committees and their candidates. Restricting the parties' ability to coordinate with their candidates is not only "a parody of what parties are about in most democracies, but encourages inefficient use of resources (hence ever-more money is needed), legal gamesmanship, and diminished political accountability."[22] The parties are limited to investing only a small fraction of funds in efficient and effective

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[20] Brennan Center for Justice, *The Two Trends that Matter for Party Politics* (Dec. 9, 2014), https://www.brennancenter.org/our-work/analysis-opinion/two-trends-matter-party-politics.

[21] Ian Vandewalker & Daniel I. Weiner, *Stronger Parties, Stronger Democracy: Rethinking Reform, Brennan Center for Justice* 14 (Sept. 16, 2015), https://www.brennancenter.org/our-work/research-reports/stronger-parties-stronger-democracy-rethinking-reform.

[22] La Raja, *supra* note 15, at 103.

coordinated advocacy with their candidates, even in the most competitive races. To compensate for this, they must operate independently from their own candidates—or sit back and watch unaccountable outside groups do so—which is detrimental to a well-functioned party system. Regrettably, the limits on party-candidate coordination are unnecessary, since less intrusive restrictions already address any potential for *quid pro quo* corruption—the only concern justifying campaign finance regulation. Let me take up each of these points.

A. The value of allowable coordinated party expenditures is extremely low relative to the increasing cost of election campaigns.

The amount that parties can spend in coordination with their candidates has always been unreasonably low relative to the actual costs of campaigns. By my estimate coordinated party expenditures in House races have never exceeded 1% of total expenditures by general election candidates. To be sure, parties do not invest coordinated expenditures in every race—that would be a waste of money. But the staggering difference between party outlays for coordinated expenditures and candidate expenditures should provide some perspective on the relatively small sums controlled by the party committees.

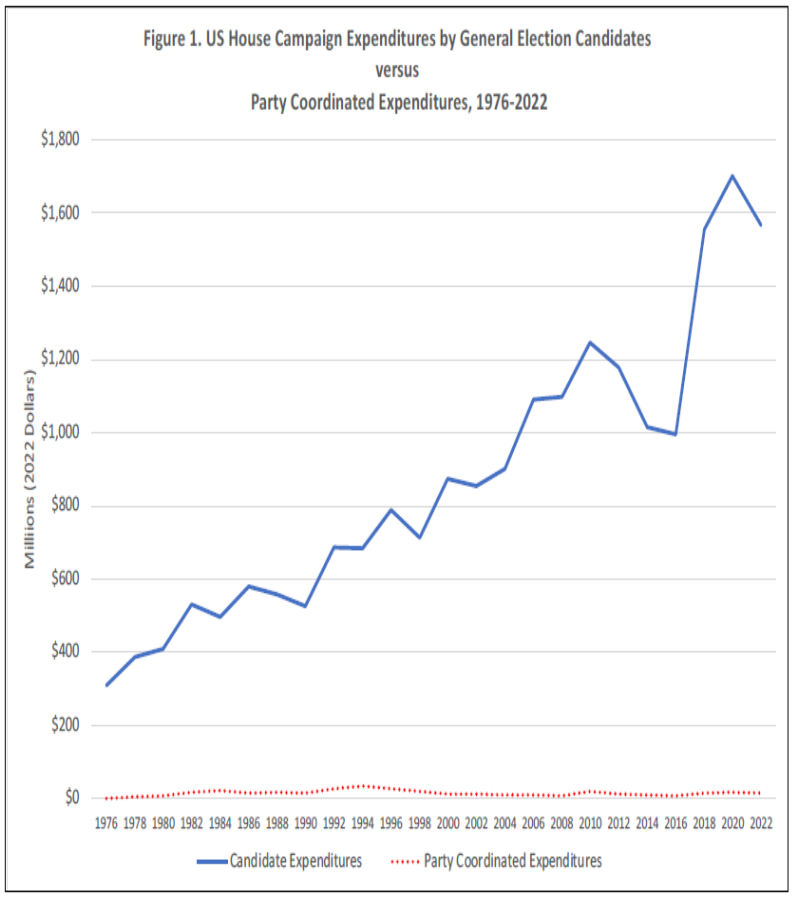
Figure 1 illustrates the small part played by coordinated party expenditures in House elections. It shows spending for general election candidates versus party coordinated spending, both adjusted for inflation (the number of total candidates in any given year has not fluctuated much). Keep in mind that candidate

expenditures are hardly the entire sum of what is spent in the most competitive contests, with millions coming from Super PACs and other independent groups as well. In the 2022 elections, House candidates spent more than $1.5 billion. The sum of coordinated party expenditures in that cycle was just $15.8 million—which is less than they spent as far back as 1982 when the parties spent the equivalent of $18.2 million in 2022 dollars.

It is remarkable that the sum of coordinated party expenditures has not increased significantly during a period of intense competition for majority control of Congress, when election costs have soared. This fact suggests clearly that FECA's severe limits on coordinated party spending have made this otherwise most effective form of candidate support less useful than alternatives such as party independent spending or reliance on allied partisans to spend through Super PACs. Without the party coordinated expenditure limits in place, however, there is no doubt that party committees would cease to engage in these less efficient, more costly independent expenditures.

One problem is that campaign spending growth has significantly outpaced the inflation rate adjustments made by the FEC for coordinated expenditures. Between 1976 and 2022 (the years for which I have data from the Campaign Finance Institute), the average rate of increase in campaign spending each cycle by House candidates increased by as much 18%. In contrast, the average increase in the inflation rate for the 2-year cycle has been 7.8% using the CPI. In short, even with inflation adjustments that the FEC applies to limits on coordinated party expenditures,

the limits have hardly kept pace with the rising cost of House elections.



The Senate elections tell a parallel story about the highly constrained amounts of coordinated party expenditures. Figure 2 shows a similar graph as the previous one, but adds other forms of party support, including party contributions and independent spending. Once again, the steep rise in candidate spending for Senate races is clear. In inflation-adjusted terms, Senate general election candidates

spent $1.316 billion in 2022 compared to $196 million in 1976. Clearly, the campaign world has changed. At the same time coordinated party expenditures have typically made up about 5% of combined total of candidate and coordinated party expenditures. Note how the amount of party contributions barely registers in Figure 2. The most significant support that party committees have provided has been in the form of less effective, inefficient independent expenditures, which they have relied on since the early 2000s, after McCain-Feingold prevented them from using soft money. Even here, independent expenditures made up 22% of combined candidate and party spending at the high point in 2008, and just 5% in 2022.

To drill down further, I looked at the statistics from the FEC for candidates who received coordinated spending in the most recent 2022 elections. Keep in mind that, for the two major parties, only the Republican National Committee ("RNC") and Democratic National Committee ("DNC") and the state party committees in each relevant state are allowed to make coordinated party expenditures for House and Senate races. Each of those committees, however, may, by FEC regulation, assign its authority to another party committee. 11 C.F.R. § 109.33. As I understand it, the RNC has historically given the party's Senate and House national committees near majority control over coordinated expenditures for their relevant races—although not always because these committees occasionally have different priorities.[23] The assignment rules—and the need to

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[23] Ben Karmisar, *Trump Primary Threats Could Put RNC in a Bind*, The Hill (Aug. 8, 2017),

ask another committee for permission to coordinate with their candidates—obviously add a layer of complexity to making coordinated party expenditures for committees like the NRSC and NRCC.

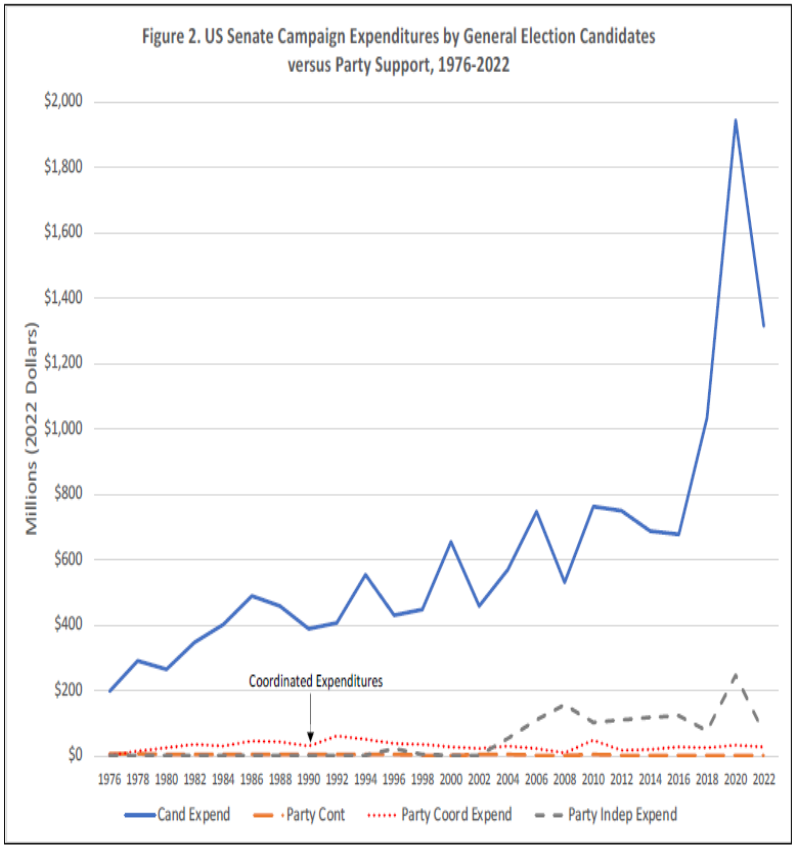

Table 1 shows the amounts of coordinated party expenditures for Republican Senate candidates in 2022, based on reporting data available on the FEC's website. The Republican Party, with the NRSC as its

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https://thehill.com/homenews/campaign/347724-trump-primary-threats-could-put-rnc-in-a-bind.

primary actor, allocated coordinated expenditures in 21 Senate contests. In 10 high-stakes contests, the party spent 94% or more of the maximum coordinated limit—in 4 of the contests, including the Ohio Senate race, it spent up to 97-99% of limit. As this shows, even in the most competitive of races, the parties often fall just shy of reaching the limit due to compliance concerns. They regularly reserve some portion of their coordinated authority in the event of unanticipated campaign expenses coming up post-election that need to be deemed coordinated to ensure legal compliance and thus avoid FEC or other enforcement actions.

Table 1. Republican Party Coordinated Expenditures in 2022 Senate Elections

State	Coordinated Expenditures NRSC	Coordinated Expenditures Other Party (FEC)	Coordinated Limit	Percent of Limit Used	Campaign General Election Operating Expenditures	Total Campaign and Coordinated Expenditures	Coordinated as % of Total Expenditures in General Election
Pennsylvania	$2,237,000	$0	$2,262,000	99%	$30,543,095	$32,780,095	7%
Ohio	$1,991,800	$0	$2,016,800	99%	$12,281,410	$14,273,210	14%
Georgia	$1,783,118	$0	$1,819,200	98%	$55,346,166	$57,129,284	3%
Wisconsin	$957,996	$22,504	$1,015,800	97%	$10,900,099	$11,880,599	8%
Arizona	$1,199,200	$0	$1,244,800	96%	$11,594,769	$12,793,969	9%
Florida	$3,475,000	$223,622	$3,845,200	96%	$46,222,205	$49,920,827	7%
Nevada	$512,385	$0	$537,600	95%	$14,148,568	$14,660,954	3%
North Dakota	$0	$208,099	$219,800	95%	$3,665,564	$3,873,663	5%
North Carolina	$1,700,000	$0	$1,813,400	94%	$9,876,656	$11,576,656	15%
Iowa	$505,444	$0	$540,000	94%	$7,441,685	$7,947,128	6%
New Hampshire	$185,000	$0	$249,000	74%	$3,250,443	$3,435,443	5%
Missouri	$0	$517,819	$1,051,600	49%	$3,642,874	$4,160,693	12%
Washington	$625,000	$1,600	$1,332,800	47%	$15,101,605	$15,728,205	4%
Colorado	$175,450	$125,000	$1,004,200	30%	$6,831,631	$7,132,081	4%
Connecticut	$162,500	$0	$632,200	26%	$1,491,395	$1,653,895	10%
Utah	$30,000	$61,971	$525,600	17%	$5,814,913	$5,906,884	2%
Vermont	$15,000	$0	$219,800	7%	$324,538	$339,538	4%
Alabama	$0	$18,262	$861,200	2%	$1,618,185	$1,636,447	1%
Arkansas	$6,720	$0	$510,600	1%	$2,142,429	$2,149,149	0%
Indiana	$0	$11,340	$1,147,200	1%	$5,717,371	$5,728,711	0%
Kentucky	$0	$7,362	$768,000	1%	$10,368,050	$10,375,412	0%
	$15,561,613	**$1,197,579**			**$258,323,651**	**$275,082,843**	**6%**

Data Source: Federal Election Commission[24]

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[24] FEC Campaign Finance Data, 2021-2022 Disbursements for Party Coordinated Expenditures (all spenders), https://www.fec.gov/data/party-coordinated-expenditures (Republican Senate candidates filtered); FEC, *Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 87 Fed. Reg. 5,822, 5,822-23 (Feb. 2, 2022) (listing 2022 coordinated party expenditure limits); Line 17 Operating Expenditures Made by House or Senate Committees, https://www.fec.gov/data/disbursements/?data_type=processed &committee_id=C00230482&committee id=C00473371&committee id=C00482984&committee id=C00614776&committee id=C00620518&committee id=C00783142&committee id=C00784165&committee id=C00787135&committee id=C00787853&committee id=C00795930&two year transaction period=2022&min date=05%2F04%2F2022&max date=12%2F31 %2F2022&line number=F3-17 (Budd, Grassley, Hoeven, Johnson, Laxalt, Masters, Oz, Rubio, Vance, and Walker); https://www.fec.gov/data/disbursements/?data type=processed&committee id=C00459255&committee id=C00473 827&committee id=C00476317&committee id=C00711010&committee id=C00775015&committee id=C007767 65&committee id=C00781443&committee id=C00791186&committee id=C00804377&committee id=C0080969 9&two year transaction period=2022&min date=05%2F04%2F2022&max date=12%2F31%2F2022&line numb er=F3-17 (Bolduc, Boozman, Britt, Lee, Levy, Malloy, O'Dea, Schmitt, Smiley, and Young); https://www.fec.gov/data/disbursements/?data type=processed&committee id=C00496075&two year transaction period=2022&min date=05%2F04%2F2022&max date=12%2F31%2F2022&line number=F3-17 (Paul). Where available, I computed general election operating expenditures for each committee by filtering those disbursements designated as "G2022" in the data. When such designations were not available, I derived the total by filtering for disbursements made the day after the relevant primary election through the end of 2022. For Georgia (Walker), the operating expenditure figure also includes

Illustrating how limited the parties' role has become under these limits, for all 21 of these 2022 Senate contests, the Republican Party's coordinated party expenditures made up only 6% of the total of all campaign post-primary operating expenditures and party coordinated expenditures. In the 10 high-stakes contests where the NRSC spent 94% or more of the party's coordinated expenditure authority, the party's coordinated expenditures exceeded 9% of total party/candidate campaign spending *in only 4 of the races*. At the top end, in North Carolina, party coordinated spending reached 15% of total; at the low end, in Georgia and Nevada, it did not exceed 3%. As for the Democratic Party, with the DSCC taking the lead, the party spent over $8.7 million on 17 Senate candidates,[25] whose campaigns collectively spent almost $452 million on general election operating expenditures.[26] That means that coordinated party

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spending toward the general election run-off. For Florida (Rubio), the figure includes all 2021-2022 spending by the campaign, since Florida canceled its Republican primary election. All referenced data last accessed October 12, 2023.

[25] FEC Campaign Finance Data, 2021-2022 Disbursements for Party Coordinated Expenditures (all spenders), https://www.fec.gov/data/party-coordinated-expenditures (Democratic Senate candidates filtered) (last accessed Oct. 12, 2023).

[26] FEC Campaign Finance Data, 2021-2022 Disbursements for Line 17 Operating Expenditures, https://www.fec.gov/data/disbursements/?data type=processed&committee id=C00257642&committee id=C00696526&committee id=C00726018&committee id=C00736876&committee id=C00765164&committee id=C00777771&committee id=C00777904&committee id=C00784959&committee id=C00802959&committee

expenditures by the Democratic Party amounted to less than 2% of total campaign expenditures (candidate and coordinated party) for 2022 Democratic general election Senate candidates. In 2022, the Republican Senate candidates raised much less than their Democratic rivals and, by necessity, depended more heavily on independent expenditures to remain competitive.[27]

As it pertains specifically to plaintiff Vance, the Republican nominee in Ohio's 2022 Senate election, his campaign spent over $12 million in operating

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id=C00810754&two year transaction period=2022&line number=F3-17 (Barnes, Beasley, Busch Valentine, Christiansen, Kelly, Murray, Padilla, Ryan, and Warnock); https://www.fec.gov/data/disbursements/?data type=processed&committee id=C00308676&committee id=C00346312&committee id=C00540732&committee id=C00573 758&committee id=C00574889&committee id=C00588772&committee id=C00726018&committee id=C007658 00&two year transaction period=2022&line number=F3-17 (Duckworth, Hassan, Fetterman, Schatz, Schumer, Van Hollen, McDermott, and Wyden). As above, where available, I determined the total general election operating expenditures for each committee by filtering disbursements designated as "G2022"—except in the case of Georgia (Warnock), which also accounts for general election runoff operating expenditures. When such designations were not available in the data, I derived the total by filtering for disbursements starting the day after the relevant primary election through the end of 2022. All referenced data last accessed October 12, 2023.

[27] Taylor Giorno, *"Midterm spending spree": Cost of 2022 federal elections tops $8.9 billion, a new midterm record*, OpenSecrets (Feb. 7, 2023), https://www.opensecrets.org/news/2023/02/midterms-spending-spree-cost-of-2022-federal-elections-tops-8-9-billion-a-new-midterm-record.

expenditures after the May 3, 2022 primary election, according to FEC reporting data. The party used practically the maximum of its allowable coordinated expenditures at $1,9991,800, with the NRSC spending the full authority it had been assigned by the RNC. Even still, in sum, the party covered only 14% of the combined candidate and party coordinated expenditures in the general election period—which, notably, was the second highest percentage for any of the Republican Senate candidates in 2022. Vance did not raise as much in the general election as competitive Republican candidates in other states, even though he faced a Democratic candidate who reported spending more than $61 million on general election operating expenditures from his own campaign. Given the constraints on NRSC financing with low contribution limits and coordinated spending limits, the balance of financing in support of Vance was, by necessity, through independent expenditures, primarily issued by an outside Super PAC called the Senate Leadership Fund, which had publicly announced a significant investment on advertising in the race.[28]

Coordinated spending in the November 2022 House general election races tells a similar story of a party bumping up against low limits on a broader scale. The

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[28] Andrew J. Tobias, *National Republican group plans massive ad buy boosting J.D. Vance, signaling deepening GOP focus on Ohio's Senate race,* Cleveland.com (Aug. 19, 2022), https://www.cleveland.com/news/2022/08/national-republican-group-plans-massive-ad-buy-boosting-jd-vance-signaling-deepening-gop-focus-on-ohios-senate-race.html.

NRCC spent very close to the 2022 aggregate party coordinated limit for House elections ($110,000) in several races, spending $98,000 or more in 76 general election contests.[29] The NRCC spent at least $103,000 in 67 of the general election contests, including in Ohio's Congressional District 1 for plaintiff Chabot. Again, because of the strictness of the coordinated party expenditure limits and real threat of enforcement for violating the limits, the amounts of coordinated spending often come up just shy of the limit to reserve funds for compliance.

In all, the NRCC spent roughly 94% of the Republican Party's total coordinated authority in 68 general election House races in 2022, including in each of the 10 most expensive contests, as reported by OpenSecrets: Virginia District 7, California District 47, Texas District 28, Michigan District 7, Oregon District 6, Pennsylvania District 7, Nevada District 3, New Hampshire District 1, and Washington District 8.[30] Yet, focusing in on those 10 races, we see how much the coordinated party expenditure limits constrain the parties from meaningfully helping their candidates with coordinated expenditures in critical contests. In these 10 contests, per FEC reporting data,

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[29] FEC Campaign Finance Data, 2021-2022 Disbursements for Party Coordinated Expenditures (NRCC), https://www.fec.gov/data/party-coordinated-expenditures/?committee id=C00075820&cycle=2022 (last accessed Oct. 12, 2023).

[30] Most Expensive Races, OpenSecrets, https://www.opensecrets.org/elections-overview/most-expensive-races?housespentcycle=2022&display=allcandsout&senatespentcycle= 2022.

Republican candidates spent $24.6 million on general election operating expenditures compared to just over $1.0 million in coordinated party expenditures—meaning coordinated party expenditures made up just 4% of this combined campaign spending.[31]

In the competitive U.S. House race in Ohio's Congressional District 1, the combined Republican candidate general election operating and party spending came to just $1.8 million,[32] of which less than

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[31] FEC Campaign Finance Data, 2021-2022 Disbursements for Line 17 Operating Expenditures, https://www.fec.gov/data/disbursements/?data type=processed&committee id=C00499392&committee id=C00722892&committee id=C00769414&committee id=C00780049&committee id=C00784884&committee id=C00793976&committee id=C00797282&committee id=C00798322&committee id=C00799684&committee id=C00809178&two year transaction period=2022&line number=F3-17 (Barrett, Baugh, Becker, Erickson, Garcia, Larkin, Leavitt, Scheller, Valadao, and Vega). As above, where available, total general election operating expenditures for each committee were determined by filtering disbursements designated as "G2022" in the data. When such designations were not available in the data, I derived the total by filtering for disbursements beginning the day after the relevant primary election through the end of 2022. All referenced data last accessed October 12, 2023.

[32] FEC Campaign Finance Data, 2021-2022 Disbursements for Line 17 Operating Expenditures by Steve Chabot for Congress, https://www.fec.gov/data/disbursements/?data type=processed&committee id=C00301838&two year transaction period=2022&line number=F3-17 (figure derived from for each committee's data for "G2022" disbursements); FEC Campaign Finance Data, 2021-2022 Disbursements for Party Coordinated Expenditures for Steve Chabot, https://www.fec.gov/data/party-coordinated-expenditures/?candidate

6% was party coordinated spending, $103,000.[33] An additional $4,300,055 was spent on independent expenditures supporting Chabot or opposing his opponent, Greg Landsman, including $1,849,629 by the NRCC's firewalled unit and another $2,349,644 million by the Congressional Leadership Fund, which is a Super PAC dedicated to supporting Republican House candidates.[34] With all that campaign money in support of the Republican candidate, the party's coordinated expenditures of $103,000—the most effective way of working with their candidates—amounted to less than 1.7% of total support for Chabot's general election candidacy.

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id=H8OH01043&cycle=2022. All referenced data last accessed October 12, 2023.

[33] As in every other race in states with more than a single Congressman, the total coordinated party expenditure limit for the Ohio District 1 contest was $110,000 – $55,000 each to the RNC and Ohio Republican Party. The RNC assigned the NRCC $50,000 of its authority, reserving the remainder to ensure compliance, and the state party assigned the NRCC its full limit. The NRCC, as it did in over 60 other races, reserved an additional portion out of its own compliance concerns.

[34] FEC Campaign Finance Data, 2021-2022 Independent Expenditures Opposing Greg Landsman, https://www.fec.gov/data/independent-expenditures/?data type=processed&cycle=2022&is notice=false&most recent=true&candidate id=H2OH01194& support oppose indicator=O (last accessed Oct. 12, 2023); FEC Campaign Finance Data, 2021-2022 Independent Expenditures Supporting Steve Chabot, https://www.fec.gov/data/independent-expenditures/?data type=processed&cycle=2022&is notice=false&most recent=true&candidate id=H8OH01043& support oppose indicator=S (last accessed Oct. 12, 2023).

B. The coordinated party expenditure limits undermine the relationship between the parties and their candidates.

Clearly, the parties are not able to take advantage of working closely with their candidates because the coordinated party expenditure limits prevent them from having much of an impact in such costly campaigns. Parties instead rely much more on independent expenditures, whether their own or those made by allied outside groups such as Super PACs. I worry about parties having to spend independently from candidates for all the reasons I mentioned previously in this report. It loosens the candidate-party linkages that are naturally part of this association, and creates unnecessary inefficiencies and additional administrative and compliance costs. In the absence of coordination, independent expenditures are not always very effective and are not preferred by candidates "who have no control at all over how the money is spent. Indeed, although well intentioned, such spending can sometimes backfire" and be counterproductive.[35] Moreover, unlike Super PACs, the parties cannot raise money in unlimited sums, even for their independent expenditures, putting them at a substantial fundraising disadvantage with Super PACs and other non-party

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[35] Diana Dwyre, *Political Parties and Campaign Finance What Role Do the National Parties Play?*, Prepared for the Campaign Finance Task Force Conference 37 (Bipartisan Policy Center April 21, 2017) (revised May 2017), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/05/Political-Parties-and-Campaign- Finance-What-Role-Do-the-National-Parties-Plav.-Diana-Dwyre.-Diana-Dwyre.pdf.

groups that have no such restrictions. This disadvantage is all the more heightened when the parties' true competitive advantage over Super PACs—the ability coordinate with campaigns—is restricted.

Campaign finance expert, Professor Diana Dwyre of Chico State University, in her section on the political parties for the Bipartisan Policy Center's major report on the U.S. campaign finance system, suggested that parties were in a precarious situation. As she wrote, "The extent to which the parties are able to count on these network allies to pursue the parties' goals may contribute to how successfully the parties adapt to a campaign finance landscape that has left them with less financial clout than non-party campaign finance actors." She then mentioned the possibility of a "reexamination" of the restrictions on party coordinated spending, in light of *McCutcheon v. FEC*, 572 U.S. 185 (2014), and the now clearer understanding of what constitutes "corruption" justifying campaign finance regulation (*i.e.*, *quid pro quo* corruption), which calls into serious doubt any "notion that parties can act as 'corrupt conduits' through which interested money can influence lawmakers' policy decisions."[36] Dwyre stated, "Such a shift in opinion would potentially put parties on more of a level playing field with nonparty groups, which may increase the number of competitive races as both parties would have more resources to pursue majority status."[37] I agree with Dwyre's assessment.

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[36] *Id. at* 41.

[37] *Id. at* 40-41.

C. There are less restrictive alternatives to prevent *quid pro quo* corruption.

An objection of the FEC and its expert is that political parties will serve definitively as conduits if they have no limits on how much they can support their candidates, which would increase the potential for *quid pro quo* between candidates and donors. There are several problems with the claim.

First, the parties themselves are highly constrained by FECA's base contributions limits. The fact that the party committee must raise money in small increments is alone a prophylactic against *quid pro quo* corruption (which is rare through party committees to begin with). Tacking on a double prophylactic to limit how a party can then spend such funds once in the door is over the top—especially when it restricts an institution as important to our political system as the parties from doing what they are intended to do. In my opinion, this is overregulation of the worst kind. For no clear reason, the law infringes on the associational rights of a vital civic organization whose purpose is to recruit candidates committed to party policies, inform and mobilize the public, and organize the government in the national interest all to the detriment of our democracy.

Second, the FEC already can monitor against potential corruption through party financing by enforcing FECA's anti-earmarking rules. The anti-circumvention approach of using low contribution limits to parties and tightly capped coordinated party expenditures, both to avoid the potential for corruption, imposes many costs on associational rights

and healthy party organizing, with minimal benefits. As my co-author and I wrote in our 2015 book:

> The anti-circumvention approach leads to a "whack-a-mole" dynamic in which regulators keep adding new statutes in a vain attempt to close new loopholes as they crop up. We think a better strategy would be to simply enforce rules that prohibit donors from earmarking contributions to the party. This would mean that donors could not tell the party where they want their contribution to be spent and that candidates could not legally compel the party to turn over funds on the basis of a claim that particular donations were intended for themselves.[38]

This remains true.

In my view, no restrictions should be imposed on party support of candidates at all. Political parties should be permitted to help their candidates as much as desired with direct contributions or in-kind support. Among several reasons, this advances a positive dynamic toward attenuating polarization, because parties tend to target moderate candidates in closely contested districts. Not only will this dynamic help finance more moderates (who better reflect the district or state), but it will encourage the financing of challengers to face incumbents. The leadership that controls a legislative party has powerful incentives to finance challengers and moderates. In 2015 we wrote, "We would not think it unreasonable if parties could

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[38] La Raja & Schaffner, *supra* note 2, at 141.

provide at least half of candidate resources for a political campaign."[39] I still believe this to be true.

This is also an appropriate time to again reference my recent work with a national task force of election law experts. As noted, I lead the working group on campaign finance, where we took a vote in May 2023 (which I documented on google surveys) about support for various recommendations. The group of 10 scholars overwhelmingly favored unburdening parties from many campaign finance restrictions. For example, 10 of 10 favored a significant increase in contributions limits to political parties; and 7 of 10 favored ***removing*** limits on coordinated party expenditures, including myself.

VII. MY REBUTTAL OF THE OPINIONS OF PROFESSOR KRASNO

Let me turn to address directly Professor Krasno's opinions in support of restricting party coordinated expenditures. In his report, Professor Krasno did not follow his own lesson to view the campaign finance system holistically. He writes, "While it may be tempting to examine a single part of a statute under a microscope, campaign finance systems are *systems* whose different parts operate together in concert. Experience shows that altering an element of the campaign finance system can have repercussions throughout." Precisely so. When viewing the campaign finance system as a "system," we observe significant changes over time that call for reconsideration of old regulations. More critically, we can see the distortions created by disabling political

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[39] *Id. at* 137-38.

parties from working in coordination with their candidates.

These distortions not only undermine the vital functions of the parties, as I explained above, but also create an electoral environment that is fragmented, less transparent, and less accountable. It is perhaps more surprising, given his stature in the profession, that Professor Krasno fails to acknowledge how party committees remain the singular institution most likely to address pathologies of polarization, fragmentation, and weak accountability. Instead, he prefers to unearth well-known—but tired—narratives of party malfeasance, drawing on the long-gone patronage days of Tammany Hall in the manner of a Frank Capra classic. I do not pretend that political parties have followed the Rule of Saint Benedict. I do believe, however, that American democracy is more threatened by the weakness of political parties than the probability of them engaging in *quid pro quo* corruption, as apparently suggested by Professor Krasno. The marketplace for campaigns has changed dramatically, as I indicated above, and yet Professor Krasno is adamant that party committees must continue to dispense support to candidates with a spoon while competitors avail themselves to backhoes.

Below I set out Professor Krasno's main points as I see them, along with my rebuttals to each.

A. Professor Krasno claims that political parties are doing great—they're not.

As already mentioned, Professor Krasno's oddest claim about the political parties is that 'they have prospered beyond their wildest dreams" under the current campaign finance regime. His reference point

is the 1960s and 1970s when Democrats had large majorities in Congress, the parties were less ideologically sorted, and candidates relied on the "personal vote" to win elections as much as the party label. Times have changed significantly. The electoral stakes cannot be compared. Today, the parties have very different platforms, and most importantly, Congress has experienced insecure majorities for the past 20-plus years.[40] This is an era of heightened collective mobilization. And yet the parties are still operating under rules established in 1974 during the candidate-centered era.[41] The subsequent McCain-Feingold reforms in 2002 doubled down on anti-party rules by taking away soft money. Only the Supreme Court's *McCutcheon* decision in 2014 gave the political parties some reprieve by striking down the aggregate limits on the amount an individual could give to political committees in a cycle, meaning that political parties did not have to compete with candidates and other committees for the same donors.

As evidence for party strength, Professor Krasno cites the strength of partisan identification among the electorate and party unity in casting votes in Congress. However, partisan strength in the *electorate* has little to do with the health of political party *organizations*. Moreover, the party-in government has found it very difficult to maintain its brand and hold together coalitions, even when members largely agree on issues. Professor Julia

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[40] Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* (Univ. of Chicago Press 2016).

[41] La Raja, *supra* note 15.

Azari has argued convincingly that a major problem with U.S. democracy is that partisanship is strong while party organizations are weak.[42] This means that parties struggle to perform the necessary bargaining and negotiating that is necessary in large coalitions. Recent brinksmanship in Congress among Republicans to pass a budget and support a Speaker of the House suggests as much. Kevin McCarthy was compelled to vacate his House Speaker position by a small faction, even though 96% of the Republican conference preferred that he be the Speaker.[43] To the degree party leadership controls resources they have greater capacity to broker deals and challenge renegades who threaten the party coalition.[44]

To give a sense for the party committees' diminishing role relative to other sources of campaign funds, Figure 3 shows where resources are coming into House and Senate campaigns from different political committees, including political parties, traditional PACs, and independent expenditure committees. Party committee contributions and expenditures (primarily independent expenditures) increased after 2002's McCain-Feingold. Yet PAC contributions exceed these amounts. Importantly, the biggest change has been the non-party independent expenditures going from $14.7 million in 2004 to

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[42] Azari, *supra* note 6.

[43] Kevin, Freking, *These 8 Republicans Stood Apart to Remove Kevin McCarthy as House Speaker*, Associated Press, (Oct. 4 2023), https://apnews.com/article/kevin-mccarthy-republican-lawmakers-house-opponents-33c7d984964916f29d548b5b1dfe508b.

[44] La Raja & Schaffner, *supra* note 2, at 143.

$1.678 billion in 2020—or more than 114 times the amount that existed 16 years earlier. Make no mistake, many of these groups are challenging the party on recruitment, issue agendas, and financing of different candidates.[45] Research shows that many of these outside groups comprise distinct networks of funders, most of whom are little known to the American public.[46]

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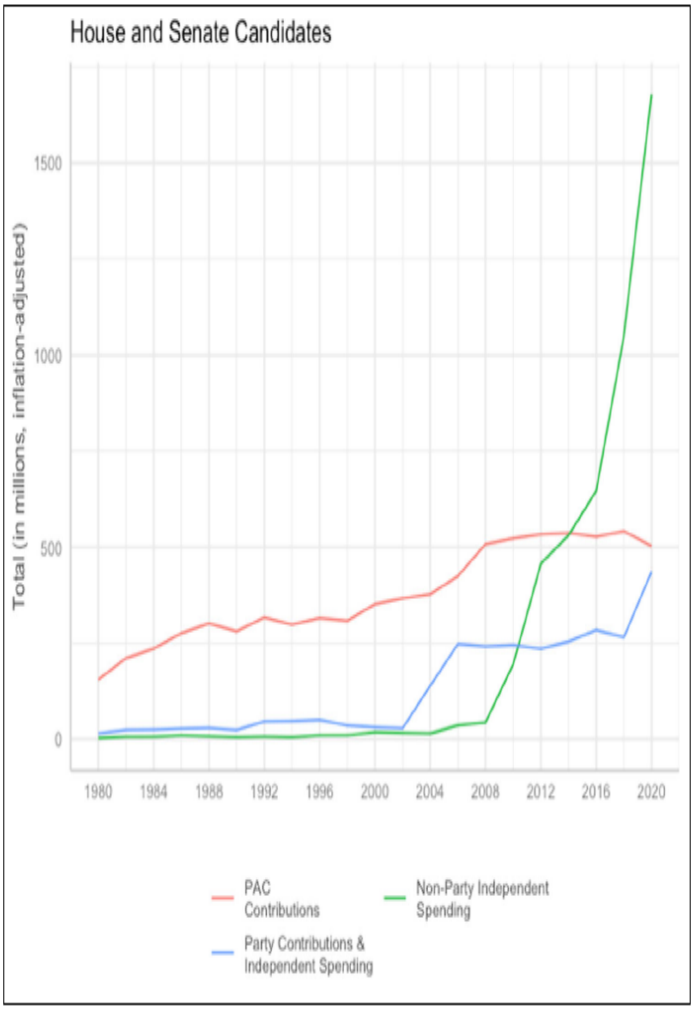
[45] *See, e.g.*, Robert F. Bauer, *The Parties' Struggles in the Political "Market,"* 54 Hous. L. Rev. 881, 899 (2017) ("Super PACs are seen to be moving in the direction of assuming most of the functions of parties ....").

[46] Manento, *supra* note 9; Oklobdzija, *supra* note 9.

Figure 3. Contributions and Spending in Support of U.S. House and Senate Elections, 1990-2020



Data Source: Adam Bonica 2023.[47]

[47] Adam Bonica. 2023. Database on Ideology, Money in Politics, and Elections: Public version 3.0 [Computer file]. Stanford, CA: Stanford University Libraries. https://data.stanford.edu/dime.

As lead author Nathaniel Persily wrote in the Bipartisan Policy Center report on campaign finance, "At both the federal and state level, an increasing share of money in the campaign finance system has moved away from traditional party organizations and candidates, who are most directly accountable to voters, toward entities that are less directly accountable to the electorate and that are required to disclose less about their connections to campaigns and their ultimate source of funding."[48]

Professor Krasno may argue that parties are taking advantage of independent spending, just like everyone else. I do not agree, however, with placing parties in the same regulatory context as other groups because of their unique role in the political system. And by compelling party committees to spend independently if they want to robustly advocate for their candidates means that the parties must sacrifice advantages, such as lower cost advertising. But most critically, spending independently to advocate for their candidates means parties must work inefficiently to win elections, without direct communications with their own candidates about plans, strategies, or messaging.

B. Professor Krasno claims that undoing the coordinated expenditure limits would be an end run around FECA's contribution limits—it wouldn't.

I have several points in response to Professor Krasno's assertion that lifting coordinated party

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[48] Persily et al., *supra* note 3, at 34.

expenditure limits would lead to an end run around FECA's base contribution limits.

1. Party committees' base contribution limits are lower today than under the 1974 FECA amendments. Professor Krasno suggests that party committees have high contribution limits, which will make them runaway conduits for candidate fundraising. In fact, contribution limits on political parties for election funds are lower today than in 1974 when Congress passed the FECA amendments. In other words, the prophylactic against so-called corruption and earmarking to candidates has rarely been tighter. Figure 4 illustrates this. In 1974 the law imposed an annual $20,000 cap on individual contributions. Critically, these were not indexed to inflation. Because if they were, an individual contribution today should be $130,199, using the CPI-inflator. Instead, based on McCain-Feingold, parties are stuck with a limit—presently $41,300 per calendar year—that is more than three times less, in inflation adjusted terms, than what parties faced back in that first election in 1976. Put another way, $41,300 today would have meant facing a limit of roughly $7,192 (instead of $20,000) as the parties were gearing up for the 1976 elections.[49]

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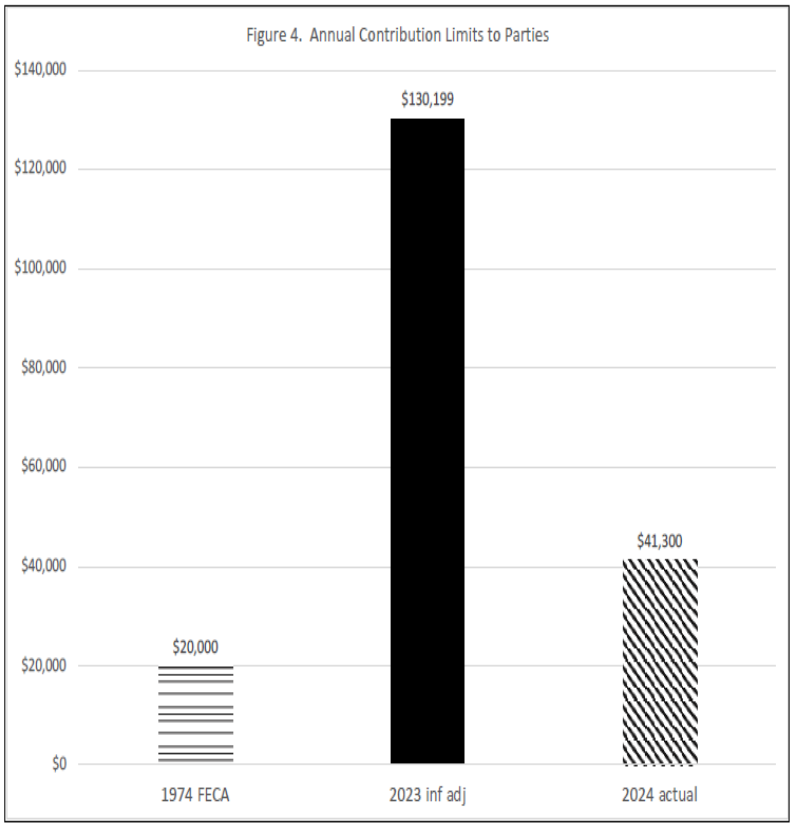
[49] I adjusted the value of $41,300 on January 2023, the amount set at start of the current election cycle, to reflect what that value would be on January 1975, the start of the election 1976 cycle, using the CPI inflation calculator at the Bureau of Labor Statistics, https://data.bls.gov/cgi-bin/cpicalc.pl.



2. Party officials have control and final say over the use of party funds. Political parties are partners with candidates. Candidates may raise funds jointly with the parties, but at the end of the day parties decide how best to use their money for the collective benefit of the party. The party committee making the expenditure, not any candidate, ultimately controls how and for what purpose it spends its money. The stakes are not for just one candidate but for the collective in pursuit of majorities, which means the party uses its funds where and how it deems it can best make the most difference. There

is abundant evidence that political parties are the most efficient users of resources, channeling it to likely competitive races.[50]

Parties also uniquely tend to help challengers in pursuit of majorities.[51] Incumbents would prefer to hoard this money for their own benefit, but parties urge them to contribute to the party so they can re-channel it to close races. (One reason parties rely on incumbents is because parties face low contribution limits, which paradoxically intensifies officeholders' interactions with large donors and PACs). The challenge for party leadership is to ensure the party does not waste its money. *In my view, the current very low limits on coordinated contributions are akin to an incumbent protection rule, given that parties are the most likely to give to challengers.*

Professor Krasno makes it appear as though the party committees are simply empty vessels for candidates to raise money through for themselves. This argument, however, is clearly undermined when you see how parties do, in fact, spend money differently than candidates and other groups. Sometimes the party makes decisions that are at odds with candidates. In 2022 the NRSC made late-term allocation decisions about funding in some battleground states that the candidates and their

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[50] Paul S. Herrnson, *Party Campaigning in the 1980s* (Harvard Univ. Press 1988); David M. Cantor & Paul S. Herrnson, *Party Campaign Activity and Party Unity in the U. S. House of Representatives*, 22(3) *Legislative Studies Quarterly* 393 (1997); La Raja & Schaffner, *supra* note 2.

[51] Herrnson, *Party Campaigning in the 1980s*, *supra* note 50; La Raja & Schaffner, *supra* note 2.

consultants in those states did not like.[52] Professionals at the NRSC did this because they did not think it was strategically wise or efficient, based on financial considerations, to continue investing in some races, despite candidate pleas.[53] This happened on the Democratic side as well in the 2022 U.S. Senate race in Ohio.[54] Whether the candidates had any role in helping raise that money or not, the party makes these decisions with an eye toward benefiting the entire party. Without the collective mechanism of the party, much money would be wasted on incumbents who do not have difficult races. The party gets the team to work together, despite individual self-interest in keeping campaign funds.

C. Professor Krasno claims that parties are known for being "corrupt"—not so.

1. There is little evidence of quid pro quo corruption through parties. A vexing problem in debates about corruption is that some invoke a very inexact definition. This is true of Professor Krasno's report, which describes corruption as the following: "the potential for contributions to politicians as candidates to exert undue influence on these politicians as elected officials." Few phrases are as indeterminate in the study of politics as "undue influence." What marker tells us when a contribution

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[52] Natalie Allison, *GOP slashes ads in key Senate battlegrounds*, Politico (Aug. 15, 2022), https://www.politico.com/news/2022/08/15/gop-slashes-ads-in-key-senate-battlegrounds-00051969.

[53] *Id.*

[54] Tobias, *supra* note 28.

exerts undue influence? Political scientists tend to point to three factors that shape congressional votes: constituency preferences, candidate beliefs and the party. Beyond these, the findings are less robust. And most importantly, we have not been able to find a pattern of votes for money.

At the federal level there is little evidence of *quid pro quo* corruption for campaign finance, especially in the face of FECA's already restrictive base contribution limits. In a widely cited meta- analysis of PAC contributions by Ansolabehere, de Figueiredo, and Snyder (2003), the scholars found that "the evidence that campaign contributions lead to a substantial influence on votes is rather thin. Legislators' votes depend almost entirely on their own beliefs, and the preferences of their votes and their party. Contributions explain a miniscule fraction of the variation in voting behavior in the U.S. Congress. Members of Congress care foremost about winning re-election."[55] There is some research that suggests that some donors may get access to legislators, although there are plenty of null findings.[56]

In any event, as the Supreme Court has acknowledged, "'ingratiation and access'" are not *quid pro quo* corruption. *McCutcheon*, 572 U.S. at 192 (plurality opinion) (quoting *Citizens United*, 558 U.S.

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[55] Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, *Why Is There So Little Money in U.S. Politics?*, 17 The Journal of Economic Perspectives 105, 116 (2003).

[56] *See* Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 Am. J. of Pol. Sci. 545 (2016) (listing papers with null findings).

at 360). Rather, I understand *McCutcheon*, in particular, to say that "corruption" must be more narrowly defined as *quid pro quo—i.e.,* "dollars for political favors"—for it to have substantive meaning and to be sufficiently weighty to justify campaign finance restrictions. *Id.*

Professor Krasno contends that we have not found *quid pro quo* corruption because the limits on coordinated party expenditures are working. After listing his examples of political corruption, he then writes: "One objection to his brief history is coordinated expenditures do not feature prominently in the examples of (quid pro quo) corruption to which I have quickly alluded. From my perspective, this should be taken as a triumph of the existing legal regime which imposes fairly generous limits on their magnitude." I do not think this speculative argument, which lacks any evidence, justifies limiting the associational rights of political parties and their candidates. It entirely ignores that other, less restrictive campaign finance rules already combat corruption, including the base contribution limits and anti-earmarking rule. Indeed, I am dubious that the coordinated limits make any difference. And I am not aware of there being any evidence of greater occurrences of *quid pro quo* corruption through the party system (which, to repeat myself, is rare in all events) from the several American states that allow parties to support their candidates without limit.

2. The linkage between campaign finance regulation and public confidence in government is weak. Professor Krasno argues, referring to the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), that "faith in the political system depends on the

perception that the system is not corrupt." And that "Campaign finance laws, including the limits on parties' coordinated expenditures ... have been upheld because they serve to instill confidence in the system by minimizing, if not completely preventing, this type of corruption." Again, this is an open-ended understanding of corruption—not *quid pro quo*—but even so, a pair of top scholars have put to rest the argument about the linkage between campaign finance laws, perceptions of corruption and confidence in government.

In the book *Campaign Finance and American Democracy: What the Public Really Thinks and Why It Matters* (2020), Professors Jeffrey Milyo (University of Missouri) and David Primo (University of Rochester) illustrate, with reams of data on public opinion, that campaign finance laws in the American states make *no difference* on levels of trust in government.[57] They write: "*There is no scientific evidence that campaign finance reforms actually increase public trust in government*."[58] Milyo and Primo did not look directly at laws with limits on parties, but one of their 'regimes' included states with no restrictions of fundraising and spending. These include states like Virginia, whose citizens may have no less trust than in states with tight restrictions on campaign finance laws. If anything, Milyo and Primo attribute growing mistrust to other factors, including

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[57] David M. Primo & Jeffrey D. Milyo, *Campaign Finance and American Democracy: What the Public Really Thinks and Why It Matters* (Univ. of Chicago Press 2020) (emphasis in original).

[58] *Id. at* 160.

polarization of the parties—which, as my research shows, would be attenuated if parties controlled more resources to support quality candidates and deter extremists.

3. Voters favor imposing fewer restrictions on parties than other groups. In my own research, I have found that citizens, in fact, are much more likely to allow parties to support their candidates with high or no limits than other groups. My co-author and I asked the public, "To what extent do you think various groups should be allowed to contribute to political candidates?" We showed them four groups: political parties, advocacy groups, labor unions, and businesses. The response choices were (1) Not at all; (2) Should be allowed to contribute a small (but limited) amount; (3) Should be allowed to contribute a large (but limited) amount; (4) Should be allowed unlimited contributions. Our findings show that voters are most willing to grant parties greater freedom to support candidates robustly. For each of the non-party groups, just 30% said either no limits or allow large contributions. But for political parties, 45% of respondents said *no limits or high contribution limits*, a difference of 15 percentage points.[59] That finding is notable given how much the electorate generally dislikes money in politics, with many giving the unrealistic answer that they do not want *any* groups to give campaign contributions.

VIII. CONCLUSION

To recap as briefly as possible: The burdens imposed on political parties in supporting their

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[59] *See* La Raja & Schaffner, *supra* note 2, at 158 (with figures).

candidates through coordinated party expenditures are (a) detrimental to a well-functioning party system and associational rights, and (b) not necessary to prevent *quid pro quo*, especially given the other, less restrictive prophylactic measures in the law. Limiting coordination between a party and candidate makes little sense, and the prevailing limits on coordinated party spending are woefully low, especially in consideration of the intense incentives for partisan mobilization, the increasing cost of elections, and the growing fragmentation of political campaigns.

The constraints on parties for working closely with their candidates imperil their vitality. In the current moment, contrary to Professor Krasno's assertions, the political parties *are* weak, which threatens our democracy. There is no evidence that the coordinated party expenditure limits deter *quid pro quo* corruption, but they *do* burden the parties' First Amendment rights and associational activities. I say this with sincere urgency, because I believe the *quid pro quo* potential from allowing parties to coordinate with their candidates fully—if there is any—is far less of a threat to American democracy than the weakened state of political parties to which those limits have contributed. Weak political parties lack sufficient collective mechanisms, including working directly with candidates in campaigns, to be able to manage a large coalition and defend the party brand. Beyond the constitutional principle is the institutional imperative of allowing political parties to perform their integrative functions and advance policies based on their adherents' views of the national interest.

The testimony of Professor Krasno in his report does not stand up to the basic facts on the ground, let alone

the plentiful research on the state of political parties and the contemporary dynamics of U.S. campaign finance. We need to rethink our election laws, and seemingly dubious (legally) and deleterious anti-party rules like FECA's coordinated party expenditure limits are exactly where we must focus our attention.

s/ Raymond J. La Raja October 13, 2023
Raymond J. La Raja