No. 24-621

IN THE

Supreme Court of the United States

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, ET AL.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A political party exists to get its candidates elected. Yet Congress has severely restricted how much parties can spend on their own campaign advertising if done in cooperation with those very candidates. 52 U.S.C. § 30116(d).

In an opinion by Chief Judge Sutton, a 10-judge majority of the en banc Sixth Circuit agreed that these so-called "coordinated party expenditure limits" stand in serious tension with recent First Amendment doctrine. App.10a-15a. It nevertheless upheld them as constitutional, both on their face and as applied to coordinated political advertising ("party coordinated communications"), believing the case to be controlled by *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*). In doing so, the majority acknowledged that in the 23 years since *Colorado II*, this Court "has tightened the free-speech restrictions on campaign finance regulation," that "tension has emerged between the reasoning of *Colorado II* and the reasoning of later decisions of the Court," and that relevant facts have "changed, most notably with 2014 amendments" to the limits and "the rise of unlimited spending by political action committees." App.3a-4a, 11a. But it thought "any new assessment of the validity of the limits" remained this Court's "province, not ours." App.14a-15a.

The question presented is:

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.

PARTIES TO THE PROCEEDING

Petitioners National Republican Senatorial Committee (NRSC), National Republican Congressional Committee (NRCC), Senator James David (J.D.) Vance, and former Representative Steven Joseph Chabot were the plaintiffs below.

Respondents Federal Election Commission (FEC), Allen Joseph Dickerson, Dara Lindenbaum, Shana M. Broussard, Sean J. Cooksey, James E. Trainor, III, and Ellen L. Weintraub were the defendants below.

RULE 29.6 STATEMENT

Neither the NRSC nor the NRCC has a parent corporation. Neither is publicly held, and no publicly held corporation owns 10% of more of either's stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *NRSC v. FEC*, No. 24-3051 (6th Cir.), judgment entered on September 5, 2024;
- *NRSC v. FEC*, No. 22-cv-639 (S.D. Ohio), question certified on January 19, 2024.

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INTRODUCTION

This petition, at its core, asks whether the First Amendment permits the government to "restrict political parties from spending money on campaign advertising with input from the party's candidate for office." App.3a. A majority of the en banc Sixth Circuit concluded that it had to say yes—but only because it believed this Court's 5-4 decision in *Colorado II* left it no choice. *Id.* Yet while the opinions below split over whether *lower courts* remained shackled by that 2001 ruling, they agreed *this Court's* review was warranted. *See* App.14a-15a, 35a, 66a, 70a, 117a, 172a-75a.

This Court should take up the invitation. For years, Congress has restricted how much of their own money political party committees can spend in cooperation, or "coordination," with their candidates to influence federal elections. 52 U.S.C. § 30116(d) (originally codified at 2 U.S.C. § 441a(d)). As Judge Thapar recognized, these coordinated party expenditure "limits run afoul of modern campaign-finance doctrine and burden parties' and candidates' core political rights." App.35a. And that constitutional violation has harmed our political system by leading donors to send their funds elsewhere, fueling "the rise of narrowly focused "super 'PACs'" and an attendant "fall of political parties' power" in the political marketplace, which has contributed to a spike in political polarization and fragmentation across the board. App.13a; *see* App.134a-35a, 148a-49a. All this has caused even stalwart defenders of campaign-finance regulation in general to call for the end of the limits here. *See, e.g.*, Weiner & Vandewalker, BRENNAN CTR. FOR JUSTICE, *Stronger Parties, Stronger Democracy: Rethinking Reform* 14-15 (2015).

Writing for a 10-judge en banc majority below, Chief Judge Sutton did not dispute any of this. In fact, he suggested that the challenged limits might not have survived Sixth Circuit review were that court "faced with a clear playing field." App.13a. But, believing himself confined to *Colorado II*'s "deferential review," he left the limits' fate to this Court. App.14a-15a.

Colorado II, however, is distinguishable from this case twice over. For one, while *Colorado II* rejected a facial challenge to an earlier version of the limits, Congress amended that law in 2014 to allow unlimited coordinated expenditures for certain activities, such as "'election recounts … and other legal proceedings.'" App.12a. Because this Court is faced "with a different statute," this facial challenge to the "limits currently in place" merits "plenary consideration." *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (plurality). And for another, *Colorado II* left open the door to an "as-applied challenge," such as one involving coordinated spending beyond the mere "payment of the candidate's bills." 533 U.S. at 456 n.17. That describes the one here, which concerns coordinated political *advertising*, dubbed "party coordinated communications" by 11 C.F.R. § 109.37. Either way, this Court can reverse without reconsidering *Colorado II*.

Yet if the Court thinks *Colorado II* controls, it should overrule that outdated decision. As the majority below noted, both "the law and facts" have left it behind. App.3a. Indeed, it is irreconcilable with this Court's subsequent cases. And given that *stare decisis* is at its weakest for "decisions that wrongly denied First Amendment rights," *Janus v. AFSCME*, 585 U.S. 878, 917 (2018), it is past time to "knock down" this "'legal last-man-standing,'" App.12a.

This is the case to do so. The en banc Sixth Circuit squarely and exhaustively addressed the question presented, producing six opinions exploring the issue as a matter of precedent and first principles. App.1a-156a. And it did so on the back of an extensive factual record developed through discovery, complete with expert reports and factual findings by the district court. Moreover, while the judges below parted ways on the merits, they agreed that this case is free of any threshold obstacles that would impede this Court's review. App.5a-6a. It is therefore hard to imagine a better vehicle for this Court to vindicate the fundamental principle that the government cannot abridge "the political speech a political party shares with its members"—"speech which is 'at the core of our electoral process and of the First Amendment freedoms.'" *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222-24 (1989).

OPINIONS BELOW

The en banc Sixth Circuit's decision (App.1a-156a) is reported at 117 F.4th 389. The district court's order certifying the question presented to the en banc Sixth Circuit (App.158a-247a) is reported at 712 F. Supp. 3d 1017.

JURISDICTION

The en banc Sixth Circuit entered its judgment on September 5, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The constitutional and statutory provisions at issue are reproduced in the appendix. App.248a-70a.

STATEMENT OF THE CASE

1. In 1972, Congress passed, and President Nixon signed, the Federal Election Campaign Act (FECA) to restrict 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 imposes a host of limits on the funds political party committees can receive and spend for the purpose of influencing a federal election.

On the front end, FECA restricts how much money party committees may *receive* by imposing base contribution limits on the amounts individuals and other political committees may contribute. Presently, the base limit on individual contributions is $41,300 per year to the national party committees. 52 U.S.C. § 30116(a)(1)(B); FEC, *Contribution Limits*, https://perma.cc/X65Z-L27E (*Base Limits*).

On the back end, FECA caps how much party committees may *give* by subjecting them to base limits on contributions to federal candidates. 52 U.S.C. § 30116(c). Currently, a party committee may give only $5,000 per election, although a national party committee and its Senate committee may together contribute up to $57,800 to a Senate candidate's campaign. *Id.* § 30116(a)(2)(A), (h); *Base Limits*.

Finally, "the Party Expenditure Provision" purports to cap "*all* party expenditures" supporting federal candidates, *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 621 (1996) (*Colorado I*) (plurality)—whether "coordinated" (those "made with input from the candidate the party supports") or "independent" (those "spent without input from the candidate"). App.7a-8a; *see* 52 U.S.C. § 30116(d).

Enacted to "reduc[e] what [Congress] saw as wasteful and excessive campaign spending," this provision imposes unique limits on how much party committees can spend in support of their candidates, based on office sought, state, voting-age population, and inflation. *Colorado I*, 518 U.S. at 618; *see id.* at 610-11. For presidential, Senate, and House races in states with only one representative, the limits are calculated by multiplying by two cents the voting-age population of the United States or the state, depending on the office. 52 U.S.C. § 30116(d)(2)-(3). The FEC updates the limits annually based on this formula. For House races in all other states, Congress set a limit of $10,000, which is also increased annually based on the Cost-of-Living Adjustment. *Id.* § 30116(d)(3)(B).

2. In two decisions arising out of Colorado, this Court addressed whether an earlier version of the Party Expenditure Provision was unconstitutional. In the first (*Colorado I*), the Court explained that the First Amendment gives party committees the "same right" as others "to make unlimited independent expenditures" in support of their candidates. 518 U.S. at 618. It therefore held that "the Party Expenditure Provision as applied" to the *independent* expenditures of a party violated the First Amendment. *Id.* at 613.

In the sequel (*Colorado II*), this Court rejected a facial challenge urging that the Party Expenditure Provision could not be applied to a party's *coordinated* expenditures, either. 533 U.S. at 437. Writing for a five-Justice majority, Justice Souter applied the line between contribution limits and expenditure limits from *Buckley v. Valeo*, 424 U.S. 1 (1976), and treated coordinated party expenditures "as the functional equivalent of contributions." 533 U.S. at 447.

The majority then held that FECA's limits on these expenditures survived *Buckley*'s "'closely drawn'" test for "contribution limit[s]," which asks "whether the restriction is 'closely drawn' to match … the 'sufficiently important' government interest in combating political corruption." *Id.* at 456. In so holding, it specifically defined "corruption" "not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment." *Id.* at 441. And it concluded that the limits were a justified response to "the risk of corruption (and its appearance) through circumvention of valid contribution limits," *id.* at 456, even if "better crafted safeguards" were available, *id.* at 462. In the majority's view, "Congress is entitled to its choice." *Id.* at 465.

Justice Thomas—joined by Chief Justice Rehnquist in part and Justices Scalia and Kennedy in full—dissented. *Id.* at 465-82. The four dissenters contended the limits fail even "closely drawn" scrutiny because there is no evidence "that coordinated expenditures by parties give rise to corruption," *id.* at 474, and because "better tailored alternatives" are available to prevent any potential corruption in any event, *id.* at 481.

3. The upshot of the *Colorado* decisions is that party committees can make only *independent* expenditures in support of their candidates without limit. In doing so, however, they must be careful to avoid the FEC's expansive view of what qualifies as a "coordinated" expenditure—any payment for influencing a federal election that is "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee," 11 C.F.R. § 109.20(a); *see* 52 U.S.C. § 30101(9)(A)(i) (defining "expenditure").

Coordinated party expenditures thus include party payments of *any* expense made in coordination with a candidate or campaign, down to renting a rally venue, hiring fundraising consultants, or reimbursing a candidate's travel bills. They also include payments made in connection with so-called "party coordinated communications." 11 C.F.R. § 109.37. In general, these communications are any form of general public political advertising paid for by a party committee and coordinated with a candidate or campaign that expressly advocates the election or defeat of a clearly identified federal candidate. *Id.* § 109.37(a)(2)(ii); *see id.* § 100.2. Yet the term also captures party communications lacking express advocacy, such as coordinated advertising that merely references a candidate within certain timeframes before the general election. *Id.* § 109.37(a)(2)(i), (iii).

Given this broad understanding of coordinated party expenditures, party committees have generally sought to comply with § 30116(d) by creating separate "independent expenditure units," firewalled from the party's main operations, to engage in public advocacy campaigns independent of both the committee and the candidates. App.219a-20a. That approach is far more expensive and far less effective than just working with the candidates themselves. *Id.* The limits therefore impede party committees' ability "to unify their political message" with their candidates, "increase their costs, create redundancies, and discourage them from communicating effectively with their candidates and spending money efficiently to support them." App.4a. Indeed, even *Colorado II* agreed that "limiting coordinated expenditures imposes some burden on parties' associational efficiency." 533 U.S. at 450 n.11.

A party committee wishing to engage in coordinated spending, however, faces the intricate scheme set up by § 30116(d). To start, this provision strips some party committees—including NRSC and NRCC (the Committees)—of the right to make any of their *own* coordinated expenditures, as the Republican National Committee (RNC) is the only national Republican party committee allowed to make these expenditures (up to § 30116(d)'s limits). 52 U.S.C. § 30116(d)(1)-(3); *see* 11 C.F.R. § 109.32. If the Committees want to make coordinated expenditures with their candidates, they must first get permission—a written assignment of spending authority—from the RNC or the state party committee in the candidate's home state. 11 C.F.R. § 109.33; *see* App.217a-18a. Even then, they must comply with the scope of the assignment and § 30116(d)'s limits on coordinated party expenditures. For 2024, these limits range from $123,600 to $3,772,100 for Senate candidates, and from $61,800 to $123,600 for House candidates. App.118a-19a; FEC, *Coordinated Party Expenditure Limits*, https://perma.cc/T9N9-9VJP (*Coordinated Limits*).

4. In 2014, Congress significantly amended § 30116(d) to increase the size of permissible coordinated party expenditures—but only for certain purposes—by adding three exceptions to the limits for national party committees. 52 U.S.C. § 30116(d)(5). FECA now lets donors contribute up to three times the general base limit—currently $123,900 (as opposed to $41,300) for individuals—into special accounts for (1) "presidential nominating convention[s]," (2) a party's "headquarters buildings," and (3) "preparation for and the conduct of election recounts and contests and other legal proceedings." *Id.* § 30116(a)(1)(B), (9).

Today, parties use legal-proceedings accounts to pay for a vast array of candidate and campaign legal costs. *See* App.218a. Section 30116(d) expressly exempts "expenditures made from any of th[ese] accounts" from its coordinated party expenditure limits, *id.* § 30116(d)(5), except for a $20-million cap on all convention spending, *id.* § 30116(a)(9)(A).

5. In 2022, petitioners—the NRSC, NRCC, then-candidate J.D. Vance, and then-Representative Steve Chabot—brought facial and as-applied challenges to the coordinated party expenditure limits as they stand today. They proceeded under 52 U.S.C. § 30110, which provides that the district court "immediately shall certify all questions of constitutionality" of FECA to the relevant en banc court of appeals.

Following discovery at the FEC's request, the district court certified the question presented to the en banc Sixth Circuit. App.202a. In doing so, the court determined that petitioners satisfied both Article III and § 30110, App.165a-71a, and had presented a non-frivolous question, App.171a-77a. On the latter point, the court explained that "even assuming *Colorado II* governs," the "change in the legal landscape" since 2001 made this challenge "arguably meritorious." App.176a. Specifically, it observed that this "Court has narrowed the justifications the government can use to defend its limits" and that "Congress has altered the rules permitting additional exceptions." *Id.* Finally, after "sift[ing] through voluminous proposed findings of fact," App.117a, the district court made 178 paragraphs of factual findings "to serve as the record in this case," App.212a; *see* App.204a-47a. It did not find any instance of *quid pro quo* corruption linked to coordinated party expenditures. *See* App.246a-47a.

6. A majority of the en banc Sixth Circuit answered the question presented in the negative. App.19a.

Writing for a 10-judge majority, Chief Judge Sutton first explained that while former Representative Chabot's claim might be moot, 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 question presented. App.5a-6a.

Turning to the merits, the majority acknowledged that "the law and facts have changed since" *Colorado II*. App.3a. It identified "several ways in which th[is] Court's recent decisions create tension with *Colorado II*'s reasoning": (1) a recognition that "the prevention of *quid pro quo* corruption or its appearance" is the "only" basis "for restricting political speech"; (2) a requirement of "actual evidence that a spending restriction will reduce *quid pro quo* corruption or its appearance"; and (3) a reinvigoration of "the closely drawn test, emphasizing that this rigorous test demands narrow tailoring." App.10a-11a (cleaned up). The majority also observed that the exemptions Congress added to § 30116(d) in 2014 could render the provision fatally "underinclusive," and that "political campaigns and political spending have materially changed in the last two decades." App.13a. The majority nevertheless concluded that the "deferential review" applied in *Colorado II* required it to reject the facial and as-applied challenges here. App.3a.

Judge Thapar (joined by Judges Kethledge, Murphy, and Nalbandian) concurred to explain why FECA's "limits on party-coordinated speech fail even" the "'closely drawn'" test, as they neither "advance a 'sufficiently important' government interest" nor are

"'closely drawn' to that interest." App.24a. He nevertheless agreed petitioners could not prevail in lower courts due to *Colorado II*, an "outlier" decision "out of step with modern doctrine." App.18a, 25a. Instead, this Court "is the proper audience" for the "grave constitutional issues" here. App.35a.

Judge Bush concurred *dubitante*, agreeing that this "case is a strong candidate for certiorari." App.66a. He urged this Court to "revisit[] *Colorado II*" because "it conflicts with recent decisions of the Court" as well as "history and tradition." App.37a.

Concurring in the judgment, Judge Stranch (joined by Judges Moore and Clay in full and Judges Davis and Bloomekatz in part) criticized the majority for agreeing that "doctrinal, statutory, and factual changes undermine *Colorado II*." App.84a. But because "[a]ll recognize that 'our work'" is "'a warm up for eventual Supreme Court review,'" she offered a defense of the limits on the merits. App.71a; *see* App.86a-114a. Judge Bloomekatz (joined by Judge Davis) wrote to clarify that she agreed with Judge Stranch solely on *stare decisis* grounds. App.115a.

Judge Readler dissented, reasoning that in light of "the changed statutory regime" and *Colorado II*'s express reservation of "a future as-applied challenge," that "largely obsolete precedent" did not prevent the Sixth Circuit from reviewing the limits under this Court's recent First Amendment doctrine. App.119a, 132a, 137a. Applying that framework, Judge Readler concluded that these "limits on political speech fail the 'closely drawn' standard." App.156a. He added that if his colleagues felt able "to reach the merits of that question, I suspect many would agree." *Id.*

REASONS FOR GRANTING THE WRIT

Before a political party speaks in support of its candidate, it would naturally seek to get the candidate's input. And for nearly the first 200 years of our Nation's history, a party was free to do so. Yet today, Congress has built a wall of separation between party and candidate, forcing party committees to figure out how to get their candidates elected without hearing from them. That is the campaign "equivalent of prohibiting communication between a coach and quarterback late in a tied game." App.141a.

The government's principal defense of this speech restriction is that without these caps on coordinated spending, donors would use parties to launder bribes to candidates. Only three judges below could bring themselves to endorse that far-fetched position, and for good reason. Among other things, FECA imposes "*five* prophylaxes" against such schemes, App.29a, which may be why Congress now permits the parties to engage in unlimited coordinated spending on their candidates' legal fees. Instead, the majority of judges below allowed the First Amendment violation here solely on the ground that *Colorado II* gave them no other choice.

This Court has a freer hand. In rejecting a facial challenge to the coordinated party expenditure limits as they stood nearly 25 years ago, *Colorado II* did not hold that they would be constitutional forever, even if later amended—let alone that an as-applied challenge targeting only political advertising could not proceed. And if *Colorado II* does shield these speech caps from the Constitution for eternity, this Court should excise that anomaly from its First Amendment doctrine now.

Indeed, it is past time to either clarify the limited reach of *Colorado II* or overrule that decision outright. That 5-4 aberration was plainly wrong the day it was decided, and developments both in the law and on the ground in the 23 years since have only further eroded its foundations. And far from some historical curio safely tucked away in a dusty volume of the U.S. Reports, the decision "lies about like a loaded weapon ready for the hand of any authority" that seeks to limit political speech in the future. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). In the meantime, *Colorado II* has stripped the parties of their comparative advantage in the marketplace for campaign contributions: the ability to coordinate with their candidates. With that link severed, donors have largely redirected their funds to outside groups such as Super PACs, which are more and more acting as "shadow parties" today. App.135a. The result is a more polarized process in which political parties—an institutional force almost as old as "the formation of the Republic itself"—have been supplanted by less-restricted speakers. *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

This case provides the perfect vehicle to rectify this First Amendment distortion. It comes to this Court without any obstacles to addressing the question presented and with a raft of opinions exploring the issue from virtually every angle. It provides a suite of options that would allow this Court to clarify or overrule *Colorado II* as it sees necessary. And it likely marks the last chance this Court will get to tackle the question for quite some time, as neither committees nor candidates will squander their limited resources on another challenge if this petition is denied.

I. THE COORDINATED PARTY EXPENDITURE LIMITS VIOLATE THE FIRST AMENDMENT.

As the majority below all but admitted, FECA's coordinated party expenditure limits are dead on arrival under recent First Amendment cases. The real question is whether *Colorado II* requires turning a blind eye to these unconstitutional speech caps now. The answer is no: *Colorado II* either does not control this case or does not survive the *stare decisis* inquiry.

A. The limits flunk even "closely drawn" scrutiny.

Here, "there is no doubt that the law does burden First Amendment electoral speech": every judge below agreed on that. *FEC v. Cruz*, 596 U.S. 289, 305 (2022); *see, e.g.*, App.4a-6a, 99a. The government thus "'bears the burden of proving the constitutionality'" of the limits. *Cruz*, 596 U.S. at 305. It cannot do so "even under the 'closely drawn' test," much less strict scrutiny, the appropriate standard here. *McCutcheon*, 572 U.S. at 199; *see infra* at 25-26. Even under closely drawn scrutiny, the FEC still must demonstrate that § 30116(d) both furthers "a 'sufficiently important' interest" and "'employs a means closely drawn'" to do so. *McCutcheon*, 572 U.S. at 197. It has shown neither.

1. To survive even "'closely drawn' scrutiny," the government still "must prove at the outset that it is in fact pursuing a legitimate objective." *Cruz*, 596 U.S. at 305. And on that front, there is "only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance"—"the direct exchange of money for official acts." *Id.* at 305, 309. The FEC has not proven that § 30116(d) "furthers a permissible anticorruption goal." *Id.* at 313.

a. To start, as *Colorado I* pointed out, "Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." 518 U.S. at 618. Indeed, the desire to limit money in politics is the only tenable explanation for § 30116(d)'s complex formula, which results in *different* limits for candidates based on the relevant state, office sought, and voting-age population.

Had Congress truly feared that coordinated party spending could be used for bribes, it would have modeled § 30116(d) on the *uniform* base limits, which presume any party contribution over $5,000 poses a risk, whether to a Senate candidate in Pennsylvania or one in California. *See McCutcheon*, 572 U.S. at 221. Instead, Congress allowed a party to spend under $1.3 million in coordination with its Pennsylvania Senate candidate but nearly $3.8 million with its California one. *See Coordinated Limits*. That framework makes no sense if Congress thought that coordinated party expenditures above a certain threshold posed a risk of bribery; no one seriously thinks the purity of politicians tracks state lines.

It makes perfect sense, however, if Congress had the "impermissible objective of simply limiting the amount of money in politics." *Cruz*, 596 U.S. at 313. And because "[g]overnment justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented *post hoc* in response to litigation," the FEC cannot defend the limits on a new theory now. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (cleaned up).

b. Even if the government could indulge in revisionist history, it has offered no tenable theory for why the limits are "necessary to prevent *quid pro quo* corruption." *Cruz*, 596 U.S. at 310. Tellingly, the FEC has not relied on the traditional justification for coordinated expenditure limits—namely, that such payments "are functionally equivalent to direct contributions to a candidate" and hence pose the same risk of "quid-pro-quo corruption." App.26a; *see Buckley*, 424 U.S. at 46-47. In other words, the FEC does not claim that *parties* are trying to bribe their *candidates* with campaign contributions.

Wisely so, for "it doesn't make any sense to think of a party as 'corrupting' its candidates." App.26a. "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." *Colorado I*, 518 U.S. at 646 (Thomas, J., concurring in the judgment). That is why no one could reasonably contend that the NRSC, for instance, would commit "bribery" by conditioning its contributions to a Senate candidate on his agreement to support a Republican-sponsored tax bill. And that is why FECA treats any coordinated expenditures by individuals and other political committees as contributions subject to the base limits, 52 U.S.C. § 30116(a)(7)(B), but frees party committees to engage in coordinated expenditures up to arbitrary caps significantly above the base limits, *id.* § 30116(d).

c. Instead, the government defends the limits on the theory that they are necessary to prevent "would-be bribers" from "circumventing donor-to-candidate contribution limits" through a scheme in which they "funnel" their bribes through "a political party." App.27a-28a.

In other words, the argument is that a donor will launder his contributions to a candidate *through* the party in exchange for official action. But this Court rejected that theory in *McCutcheon,* for "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." 572 U.S. at 210. The government's *quid pro quo*-by-circumvention theory here fails for many of the same reasons it failed in *McCutcheon*.

First, it is implausible that a donor seeking to engage in such a Rube Goldberg bribery plot would use a party committee to do so, as he would run into a "quintuple prophylactic statutory scheme." App.31a. As an initial matter, "the base limits *themselves* are a prophylactic measure," as "'few if any contributions to candidates will involve *quid pro quo* arrangements.'" *McCutcheon*, 572 U.S. at 221. And FECA's *other* prophylaxes make it inconceivable that a donor could effectively circumvent the base limits and bribe a candidate through donations to a party committee.

Suppose a candidate and donor agree that the candidate will take an official act if the donor makes a certain contribution. To funnel that money through "a party committee," the donor would first have "cede control over the funds," meaning any routing of the funds to a candidate would occur at the party's "discretion—not the donor's." *Id.* at 211; *see* App.214a. Yet once in the party's hands, the funds will likely be spent on "close races" regardless of "donor preference." App.145a. And because those races attract the most money, any spending by the party (and donor) "will be significantly diluted," thereby diminishing the donor's "salience." *McCutcheon*, 572 U.S. at 212; *see* App.148a.

To launder a bribe through a party committee, the donor therefore would have to convince the party to violate FECA's earmarking rule, which *already* forbids such circumvention by applying the base contribution limits to funds that are "in any way earmarked or otherwise directed through an intermediary or conduit" to a federal candidate. 52 U.S.C. § 30116(a)(8). So, if "a donor gives money to a party committee but directs the party committee to pass the contribution along to a particular candidate, then the transaction is treated as a contribution from the original donor to the specified candidate," and governed by the $3,300 base limit for individuals. *McCutcheon*, 572 U.S. at 194. And the FEC's regulations "define earmarking broadly," *id.* at 201—sweeping in 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 or a candidate's authorized committee," 11 C.F.R. § 110.6(b)(1). The government's feared bribery scheme would therefore "flagrantly violate[] the law" today. App.33a n.3.

FECA further caps the donor's total contribution to the party at $41,300, an amount Congress views as sufficiently restrictive to prevent *quid pro quos*. And even then, the party cannot give the money directly to the candidate, but can only spend it in coordination with him—yet another layer of party discretion. Finally, the donation will be publicly disclosed at fec.gov, tipping off third-party watchdogs that routinely monitor FEC disclosures in the event the candidate takes an official act benefiting the donor. 52 U.S.C. § 30104(b); *see McCutcheon*, 572 U.S. at 224.

As Judge Thapar put it, "[s]uch 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." App.29a (quoting *Cruz*, 596 U.S. at 306) (alterations omitted). Rather than try to navigate this pyramid of prophylaxes, donors are likely to employ "a far better vehicle for influencing a candidate"—"Super PACs." App.149a. While Super PACs cannot coordinate with a candidate, their donors often "let it be known who they are helping, and in what amounts." *Id.* Accordingly, as this Court noted in *McCutcheon,* there should be "fewer cases of conduit contributions" to "parties" today, because donors seeking to influence "officials will no longer need to attempt to do so through conduit contribution schemes," but can just "make unlimited contributions to Super PACs." 572 U.S. at 214 n.9 (quoting congressional testimony of Acting Assistant Attorney General). Indeed, it is "hard to believe that a rational actor would" try to skirt the base limits through contributions to parties when he could instead spend "unlimited funds on independent expenditures" supporting a candidate via a Super PAC. *Id.* at 213-14.

Second, the FEC has (unsurprisingly) provided no "'record evidence'" showing "the need to address … *quid pro quo* corruption" through the limits. *Cruz*, 596 U.S. at 307. "Despite having decades to look for" *quid pro quos*-by-circumvention in this area—whether in the coordinated party spending that FECA permits, the "28 states" that "'largely give parties free rein to make coordinated expenditures on behalf of their state-level nominees,'" or the discovery that the government sought to find such evidence now—the

FEC offered (to put it generously) "rather paltry" support. App.14a, 31a-32a. At best, it provided "'mere conjecture' supported by 'a handful of media reports and anecdotes,'" which is not enough to meet its burden. App.151a (quoting *Cruz*, 596 U.S. at 310).

Finally, FECA's "nonsensical exceptions to the spending limits" independently doom an "anti-circumvention rationale." App.30a-31a. While capping parties' coordinated payments on *campaign advertisements*, Congress has long let them make unlimited coordinated expenditures on *campaign activities* that "confer substantial benefits on federal candidates"—including certain "voter registration" and "GOTV" (get-out-the-vote) efforts and the dissemination of campaign materials. *McConnell v. FE*C, 540 U.S. 93, 168 (2003); *see* 52 U.S.C. § 30101(8)(B)(ix), (xi), (9)(B)(viii), (ix). And since 2014, Congress has freed the parties to engage in unlimited coordinated spending on presidential nominating conventions, party infrastructure, and candidate legal fees—all from accounts with base-contribution limits three times higher than those for general operating accounts. 52 U.S.C. § 30116(a)(1)(B), (9), (d)(5).

In light of these exceptions, § 30116(d)'s limits are "'wildly underinclusive'" when it comes to achieving the supposed "goal" of preventing *quid pro quos*-by-circumvention. *NIFLA v. Becerra*, 585 U.S. 755, 774 (2018); *see Buckley*, 424 U.S. at 45 (fact that limit "prevents only some large expenditures … undermines [its] effectiveness as a loophole-closing provision"). As Judge Thapar noted, no one can seriously claim that "funneling money to a candidate's election-night recount" somehow poses "less of a bribery risk than funneling money to his advertisements." App.30a.

Likewise, given that "the whole point of a political convention is to advertise party and candidate political messages to voters," there is no good reason why *these* "coordinated advertising expenses" come with less risk of "corruption" than others. App.155a. In light of "Congress' judgment" that such payments do not "unduly imperil anticorruption interests, it is hard to imagine how" limiting *other* expenditures "can be regarded as serving anticorruption goals." *Davis v. FEC*, 554 U.S. 724, 741 (2008).

2. Even if the coordinated party expenditure limits actually sought to prevent *quid pro quos*, they still would "fail to pass muster" "on the 'closely drawn' prong." App.32a-33a. Here, the FEC must show the limits are "'narrowly tailored to achieve'" that lone permissible objective. *McCutcheon*, 572 U.S. at 218. It cannot do so. On top of the limits' underinclusivity, "there are multiple alternatives available" that would further an "anticircumvention interest, while avoiding 'unnecessary abridgment' of First Amendment rights." *Id.* at 221; *see* App.152a-53a; *supra* at 20-21.

First, given that the government's *quid pro quo*-by-circumvention theory hinges on FECA's "fundraising disparity" between the candidate-contribution limits ($3,300) and party-contribution limits ($41,300), "the solution is simple: just lower the party-contribution limits." App.34a. That fix would better address any circumvention by targeting "the delinquent actor"—*the donor* seeking to evade the base contribution limits—rather than *the party's* speech. *McCutcheon*, 572 U.S. at 222. And it would "pose a smaller First Amendment burden" on parties as a whole, as "spending limits 'impose far greater restraints … than contribution limits'" for individuals. App.35a.

Second, the "earmarking" rule "already prohibit[s]" any "agreements to circumvent the base limits," whether explicit or "implicit." *McCutcheon*, 572 U.S. at 222-23. That remains true for "a donor attempting to circumvent the base contribution limits through party committee contributions," App.154a, so that any *quid pro quo* laundered through a party already "violate[s] the Act's earmarking rules," App.33a n.3. The FEC has offered no good reason why this existing alternative is insufficient, and if it is, why the government could not "strengthen" it. *McCutcheon*, 572 U.S. at 223.

Finally, FECA's "disclosure" requirement is "a less restrictive alternative" to § 30116(d)'s "ceiling on speech." *McCutcheon*, 572 U.S. at 223. Given that contributions to, and coordinated expenditures by, parties are readily accessible to the public through the internet, it is unclear why § 30116(d)'s additional prophylaxis is necessary. *Id.*; *see* App.29a, 154a.

B. *Colorado II* cannot save the limits.

Understandably, the majority below did not try to defend the challenged limits under recent doctrine. Instead, it held that *Colorado II* shielded the limits from lower-court scrutiny. But neither that decision, properly understood, nor *stare decisis* can salvage these speech restrictions as they stand today.

1. Start with the scope of *Colorado II*. In rejecting a facial challenge to the limits as they stood in 2001, *Colorado II* did not hold they would *always* comply with the First Amendment, no matter what Congress did in the future. Indeed, it could not have done so. "Otherwise, statutory amendments would be shielded from review so long as the revised law retained some semblance to a prior version." App.133a.

That is not how *stare decisis* works, as *McCutcheon* itself confirms. Even though *Buckley* had upheld "the aggregate limit in place" in 1976, this Court explained that this holding did "not control" a facial challenge to the aggregate limits existing in 2014, as they were part of a "different statutory regime." 572 U.S. at 200. Notably, "statutory safeguards against circumvention have been considerably strengthened since *Buckley*," making the challenged limits "particularly heavy-handed." *Id.* Because it was "confronted with a different statute," this Court concluded a "challenge to the system of aggregate limits currently in place" deserved its "plenary consideration." *Id.* at 203.

The same is true here. As the majority below noted, the 2014 amendments to § 30116(d)—which freed the parties to engage in unlimited coordinated spending on conventions and candidates' legal fees—could show that the remaining limits do "too little for First Amendment purposes." App.13a; *see supra* at 20-21. It nevertheless hewed closely to *Colorado II*, questioning whether "changes to a statute" could ever allow "a *lower court* to reach a different outcome from an earlier Supreme Court decision about the validity of the same statute." App.14a (emphasis added). But as Judge Thapar emphasized, *this Court* "has held that changes in statutes … can justify *its* departure from past precedents," as *McCutcheon* shows. App.35a-36a. Petitioners' facial challenge thus warrants this Court's "plenary consideration." *McCutcheon*, 572 U.S. at 203.

2. So does their as-applied challenge. *Colorado II* expressly left open the possibility of a future "as-applied challenge" targeting the limits' application to a "party's own speech," as opposed to mere "payment of the candidate's bills." 533 U.S. at 456 n.17.

That describes the as-applied challenge here. In challenging the limits' coverage of "party coordinated communications," the Committees seek the freedom to run their own ads while still obtaining input from the candidates. That is miles away from a party committee "simply reimbursing its candidate for campaign expenses," such as a candidate's travel bills. App.138a.

While the majority below agreed "*Colorado II* left" room for *some* as-applied challenges, it thought that the decision foreclosed *this* one given its "breadth." App.15a-16a. Because over 90% of the Committees' current independent expenditures go to "'political advertising,'" the majority reasoned that accepting this challenge would "leave little" activity for *Colorado II* to cover. App.18a; *see* App.221a-23a. But "[c]ourts do not resolve unspecified as-applied challenges in the course of resolving a facial attack," even if the later challenge covers "the 'vast majority' of a statute's applications." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 476 n.8 (2007) (opinion of Roberts, C.J.).

3. In all events, even if *Colorado II* did foreclose the challenges here, it should be overruled. The "*stare decisis* considerations most relevant here … all weigh in favor" of casting that relic aside. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2270 (2024).

a. To start, *Colorado II* was "poorly reasoned" even under First Amendment doctrine back in 2001. *Janus*, 585 U.S. at 918. As the four dissenters observed, the majority in *Colorado II* was able to uphold the limits under the "closely drawn" test only by "jettison[ing] th[e] evidentiary requirement" of *Buckley* and its progeny and dismissing "better tailored alternatives." 533 U.S. at 474, 481 (Thomas, J., dissenting).

That assessment was shared by those otherwise sympathetic to campaign-finance regulation. As one scholar put it, *Colorado II* resulted in "jurisprudential incoherence" by indulging in "the fiction" that it was applying "the *Buckley* standard" while it "reduced the evidentiary burden" and "relaxed the level of scrutiny." Hasen, Buckley *Is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 32 & n.7 (2004); *see id.* at 42-45. Because *Colorado II* was "inconsistent with the decisions that came before it," replacing that aberration with a return to *Buckley* would in fact "better serve[] the values of *stare decisis*." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995). Indeed, this Court came to a similar conclusion in *Citizens United v. FEC*, 558 U.S. 310 (2010), where it overruled a decision that had itself "departed from the robust protections [the Court] had granted political speech in [its] earlier cases." *Id.* at 379 (Roberts, C.J., concurring); *see id.* at 363 (majority).

More fundamentally, *Colorado II* plainly erred in concluding that closely drawn scrutiny rather than strict scrutiny applies in the first place. *Buckley*'s exception for contribution limits "denigrates core First Amendment speech and should be overruled." *McCutcheon*, 572 U.S. at 228 (Thomas, J., concurring in the judgment). At a minimum, "*party* coordinated spending" should not be treated as "contributions" under *Buckley*'s dichotomy. *Colorado II*, 533 U.S. at 447 (emphasis added); *see id.* at 468-74 (Thomas, J., dissenting). *Buckley* excluded contribution limits from strict scrutiny on the theory that they impose "little direct restraint" on political speech because they do not "infringe the contributor's freedom to discuss

candidates and issues." 424 U.S. at 21. Even if that were true in general, it is "fanciful" to say that about the limits here, as they "constrain[] the party in advocating its most essential positions and pursuing its most basic goals." *Colorado I*, 518 U.S. at 630 (Kennedy, J., concurring in the judgment).

b. Original failings aside, legal developments in the decades since *Colorado II* have "'eroded' the decision's 'underpinnings' and left it an outlier among" this Court's "First Amendment cases." *Janus*, 585 U.S. at 924. As the majority below recognized, this Court's "recent decisions create tension with *Colorado II*'s reasoning" in "several ways." App.10a.

First, since 2001, this Court has clarified that there is "only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *Cruz*, 596 U.S. at 305. "Even on this basic starting point, however, *Colorado II* is out of step with modern doctrine." App.25a; *see* App.10a, 125a-32a. Rather than address whether the coordinated party expenditure limits did anything to prevent *quid pro quo* corruption, *Colorado II* hinged on the premise that the government had an interest in combatting "corruption … understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment." *Colorado II*, 533 U.S. at 441. But *McCutcheon* has since squarely rejected that rationale, as even its dissenters acknowledged. *See* 572 U.S. at 239-40 (Breyer, J., dissenting) (faulting the Court for contradicting "*Colorado II*[]," which "upheld [the] limits … because it found they thwarted corruption and its appearance, again understood as including 'undue influence' by wealthy donors," not only "'*quid pro quo* agreements'").

Second, in a return to its earlier approach, this "Court's recent campaign-finance decisions … demand 'actual evidence' that a spending restriction will reduce '*quid pro quo* corruption or its appearance.'" App.11a (quoting *Cruz*, 596 U.S. at 310). *Colorado II*, however, identified no evidence that the limits would achieve that goal, as opposed to preventing a "donor's influence" from being "multiplied." 533 U.S. at 460 n.23; *see id.* at 477-78 & n.8 (Thomas, J., dissenting). That is why the FEC had to seek "discovery" in this case in order to (unsuccessfully) fish for evidence of "quid pro quo corruption" now. App.150a.

Third, since 2001, this "Court has strengthened the 'closely drawn' test, emphasizing that this 'rigorous' test demands 'narrow tailoring.'" App.11a (quoting *McCutcheon*, 572 U.S. at 197, 199, 218) (alteration omitted). Yet *Colorado II* "made no mention of narrow tailoring and seemed to disavow it." *Id.* Indeed, the decision "afforded Congress significant deference," concluding "Congress was 'entitled to its choice' among different approaches, and that 'unskillful tailoring' isn't enough to invalidate a restriction." App.32a (quoting *Colorado II*, 533 U.S. at 463 n.26, 465). To meet "the narrow tailoring requirement," however, the government "is not free to enforce *any*" law "that furthers its interests"; instead, it must "demonstrate its need" for its desired measure "in light of any less intrusive alternatives." *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 612-13 (2021); *see McCutcheon*, 572 U.S. at 221-23. In relieving the government from that burden, *Colorado II* overlooked that "it remains [the] role" of *this Court*, not *Congress*, "to decide whether a particular legislative choice is constitutional." *Cruz*, 596 U.S. at 313.

c. Like its doctrinal underpinnings, the "factual" foundations for *Colorado II* have crumbled as well. *Janus*, 585 U.S. at 924; *see* App.12a-14a. For example, *Colorado II* suggested Congress adopted the limits because it was "concerned with circumvention of contribution limits." 533 U.S. at 457 n.19. That claim was at odds with statutory text and history in 2001, *id.* at 475 & n.5 (Thomas, J., dissenting), but it is even less defensible today due to the underinclusivity injected by the 2014 amendments, *see supra* at 20-21.

Moreover, *Colorado II* assumed that the "'political parties are dominant players, second only to the candidates themselves, in federal elections,'" with their "sophistication and power" putting them in a particularly good "position to be used to circumvent contribution limits." 533 U.S. at 450, 453. Whether true or not in 2001, that view "has a quaint ring to it" today. App.14a. The year after *Colorado II*, Congress sapped the parties' power by passing the Bipartisan Campaign Reform Act of 2002 (BCRA), which banned them from raising or spending "soft money"—funds raised by parties outside the Act's limits on source and amount for party-building activities. *McConnell*, 540 U.S. at 123-24. Yet "'[i]nstead of getting money out of politics, BCRA simply transferred power away from the political parties'" by causing donors to send funds elsewhere. App.135a (brackets omitted). Thus, by 2010, it had already become clear that "[t]he 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." *RNC v. FEC*, 698 F. Supp. 2d 150, 160 n.5 (D.D.C. 2010) (Kavanaugh, J.), *aff'd*, 561 U.S. 1040 (2010).

And that year saw the official arrival of Super PACs, whose "ability to raise unlimited sums of money from individuals for independent expenditures" made them "the far better vehicle" for donors. App.149a. Indeed, Super PACs raised nearly $400 million more than the parties did last year alone. *Id.* And while party contributions to candidates have barely budged since 2004, non-party independent expenditures (including by Super PACs) have shot up by over 114 times in that period. App.308a-10a.

"Rapid changes in technology" have likewise eaten away at *Colorado II*'s moorings. *Citizens United*, 558 U.S. at 364. The "rise of low-cost social media," for instance, has left parties with less institutional force. Issacharoff, *Democracy's Deficits*, 85 U. CHI. L. REV. 485, 490 (2018). And today, "disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided," given that "massive quantities of information can be accessed at the click of a mouse." *McCutcheon*, 572 U.S. at 224.

d. Finally, "[n]o serious reliance interests" are at stake. *Citizens United*, 558 U.S. at 365. Unlike in cases where entities "have acted" on the basis of a decision "to conduct transactions," *Colorado II* has "prevented" parties and candidates "from acting" in an area at the heart of the First Amendment. *Id.* If "it would be unconscionable to permit free speech rights to be abridged in perpetuity" even "to preserve" certain "contract provisions," there is no basis for allowing this infringement on First Amendment freedoms to persist. *Janus*, 585 U.S. at 927.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

All this illustrates not only why FECA's coordinated party expenditure limits violate the First Amendment, but also why this Court's intervention is necessary. Whatever one thinks of the merits, the question presented is undeniably worthy of the Court's attention. If petitioners are right, then the government for decades has been curtailing the most "basic" freedom "in our democracy"—"the right to participate in electing our political leaders." *McCutcheon*, 572 U.S. at 191. And it has been doing so to "not just any speaker, but political parties," App.118a, which have both a "constitutional tradition of … engaging in joint First Amendment activity" with "their candidates" and "a unique role" in advancing political speech, *Colorado I*, 518 U.S. at 629-30 (Kennedy, J., concurring in the judgment). Given that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views," few questions are more pressing than whether this abridgement of speech and associational rights is constitutional. *Jones*, 530 U.S. at 574. Indeed, this Court granted review in *Colorado I* to address that issue even in the absence of any alleged circuit split, 518 U.S. at 613, and returned to it just five years later in *Colorado II*, 533 U.S. at 440.

The only question is whether the constitutionality of the limits remains immensely important *now*. On that front, the size of the appendix speaks for itself. If *Colorado II*'s scope and vitality were an open-and-shut case, the Sixth Circuit could have resolved this case in

a one-paragraph, unpublished opinion. Instead, it devoted over 150 pages across six opinions to grappling with the issue. App.1a-156a. That sort of debate cries out for the definitive resolution that only this Court can provide.

And resolving that debate on the side of the speaker would correct not only a severe First Amendment violation, but a severe distortion of the political process. Because the "parties are the most likely to give to challengers"—as they will always spend some money "to help challengers in pursuit of majorities"—the limits serve as "an incumbent protection rule." App.314a (emphasis omitted). Yet "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon*, 572 U.S. at 192.

Moreover, the key advantage of political parties in competing for donations is their "unique ability to speak in coordination with" their "candidates." *Colorado II*, 533 U.S. at 453. Yet "once the interaction between party and candidate was limited by a principle of non-coordination" in *Colorado II*, the parties "no longer" had an edge. Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 HOUS. L. REV. 845, 864-65 (2017). As a result, candidates and donors have flocked to Super PACs, which can raise unlimited funds for independent expenditures. App.303a. In fact, "'Super PACs are seen to be moving in the direction of assuming most of the functions of parties'" today. App.309a n.45. That includes not only campaign ads, but "on-the-ground political operations" as well, as "FECA's limits on coordinated communications do not apply to door-to-door canvassing activities undertaken by Super PACs." App.135a.

This shift has only led to heightened polarization, as confirmed by the fact that states with "limits on party-candidate coordination" are "more likely" to have "polarized legislatures." App.284a. Given these effects, even strong supporters of campaign-finance regulation are in favor of scuttling the "exceptionally harmful" limits here. App.285a; *see, e.g.*, Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 837-39 (2014).

Coordinated party spending aside, the lingering presence of *Colorado II* and its "deferential review" threatens *other* political speech. App.3a. The lower court in *McCutcheon*, for instance, relied on *Colorado II* to uphold the aggregate limits this Court would ultimately deem unconstitutional. *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 140-41 (D.D.C. 2012). And even in the wake of this Court's more recent First Amendment decisions, lower courts have continued to rely on *Colorado II* to justify campaign-finance restrictions outside of coordinated party spending. The Second Circuit, for instance, used it to uphold Vermont's limit on "comparatively benign" party contributions to publicly financed candidates. *Corren v. Condos*, 898 F.3d 209, 226 (2d Cir. 2018); *see id.* at 224-27. And the D.C. Circuit invoked the decision to justify an application of FECA's contribution limits to donations from the dead, even though the government could "not point to even a single *quid pro quo* exchange … allegedly effected through a bequest." *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 563 (D.C. Cir. 2019) (en banc) (Katsas, J., dissenting in part); *see id.* at 544 (majority). So even as *Colorado II* has become more anomalous, it remains no less dangerous.

III. THIS CASE IS AN EXCELLENT VEHICLE.

This case presents an ideal opportunity to clarify or overrule *Colorado II*. Indeed, all the judges below appeared to recognize this "case is a strong candidate for certiorari." App.67a. It is easy to see why.

First, it cleanly tees up the question presented. As both courts below agreed, there are no justiciability roadblocks on the front end to addressing the First Amendment issue here. App.5a-6a, 165a-71a. Nor are there any remedial wrinkles on the back end—§ 30110's certification process leaves those to the district court on remand. App.185a. This is about as clean a case as it gets.

Second, both the parties and the Sixth Circuit exhaustively addressed the question presented—including whether *Colorado II* controlled and whether the challenged limits could survive a fresh review. App.1a-156a. And they did so with the benefit of district-court factual findings based on a thorough record carefully developed over months of discovery. App.186a-247a. On both the law and the facts, this case comes to this Court fully baked.

Third, this case provides the Court with a menu of options for resolving the question presented. At every step of the way, petitioners have pressed both their facial and as-applied challenges as well as preserved their request that the Court overrule *Colorado II*. This Court therefore enjoys the freedom to decide whether to clarify or overrule *Colorado II* as it sees fit.

Finally, this Court is unlikely to encounter another vehicle any time soon. As far as petitioners are aware, the last petition to even touch on the issue was submitted in 2010, and that filing raised only a

different as-applied challenge that the petitioner had failed to preserve. *In re Cao*, 619 F.3d 410 (5th Cir. 2010) (en banc), *cert denied sub nom. Cao v. FEC*, 562 U.S. 1286 (2011); *see* Pet. at i-ii, *Cao*, 562 U.S. 1286 (No. 10-776), 2010 WL 5069550; BIO at 9, *Cao*, 562 U.S. 1286 (No. 10-776), 2011 WL 493949; App.17a.

Should this Court decline to take this case, future litigants will interpret that decision as proof that, whatever the Court has said in more recent campaign-finance cases, it is content to leave the political parties as second-class holders of First Amendment rights. The FEC would respond to any new challenge by trumpeting that denial as "reaffirming the continued vitality of *Colorado II*," just as it did with the *Cao* denial below. C.A. Second Br. 18. And no other circuit would dare break rank, viewing this Court's rejection of the Sixth Circuit's invitation here as all but dispositive.

This Court should not wait another decade or more for another chance to confront a statute that continues to have a "stifling effect on the ability of the party to do what it exists to do." *Colorado I*, 518 U.S. at 630 (Kennedy, J., concurring in the judgment). Instead, it should grant review and confirm that the government cannot "contravene a political party's core First Amendment rights because of what a third party might unlawfully try to do." *Colorado II*, 533 U.S. at 482 (Thomas, J., dissenting).

CONCLUSION

This Court should grant the petition.

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