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

BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. Along with scholarly and educational work, IFS represents individuals and civil society organizations in litigation securing their First Amendment liberties. IFS has an interest here because the Sixth Circuit decision affirming the continued applicability of *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), undermines the First Amendment rights of millions of Americans and introduces confusion into an area of the law that this Court has recently endeavored to clarify.

SUMMARY OF THE ARGUMENT

This Court's decision in *Colorado II* is an aberration in modern campaign-finance law. Though the case uses the same words and phrases as recent decisions—corruption, closely drawn, sufficiently important government interest—its analysis departs from what this Court has said those words mean. The result is a decision that continues to bind lower courts, requiring them to give significant deference to the government when it enacts prophylactic-upon-prophylactic restrictions on how political parties coordinate speech with their candidates.

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1. *Amicus* notified counsel for all parties of its intention to file this brief more than 10 days prior to filing. S. Ct. R. 37.2. Counsel for *amicus* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel have made a monetary contribution to the preparation or submission of this brief. S. Ct. R. 37.6.

This brief offers two reasons for granting the petition to overrule *Colorado II*.

First, recent history shows that the factual basis underpinning *Colorado II*'s analysis was wrong. The Court based its decision on the perceived inevitable threat that unlimited party coordination would lead to donors circumventing contribution limits by funneling large donations through the parties. But over half the states allow unlimited party coordination, including 17 states that also restrict individual contributions—and yet the FEC could not come up with even one example below of donors using parties to effectuate a *quid pro quo* scheme. Thus, *Colorado II* "is undermined by experience since its announcement." *Citizens United v. FEC*, 558 U.S. 310, 364 (2010).

Second, leaving *Colorado II* like "some ghoul in a late-night horror movie" to "stalk[] our [First Amendment] jurisprudence" threatens unnecessary confusion at the cost of the free speech rights of millions of Americans. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). This Court has repeatedly strengthened closely drawn scrutiny over the past two decades. But by affirming the continued viability of *Colorado II*'s more deferential approach, the Sixth Circuit (perhaps inadvertently) has recognized a new, watered-down version of closely drawn scrutiny that applies when the government limits a political party's speech about its candidates. The Court already has too many "highly subjective judicial evaluations" that give judges the ability to restrict First Amendment freedoms based on their own policy views. *United States v. Rahimi*, 602 U.S. 680, 732 (2024) (Kavanaugh, J., concurring).

Keeping a toothless version of closely drawn scrutiny that is inconsistent with the remainder of modern campaign-finance law threatens to sow confusion at the expense of free speech. The Court can avoid that unnecessary result by granting certiorari, overruling *Colorado II*, and applying ordinary First Amendment principles to the Federal Election Campaign Act's (FECA) party-coordination limits.

ARGUMENT

Debates over campaign finance regulation often "generate[] more heat than light, more assertions than evidence." David M. Primo & Jeffrey D. Milyo, *Campaign Finance & American Democracy*, 3 (2020). But this Court requires the opposite. When the government restricts speech "to prevent an anticipated harm, it must do more than simply posit the existence of the disease sought to be cured." *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 307 (2022) (quotation omitted). The Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Id.* (quoting *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014)). The government must instead "point to record evidence or legislative findings demonstrating the need to address a special problem." *Id.* (quotation omitted).

Yet over the years, what that "record evidence" must prove has changed—dramatically so. It used to be enough for the government to show that a campaign-finance restriction prevented "undue influence on an officeholder's judgment" or "the appearance of such influence, beyond the sphere of *quid pro quo* relationships." *Citizens United*, 558 U.S. at 447 (Stevens, J., concurring in part and dissenting in part) (quotation omitted) (collecting

cases). Not so anymore. *Cruz*, 596 U.S. at 305. It used to be that the government had leeway to enact prophylactic restrictions on top of contribution limits without proving a "tangible effect on corruption," App.11a. *See Colorado II*, 533 U.S. at 457. Not so anymore. *Cruz*, 596 U.S. at 307–08. And it used to be that the government need not prove that a speech restriction was necessary to further its purpose. *Colorado II*, 533 U.S. at 463 n.26. Not so anymore. *McCutcheon*, 572 U.S. at 197. In returning campaign-finance jurisprudence to its "roots in *Buckley*," *id.* at 208, this Court has cut back the overgrowth, overruling bad precedent in the process, *see Citizens United*, 558 U.S. at 365.

Colorado II should join the dustbin of history. It's an outlier in campaign-finance law, and it rests on a flawed factual premise. More than a dozen states allow unlimited party coordination without any evidence that this has "eroded," *see* 533 U.S. at 457, their individual contribution limits. What *Colorado II* anticipated as "beyond serious doubt," *id.*, turns out to lack any evidentiary support whatsoever. Yet political parties remain hampered in supporting their candidates in every federal race as well as the races in 22 states. The only way to remedy this First Amendment violation is to grant certiorari and overrule *Colorado II*.

I. State experience undermines *Colorado II*'s anticircumvention rationale.

Colorado II upheld FECA's coordinated spending limits on the theory that "unlimited coordinated spending by a party raises the risk of corruption (and its appearance) through circumvention of valid contribution limits." 533

U.S. at 456. But even at the time, there was little evidence that donors used parties to circumvent contribution limits. The Court attributed this to the fact that federal law did not allow "unlimited coordinated spending," and so there was no "recent experience" to draw from. *Id.* at 457. So instead, the Court relied on evidence that "parties test the limits of the current law" to conclude "beyond serious doubt" that unlimited coordination would open the floodgates to nefarious behavior. *Id.*

Never mind whether that kind of predictive analysis conforms to this Court's recent approach. *See Cruz*, 596 U.S. at 307–08. The "recent experience" the Court did not have in *Colorado II* exists today because many states have enacted the exact kind of system that the Court feared.

More than half the states do not prevent political parties from coordinating with their candidates on expenditures. Pet.19–20. Many of those states cap the amount that individuals can donate to candidates while allowing parties to make unlimited donations.[2] Other states allow parties to coordinate expressly[3] or through in-kind contributions[4] without restriction, even though

2. *See* Cal. Gov't Code § 85301; 10 Ill. Comp. Stat. 5/9-8.5(b); Kan. Stat. Ann. § 25-4153(a); Ky. Rev. Stat. §§ 121.150(6), 121.015(3); La. Rev. Stat. § 18:1505.2(H)(1)(a), (b); N.J. Stat. Ann. § 19:44A-29; N.J. Admin. Code § 19:25-11.2; N.Y. Elec. Law § 14-114(1), (3); N.C. Gen. Stat. § 163-278.13(a), (h); S.D. Codified Laws §§ 12-27-7 & 12-27-8; Vt. Stat. tit. 17, § 2941(a); Wis. Stat. §§ 11.1101(1), 11.1104(5); Wyo. Stat. § 22-25-102(a), (f).

3. Ariz. Rev. Stat. §§ 16-911(B)(4)(b) & 16-912; W. Va. Code §§ 3-8-5c; 3-8-9b(a).

4. 970 Mass. Code Regs. 1.04(12)(11); N.M. Stat. § 1-19-34.7(A), (J); Ohio Rev. Code § 3517.102(B)(1), (6).

they also limit individual donations to candidates. All told, at least 17 states that prevent individuals from making unlimited contributions impose virtually no restriction on how parties financially coordinate with their own candidates.[5]

Given the large number of states that restrict individual contributions but do not restrict party coordination, one would expect to see evidence that donors use party coordination to circumvent individual contribution limits—at least, if *Colorado II* was right in holding that it is "beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." 533 U.S. at 457. But that's not the story the states' experience tells.

Consider a state like Vermont. It has some of the lowest contribution limits for statewide candidates, *see* Alec Greven, *State Contribution Limits Report* (March

5. Two more states—Maryland and Washington—restrict party support but at much higher levels than what the FEC allows, even though both states impose smaller contribution caps than the federal government for individual donors. *Compare* Md. State Bd. of Elections, *2026 Election Cycle Central Committee Coordinated Campaign Contribution Limits*, available at https://perma.cc/VZ9K-CYX5 (approximately $2.2 million in coordinated spending), & Wash. Public Disclosure Commission, *Contribution Limits*, available at https://perma.cc/D2R6-L6KS (almost $6 million in coordinated spending), *with* FEC, *Coordinated party expenditure limits*, available at https://perma.cc/D6AU-3PXU ($595,000 for Maryland and $761,900 for Washington); *compare* Md. Elec. Law Code Ann. § 13-226, Wash. Rev. Code. § 42.17A.405, & Wash. Admin. Code § 390-05-400, *with* FEC, *Contribution Limits*, available at https://perma.cc/QS5T-EHN6.

11, 2024), https://perma.cc/NQN9-T86A, and a history of enacting even lower limits than exist today, *see Randall v. Sorrell*, 548 U.S. 230, 250 (2006). Those limits more than double when donors give to parties, Vt. Stat. tit. 17, § 2941(a)(5), and Vermont allows parties to make unlimited contributions to privately financed candidates, Vt. Stat. tit. 17, § 2941(a)(3)(B). This should be the perfect storm: Individuals who max out to a candidate under one of the nation's lowest contribution limits can triple that contribution by giving to the party, knowing that the party can make unlimited donations back to the candidate. If "the inducement to circumvent would almost certainly intensify" with unlimited party coordination, *Colorado II*, 533 U.S. at 460, Vermont would be fertile ground for such unscrupulous donors.

Yet the government didn't "identify a single case of *quid pro quo* corruption in this context." *Cruz*, 596 U.S. at 307. Even after the district court granted the FEC discovery, and even after it hired an expert to prove its factual claims, the FEC produced no evidence that Vermont (or any other state like Vermont) has been susceptible to *quid pro quo* corruption from maxed-out donors using parties as a funnel to support specific candidates.

This is not for lack of trying. Focusing on Ohio (where this suit originated), the FEC's expert identified several political scandals to bolster his view that parties are particularly likely to engage in corruption. Krasno Report, D.Ct.Dkt.41-8 at 11–13. But in doing so, he admitted (as he had to) that "coordinated expenditures do not feature prominently in the examples of (quid pro quo) corruption" on which he relied. *Id.* at 13. No matter, the

expert explained: the lack of evidence "should be taken as a triumph of the existing legal regime" because "[t]he fact that scandals specifically involving coordinated federal expenditures have not been more common suggests that the current regulations are working as intended." *Id.*

Perhaps. But what to make of the fact that Vermont does not limit coordinated expenditures from parties in its elections? Or California? Or Kansas? Or Kentucky? And so on.

If the lack of *quid pro quo* corruption involving coordinated party expenditures is "taken as a triumph of the existing legal regime," *id.*, then that triumph in states without similar limits undermines any claim that restricting party coordination is "necessary to prevent an anticipated harm," *Cruz*, 596 U.S. at 307. The "evidentiary grounds . . . to sustain the limit [on party coordinated spending]," *Colorado II*, 533 U.S. at 456, does not exist.

Indeed, four of the ten states with the lowest individual contribution limits also allow unlimited party coordination. *See* Kan. Stat. Ann. § 25-4153(a); Ky. Rev. Stat. § 121.150(6); 121.015(3); 970 Mass. Code Regs. 1.04(12)(11); Vt. Stat. tit. 17 § 2941(a); Greven, *supra*. Those states all allow individuals to make significantly higher contributions to parties than to candidates. *Compare* Kan. Stat. Ann. § 25-4153(a), *with id.* § 25-4153(d); *compare* Ky. Rev. Stat. § 121.150(6), *with id.* § 121.150(11); *compare* 970 Mass. Code Regs. 1.04(12)(4), *with id.* 1.04(12)(14); *compare* Vt. Stat. tit. 17 § 2941(a)(1)–(3), *with id.* § 2941(a)(5). And so those states should all show "how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties'

coordinated spending wide open." *Colorado II*, 533 U.S. at 457. But no such evidence exists.

In fact, the FEC's expert could not point to even one example from *any* state where a candidate used coordinated party expenditures to circumvent contribution limits and route more funds to his or her campaign. Krasno Depo., D.Ct.Dkt.41-4 at 162–63; Krasno Report, D.Ct.Dkt.41-8 at 13 (conceding his examples of corruption do not involve coordinated party expenditures). In New York, for example—a state that restricts individual contributions but allows parties to make unlimited contributions during the general election—the FEC's expert confirmed he is "not aware of" a situation where candidates engaged in "*quid pro quo* routing through a party." Krasno Depo. D.Ct.Dkt.41-4 at 165.

So much for *Colorado II*'s prediction that unlimited coordination would lead to donors circumventing contribution limits. There's no beating around it: that prediction was wrong. Yet it was the entire basis for the Court's opinion. *See* 533 U.S. at 457–65. If party coordination does not "intensify" the risk of circumvention, *id.* at 460, the government has no legitimate interest in restricting it.

Nor could one say that restrictions on coordinated party expenditures decrease the "appearance" of *quid pro quo* corruption by bolstering citizen trust in government. To start, that alone could not sustain a First Amendment challenge to laws restricting campaign speech. *See Cruz*, 596 U.S. at 306–07. But campaign-finance restrictions do not measurably increase trust in government anyway. *See* Primo & Milo, *supra*, at 145. While this fact "runs counter

to the many prominent narratives about the deleterious effects of *Citizens United*," *id.*, it undermines any claim that Congress might be justified in restricting coordinated party speech based on the perception that doing so might lower the appearance of corruption among the public.

Colorado II did not shy from boldness in predicting "beyond serious doubt" that coordinated party spending would "erode[]" individual contribution limits. 533 U.S. at 457. That prediction was wrong, yet it continues to inhibit political speech today.

II. The Court should grant certiorari to undo the Sixth Circuit's implicit recognition of a new tier of scrutiny with unknown implications.

The Sixth Circuit correctly described *Colorado II*'s standard of review as "deferential"—particularly when compared to more recent campaign-finance decisions. App.4a. Yet *Colorado II* purported to do no more than apply "closely drawn" scrutiny, 533 U.S. at 456—the same standard this Court continues to apply against laws restricting contributions, *McCutcheon*, 572 U.S. at 197. The result creates obvious problems: If *Colorado II* still binds the lower courts, they must now grapple with two versions of "closely drawn" scrutiny that lead to drastically different results. The "proliferat[ion]" of judicial tiers of scrutiny has already spun out of control. *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 639 (2016) (Thomas, J., dissenting). The Court should grant certiorari to end this confusion before it spreads further.

A. The decision below implicitly adopts a new tier of scrutiny that makes it easier for governments to regulate party speech about their candidates.

1. Start with what *Colorado II* held. The question the Court considered was whether coordinated party spending should be treated "functionally as contributions" because of the risk of circumvention. 533 U.S. at 444. The Court said yes, and in doing so, explained that it would apply "*the same scrutiny* [it has] applied to the other political actors [engaged in coordinated spending], that is, scrutiny appropriate for a contribution limit[.]" *Id.* at 456 (emphasis added). This requires the government to show "the restriction is 'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combating political corruption." *Id.* (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 (2000)).

Colorado II thus did not invent a new level of scrutiny, and it did not limit its holding to only the statute in front of it. Rather, the Court held that limits on coordinated party spending must meet the same level of scrutiny—"closely drawn"—that applies to contribution limits and other forms of coordinated spending. That's why the Court relied on cases like *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Shrink* to explain how "closely drawn" scrutiny works in practice. *See, e.g.*, *id.* at 456, 463, & n.26. *Colorado II*'s bottom line was that courts should analyze coordinated party spending no differently than they analyze other kinds of contribution restrictions.

But after *Colorado II*, this Court began strengthening "closely drawn" scrutiny by returning to its "roots." *See McCutcheon*, 572 U.S. at 208. It has limited the "permissible ground[s] for restricting political speech, App.10a, imposed strict evidentiary burdens on the government, *id.* at 11a, and required narrow tailoring, *id.* None of these decisions created a new standard for courts to apply—they were, after all, "root[ed] in *Buckley* itself." 572 U.S. at 208.

The Sixth Circuit's decision below breaks from that path. Even though Congress has altered the statute, Pet.8–9, and even though this Court has strengthened "closely drawn" scrutiny since *Colorado II*, the Court of Appeals continued to apply the older "deferential form of review" to the new version of FECA's coordinated party limits, App.13a. On stare decisis grounds, perhaps that decision is right. *But see* App.120a–139a (Readler, J., dissenting). But it undoubtedly creates an entirely new tier of review: a watered-down version of closely drawn scrutiny that applies to laws restricting "a party's coordinated spending." *Colorado II*, 533 U.S. at 456. And this toothless version of "closely drawn" scrutiny threatens unnecessary confusion and mischief at the expense of the First Amendment.

2. Consider how the continued viability of *Colorado II* will affect challenges to future statutory changes Congress may enact. Suppose that Congress amends FECA to further reduce the limits on coordinated spending, and in doing so, produces "record evidence or legislative findings," *Cruz*, 596 U.S. at 307, that the new limits are necessary to reduce "undue influence on an officer's judgment," *see* 533 U.S. at 441. Under "closely drawn" scrutiny, that change would be unconstitutional

because reducing influence is not a permissible ground for restricting political speech. *See Cruz*, 596 U.S. at 305. But under *Colorado II*'s "more deferential form of review," App.13a, preventing "undue influence" passes the government-interest test, *Colorado II*, 533 U.S. at 441. And because *Colorado II*'s toothless version of "closely drawn" scrutiny permits "unskillful tailoring," *id.* at 463 n.26, and weak evidentiary support, *id.* at 457, Congress can continue adding "nonsensical exceptions to the spending limits," App.31a, without ever reckoning with how doing so undermines the government's purported rationale.

Allowing this would not just perpetuate an anomaly in First Amendment jurisprudence. It would do so in precisely the circumstances for which this Court requires the opposite. Coordinated party spending restrictions are "yet another prophylaxis-upon-prophylaxis approach[] to regulating campaign finance,"[6] which demand more "skepticism," not less. *Cruz*, 596 U.S. at 306. Yet under the Sixth Circuit's decision applying *Colorado II*, the government has a freer hand in regulating coordinated party expenditures than in regulating direct contributions to candidates—even though the former has a much more attenuated connection to *quid pro quo* corruption, if any at all.

3. Nor is this problem limited to federal law. In fact, given the variety of campaign-finance laws in the states, the opportunity for mischief and confusion abounds.

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6. Or as Judge Thapar observed, a prophylaxis-upon-prophylaxis-upon-propohylaxis-upon-prophylaxis-upon-prophylaxis approach, as "the Federal Election Campaign Act imposes *five* prophylaxes" to guard against *quid pro quo* corruption. App.28a (Thapar, J., concurring).

More than 100 million Americans live in the 22 states that restrict party coordination with their candidates. Each state does so a bit differently. Michigan, for example, treats coordinated spending as a contribution, Mich. Comp. Laws § 169.204(1), and it caps party contributions based on whether the candidates have accepted public funding, Mich. Comp. Laws § 169.252(2), (3) & (4); *id.* § 169.269(3). Oklahoma also limits coordination by treating it as a contribution, but Oklahoma imposes a smaller contribution limit on parties. Okla. Stat. tit. 21 § 187.1; *2024 State Elections: Contribution Chart*, https://perma.cc/FYJ3-XZ63. Maryland, on the other hand, restricts party coordination by limiting the amount of in-kind contributions parties can make to their candidates—but the limits dwarf what's allowed in states like Michigan and Oklahoma. *See* Md. Elec. Law Code Ann. § 13-226(c). In the 2026 election cycle, for example, Maryland allows almost $2.2 million in coordinated party spending by means of in-kind contributions. *See* Md. State Bd. of Elections, *2026 Election Cycle Central Committee Coordinated Campaign Contribution Limits*, https://perma.cc/VZ9K-CYX5.

How would a First Amendment challenge to these laws go? That answer might depend on whether *Colorado II* controls, which itself may depend on the specific facts of the case and other provisions in the state's laws.

Michigan, for example, would have a hard time explaining how its law prevents *quid pro quo* corruption by stopping donors from circumventing the individual donation limit. Donors can give unlimited amounts of money to political parties. *See* Mich. Dep't of State, *Contribution Limits for Committees Registered under*

the Michigan Campaign Finance Act, https://perma.cc/7XVV-2VF6 (visited Jan. 2, 2025). And parties can give some candidates *20 times* the individual contribution limit (about $165,000 for gubernatorial candidates). Mich. Comp. Laws § 169.252(2), (3) & (4). That means Michigan "openly tolerate[s]" the risk of donors circumventing the contribution limits by 20-fold, *see Cruz*, 596 U.S. at 312, but then jumps in to stop it once a party crosses that arbitrary threshold. Any argument that Michigan's limit on coordinated expenditures is an anticircumvention measure to prevent *quid pro quo* corruption would run into the same skepticism that doomed the law in *Cruz*. *Id.*

If the anticircumvention rationale depends on believing that donors will give to the party to get around the individual contribution limit, Oklahoma's law is closer. Unlike Michigan's limitless donations to parties, Oklahoma caps contributions to parties at about three times what's allowed for candidates. *See 2024 State Elections: Contribution Charge*, https://perma.cc/FYJ3-XZ63 By reducing the "fundraising disparity" between contributions to candidates and parties, App.34a, Oklahoma has adopted a law more tailored to the anticircumvention issue. Yet doing also raises questions about whether there is any marginal benefit to limiting party coordination as well.

But under *Colorado II*, these differences don't matter. As the Sixth Circuit explained, the Court in *Colorado II* "seemed to disavow" any narrow tailoring requirement. App.11a. That Michigan could more easily address the circumvention issue by lowering the contribution limit to parties, or that restrictions on party coordination might not be necessary in Oklahoma because it *has* lowered

those limits—does not move the needle under *Colorado II*'s watered down version of "closely drawn" scrutiny.

Nor is narrow tailoring the entire story. Perhaps Michigan can produce evidence showing "beyond serious doubt," *Colorado II*, 533 U.S. at 457, that donors are using party contributions to exert influence over public officials. That would doom the law under closely drawn scrutiny, but perhaps not under the more deferential version in *Colorado II*. *Id.* at 441.

Keeping *Colorado II* alive, as the Sixth Circuit has done, threatens this kind of confusion and incongruence. Yet no one thinks that the First Amendment rights of our nation's political parties should turn on the byzantine nuance of stare decisis. The Court should "abandon[]" the decision, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 510 (2022), and prevent it from becoming another "ghoul" that "stalks our [First Amendment] jurisprudence" in perpetuity, *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring).

B. The Court should stop the proliferation of yet another version of heightened scrutiny that gives the judiciary too much discretion to limit free speech.

The tiers-of-scrutiny "approach to constitutional interpretation departs from . . . what judges as umpires should strive to do, and what this Court has actually done across the constitutional landscape for the last two centuries." *Rahimi*, 602 U.S. at 731 (Kavanaugh, J., concurring). It is "policy by another name," *id.*, "require[ing] highly subjective judicial evaluations," *id.*

at 732—a fact none more obvious than in the world of campaign finance, where courts of past have balanced the First Amendment against vague policy goals like preventing "undue influence," *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003), or "an unfair advantage in the political marketplace," *Austin v. Mich. St. Chamber of Commerce*, 494 U.S. 652, 659 (1990) (quotation omitted), *overruled by Citizens United*, 558 U.S. at 365. Too often, the malleability of heightened scrutiny has allowed courts to "balance away bedrock free speech protections for the perceived policy needs of the moment." *See Rahimi*, 602 U.S. at 733 (Kavanaugh, J., concurring) (citing H. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 878–79 (1960)).

That malleability has amplified as "the tiers of scrutiny proliferated into ever more generations." *Hellerstedt*, 579 U.S. at 639 (Thomas, J., dissenting). Courts have recognized not just rational basis, but also "rational basis with bite." *Rahimi*, 602 U.S. at 731 (Kavanaugh, J., concurring); *see Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 692 (6th Cir. 2011). There's not just intermediate scrutiny, but exacting scrutiny, *see Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607–08 (2021), and closely drawn scrutiny as well, *Buckley*, 424 U.S. at 25. Not to mention the Court's four-part test for commercial speech that's not quite intermediate scrutiny but not strict or exacting scrutiny, either, *see Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). When a case comes to court under the Free Speech Clause, too many doctrines give the courts too much room to decide "if, in the judge's view, the law is sufficiently reasonable or important." *Rahimi*, 602 U.S. at 731 (Kavanaugh, J., concurring).

Add the Sixth Ciruit's fossilized version of *Colorado II* to the mix of seemingly endless variations of heightened scrutiny that courts can now apply to the detriment of our fundamental freedoms. While this Court has begun simplifying and strengthening the First Amendment's protection of political speech, *see McCutcheon*, 572 U.S. at 199; *Cruz*, 596 U.S. at 305, the decision below complicates and weakens it. There is no sensible basis for keeping the flawed and outdated methodology of *Colorado II* around to confuse lower courts and give governments more leeway to restrict speech. The Court should grant certiorari, overrule *Colorado II*, and resolve this important constitutional question on its merits.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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