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 Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to advocate on behalf of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber plays a key role in advancing the First Amendment rights of its members. In that capacity, the Chamber was a party to the *McConnell v. FEC*, 540 U.S. 93 (2003), litigation that challenged the facial constitutionality of an electioneering communication ban on corporate political speech. The Chamber also regularly files *amicus curiae* briefs in cases, like this one, where the business community's right to political speech is at stake. *See, e.g., Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021); *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Elections Bd. of State of Wisconsin v. Wisconsin Mfrs. & Com.*, 597 N.W.2d 721 (Wis. 1999); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). And the Chamber has litigated to

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission.

preserve its own First Amendment rights of speech and association. *See, e.g., Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

The restrictions on political parties' speech at issue in this case inhibit Americans' full participation in democratic government. Weakened political parties deprive American voters of access to information critical for their decisionmaking. Moreover, the Chamber has a broader interest in ensuring that individuals can associate and speak in concert without undue interference from the Government. If the activities of political parties are restricted, as the court below held, the freedom of other organizations is necessarily at risk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Political parties help unify and amplify the voices of the electorate. These free associations perform the crucial political function of distilling various positions and viewpoints into concise platforms, providing the voters with clear and distinct choices at the ballot box. And they play an important role in vetting and supporting candidates seeking office. In this role, political parties lubricate the gears of American democracy with free association and expression.

The business community benefits from this association and expression. Parties, together with their candidates, explain what voters can expect from their elected officials on issues that will profoundly affect businesses—everything from taxes to

regulatory burdens to trade policy. This carefully coordinated messaging allows Americans to cast their votes with a clearer understanding of the stakes for the business community and the national economy. Understanding those stakes is deeply important because every American is impacted by free enterprise—be it as an owner, an employee, or a customer in our interconnected economy.

At issue in this case are statutory limitations on political parties' ability to receive input from the candidates they support. This is an affront to the First Amendment. The Framers chose to include the right to free speech—with its corollary right to association—among those liberties enumerated in the Constitution because they recognized the paramount importance of unfettered political dialogue in a representative democracy and the need for citizens to associate with each other to advance such speech. Preventing political parties from receiving input from candidates cannot withstand scrutiny because it undermines these purposes and erodes our democratic system.

This Court should thus reverse the Sixth Circuit. Contrary to that court's holding, *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), does not permit the coordinated party expenditure limits at issue in this case. And if it does, this Court should overrule it.

If the coordinated party expenditure limits continue to stand, no organization, including the Chamber of Commerce and its members, is safe from government interference or suppression. The Court should endorse an outcome that guarantees more

political speech, not less—one that ensures citizens can act in concert to pursue their desired political outcomes. The First Amendment compels that the Sixth Circuit be reversed.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS POLITICAL SPEECH ABOVE ALL ELSE.

A. The Right To Engage In Political Speech Is At The Heart Of The First Amendment.

Throughout human history, individuals have faced the ever-present threat of punishment for speaking their minds about the affairs of the system by which they are governed. Even today, engaging in political speech, especially speech that runs counter to the state's official narrative, is risky business in much of the world. *See, e.g.*, Sarah McLaughlin, *UK Police Threaten to Prosecute Speech from "Further Afield Online" While Internet Crackdowns and Blackouts Strike Around the World*, Foundation for Individual Rights and Expression (Aug. 21, 2024), https://tinyurl.com/57dr97d8.

After the thirteen American colonies declared their independence, the Founders sought to follow a different course. They recognized that political speech—historically, the most subject to suppression—warrants the most protection. Although the Framers believed that free speech was a God-given right enjoyed by all freeborn Englishmen, they were keenly aware of its suppression in Great Britain. In the years leading up to the Revolution, even truthful criticism of the Government could, at

times, be prosecuted as seditious libel. *See Bustos v. A & E Television Networks*, 646 F.3d 762, 763 (10th Cir. 2011) (discussing *De Libellis Famosis Case*, 77 Eng. Rep. 250, 251 (Star Chamber 1606)). Dissenting opinions were recognized as dangerous to the ruling regime and treated just like physical threats of violence. The printing press—perhaps the greatest innovation in the history of political speech—was sometimes targeted by the Crown as a result. *See Citizens United v. FEC*, 558 U.S. 310, 353 (2010) (explaining that the First Amendment's Speech Clause "was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the Colonies").

Following the Revolution, Americans were no longer subjects. They became citizens, charged with the administration of their own government. Consequently, "[t]he Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting). The Framers took care to place uncompromising language in their founding document to prohibit those in power from preventing citizens from speaking about, *inter alia*, the positions and qualifications of candidates for office. The First Amendment was thus "designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, … in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen*

v. California, 403 U.S. 15, 24 (1971).

As the Framers realized, the state could not be trusted to respect criticism of officeholders or advocacy in support of those who might replace them through the democratic process. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates … and all such matters relating to political processes." *Mills v. State of Alabama*, 384 U.S. 214, 218–19 (1966).

Elections would be meaningless exercises absent the ability of Americans to inform themselves and others. Thus, the "First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office." *FEC v. Cruz*, 596 U.S. 289, 302 (2022) (quotations omitted); *see also Citizens United*, 558 U.S. at 339; *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989); *Colorado II*, 533 U.S. at 465 (Thomas, J., dissenting) ("Political speech is the primary object of First Amendment protection.").

Political speech in support of candidates often requires the expenditure of money. "When an individual contributes money to a candidate … [t]he contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'" *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (plurality) (quoting *Buckley v. Valeo*, 424 U.S. 1, 21–22 (1976) (per curiam)). Thus, political "contribution and expenditure limitations

operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14.

These foundational protections for electoral expression and association are pillars of our democracy. They ensure that voters have access to numerous and diverse voices to assess which candidate or party is fit to govern them. As Justice Holmes recognized long ago, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919). That "theory of our Constitution," *ibid.*, protects "an uninhibited marketplace of ideas," *303 Creative LLC v. Elenis*, 600 U.S. 570, 585 (2023). In the electoral context, that marketplace ensures the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley*, 424 U.S. at 14. Such a marketplace only works if it guarantees a wide range of voices—even those that generate "profound offense" and "popular opposition." *McCutcheon*, 572 U.S. at 191.

A vibrant marketplace of ideas enhances predictability and choice for the American electorate. That is because "an election campaign is a means of disseminating ideas as well as attaining political office." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979). Thus, the greater the availability and clarity of an electoral message, the better voters can understand how to cast their ballots and what the success of their chosen candidates will mean for society. Uninhibited access to ideas is thus crucial to allow "voters … to inform themselves about the candidates and the campaign issues." *Eu*, 489 U.S. at 223.

B. The Business Community Benefits From Robust Expression Driven By Political Parties.

The American business community is both a contributor to—and beneficiary of—the electoral marketplace of ideas. Political parties play an important role in both functions.

Consider first businesses' expressive contributions. The Chamber and its members often have unique insights that can help inform voters about important issues that could otherwise go unnoticed. For example—how the corporate tax rate affects local economies;[2] what opportunities exist to combat rising cargo and package theft;[3] and whether government reports are giving the public the full story about an industry.[4] Businesses communicate these insights not only to candidates and the public, but also to political parties. That is because parties serve a central role in communicating issues of importance to their adherents—be they voters, candidates, or elected officials.

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[2] *See* Watson M. McLeish & Curtis Dubay, *How Higher Corporate Taxes Would Affect Your Local Economy*, U.S. Chamber of Commerce (Sept. 19, 2024), https://tinyurl.com/57mhdjm8.

[3] *See* Press Release, U.S. Chamber of Commerce, U.S. Chamber Hosts Government & Business Leaders on Solutions to Curb Cargo, Package Theft (Dec. 18, 2024), https://tinyurl.com/4czurvaf.

[4] *See* Dan Byers, *What to Know About the Department of Energy's LNG 'Pause' Study*, U.S. Chamber of Commerce (Dec. 19, 2024), https://tinyurl.com/45ecvcxh.

For the same reason, the business community and its stakeholders benefit when political parties and their candidates work in close coordination to clearly communicate their policy platforms. Americans use candidate and party messaging to understand the impact of their electoral choices on the businesses they own, work at, or patronize. More coordination between these messengers results in more information about where candidates stand and thus more predictability about the policy consequences of elections. Parties are therefore key to helping voters understand how their vote will impact their local, state, and national business environment.

Empirical research has borne this out. Voters typically do not have time to research every single issue and candidate before an election—particularly when the subject matter is complex, as it often is for economic issues. Parties solve this information gap with a "partisan cue"—using the party's endorsement of a candidate or policy as a "signal" to help "ensure the responsiveness of electoral outcomes to the electorate's preferences." Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 Am. Poli. Sci. Rev. 63, 65, 72 (1994).

This Court has recognized the same basic reality. It has long observed that political parties are uniquely poised to "coordinate efforts" of their adherents "to secure needed legislation and oppose that deemed undesirable." *Ray v. Blair*, 343 U.S. 214, 220–21 (1952). They often do so through electoral advocacy—by telling their voters "whether a candidate adheres to the tenets of the party" and "is qualified for the position sought." *Eu*, 489 U.S. at 223. These party

heuristics—enabled by close coordination between a party and its candidates—are a highly effective "means of choosing candidates" and thus further "the integrity, fairness, and efficiency" of the electoral process. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364–65 (1997). Further, parties spending resources on messaging in coordination with their candidates can help shape those candidates' electoral communications. That furthers party discipline, "and without discipline, there's no party organization." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 104 (1990) (Scalia, J., dissenting).

These party functions are the mechanisms that make our democracy work. As Justice Scalia once explained, "[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." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Indeed. Political parties' coordination with their candidates helps ensure voters have the information they need, and the means to use that information to make informed choices in elections that will affect the nation's business community.

The business community both participates in, and benefits from, a robust exchange of ideas—driven by political parties. In this way, free association, free expression, and free enterprise are deeply intertwined.

C. The First Amendment Jealously Guards Political Parties' Right To Speak And Associate.

Because of political parties' uniquely important role in our democracy, this Court has consistently shielded parties from government efforts to dampen their expression. Indeed, while the First Amendment protects the right of all persons, whether acting individually or in concert, to spend money in furtherance of political speech, *see Citizens United*, 558 U.S. at 349 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."), the need for such protections is at its zenith when it comes to political parties. This is true for at least three reasons.

First, political parties inherently implicate the "right to associate with others." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021). As this Court has long recognized, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," given "the close nexus between the freedoms of speech and assembly." *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (citing *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937); *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). As a result, an "individual's freedom to speak … could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward th[at] end[ ] were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Thus, just as electoral expression is given robust First Amendment protections, *see supra* section I.A, so too

is association for the purpose of furthering that expression. Indeed, the "political freedom of the individual" has "traditionally been [exercised] through the media of political associations." *Sweezy v. State of New Hampshire by Wyman*, 354 U.S. 234, 250 (1957).

Political parties are, by their very nature, associations formed to further electoral expression. For that reason, it "is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments." *Eu*, 489 U.S. at 224. That protected association includes "a right to identify the people who constitute the association and to select a standard bearer who best represents the party's ideologies and preferences." *Ibid.* (cleaned up). And that association between the party and its members means that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

Thus, while the First Amendment looks skeptically on all government speech restrictions, they are "particularly egregious where the State censors the political speech a political party shares with its members." *Eu*, 489 U.S. at 224. These concerns are compounded where the speech restrictions operate "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986). Ultimately, democratic systems—as with most human endeavors—depend on individuals acting in concert.

A restriction on the operation of a political party is thus a restriction on the operation of democracy itself.

Second, and relatedly, a political party and "its candidates" are "inextricably intertwined." *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 630 (1996) (Kennedy, J., concurring) (*Colorado I*). Indeed, the "party nominates its candidate; a candidate often is identified by party affiliation throughout the election and on the ballot; and a party's public image is largely defined by what its candidates say and do." *Colorado II*, 533 U.S. at 469 (Thomas, J., dissenting). At bottom, political parties exist to "promot[e] candidates" so that they may accrue "political power." *Eu*, 489 U.S. at 224. Thus, speech by political parties also necessarily implicates the First Amendment's protections for a candidate's "freedom to speak without legislative limit." *Cruz*, 596 U.S. at 302 (quotations omitted). The reverse is also true: severing the link between party and candidate "suffocates" the party's right to support its chosen candidate. *Eu*, 489 U.S. at 224. The candidate and the party are codependent—a relationship that benefits the democratic process. The relationship cannot be inhibited without impeding the ability of Americans to select those who will govern them.

Third, limitations on speech by political parties infringe on the right of individuals to *receive* information from willing speakers. Even individuals who do not partake in collective political action themselves—individuals whose participation in the electoral system may be limited to casting a ballot on election day—nevertheless benefit from those who choose to act in concert. That is because associations strengthen the voice of those who participate, which,

in turn, allows messages to reach those who would otherwise lack access to such information. That information, in turn, strengthens our democracy by enabling voters to understand where the parties and candidates stand on crucial issues, including those that affect the businesses in their community. *See supra* section I.B.

For these reasons, the "First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). It is thus "well established that the Constitution protects the right to *receive* information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (emphasis added); *see also Murthy v. Missouri*, 603 U.S. 43, 75 (2024) ("we have recognized a First Amendment right to receive information and ideas") (quotations omitted). In short, restricting the operation of parties "hamstrings voters seeking to inform themselves about the candidates and the campaign issues." *Eu*, 489 U.S. at 223.

II. THE COORDINATED PARTY EXPENDITURE LIMITS ARE UNCONSTITUTIONAL.

The coordinated party expenditure limits cannot be squared with these core First Amendment principles. The limits cap the amount that parties may spend on messaging that is coordinated with their own candidates for office. *See* 52 U.S.C. § 30116(d). The limits thus restrict precisely what the First Amendment was designed to protect—the

"uninhibited marketplace of ideas," *303 Creative*, 600 U.S. at 585 (quotations omitted), which is essential to a properly functioning democracy.

The Government cannot sustain this restriction for two independent reasons. *First*, Congress did not enact the coordinated party expenditure limits for a permissible anticorruption purpose. *Second*, even if the Court accepted a *post hoc* anticorruption interest, the coordinated party expenditure limits do not further that interest and are inadequately tailored.

A. The Government Failed To Offer A Contemporaneous Anti-Corruption Interest To Justify The Coordinated Party Expenditure Limits.

"This Court has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *Cruz*, 596 U.S. at 305. So, to uphold the coordinated party expenditure limits, the Government must advance an anticorruption interest.

That interest must be genuine. When the Government "interfer[es] with First Amendment rights," it must offer a "contemporaneous" justification—not one "invented *post hoc* in response to litigation." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022). That requirement comes from bedrock principles of constitutional law. When fundamental rights are at stake, this Court assesses "the actual considerations that provided the essential basis for the" challenged conduct, "not *post hoc* justifications the legislature in theory could have used but in reality did not." *Bethune-Hill v. Virginia State*

Bd. of Elections, 580 U.S. 178, 189–90 (2017); *United States v. Virginia*, 518 U.S. 515, 533 (1996); *accord Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25–28 (1st Cir. 2020). Thus, this Court has long rejected "*post hoc* rationalizations" when the Government restricts speech, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988), and regularly inquires into "whether the government is in fact pursuing the interest it invokes," *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011); *see Edenfield v. Fane*, 507 U.S. 761, 768 (1993) ("Neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction.").

No contemporaneous anticorruption interest supports the coordinated party expenditure limits. "To the contrary, this Court's opinions suggest that 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." *Colorado I*, 518 U.S. at 618. As Justice Thomas explained in *Colorado II*, that was Congress's intent for both "coordinated" and "independent expenditures." 533 U.S. at 475 n.5.

The legislative record confirms Congress's pursuit of an impermissible purpose. Congress enacted party spending limits in 1974 as part of a comprehensive scheme to cap *all* speakers' expenditures in order to minimize what it saw as excess spending. Congress had at the time enacted across-the-board contribution and expenditure limits on donors and candidates. *See* Pub. L. No. 93-443, § 101(a), 88 Stat 1263, 1263–64 (1974). But "[n]otwithstanding any other provision of

law with respect to limitations on expenditures or limitations on contributions," political parties would be subject to a different expenditure cap. *Id.*, 88 Stat. at 1265–66. The reason, Congress explained, was to preserve the "role" parties played "pooling resources from many small contributors" and then making "expenditures" for their candidates. S. Rep. No. 93-689, at 7 (1974); *accord* H.R. Rep. No. 93-1438, at 56 (1974) (Conf. Report) (adopting this provision from "the Senate bill"). Indeed, this Court recognized that the "Party Expenditure Provision" functioned as an "exception" to FECA's across-the-board expenditure limits for other persons. *Colorado I*, 518 U.S. at 611 (emphasis omitted).[5]

To be sure, other aspects of FECA are designed to avoid evasion of Congress's anticorruption measures. For example, Congress's earmarking rule prevented "indirect[ ]" contributions "through an intermediary or conduit." Pub. L. No. 93-433, § 101, 88 Stat. at 1264. But the party expenditure limits evince no such purpose. *See* FEC Br. 23–27. And indeed, Congress made no mention of an evasion rationale as to the expenditure limits. *See Colorado II*, 533 U.S. at 475 n.5 (Thomas, J., dissenting) (explaining Congress "made no finding that the Party Expenditure

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[5] Contrary to Congress's intent, this legislative effort in fact diminished the role of parties by limiting their expenditures. And that diminution intensified after subsequent decisions of this Court allowed donors to "spen[d] unlimited funds on independent expenditures on behalf of" their preferred candidate, *McCutcheon*, 572 U.S. at 214, thereby allowing other speakers to substantially outspend parties, *see* Pet. Br. 48 (explaining "candidates and donors have flocked to Super PACs," which are "moving in the direction of assuming most of the functions of parties today" (quotations omitted)).

Provision" addressed "corruption"). That omission is no surprise. As this Court recognized only a few years later, Congress subjected the party expenditures to limits as part of its scheme to avoid "wasteful, excessive, or unwise" spending in "political campaigns," *Buckley*, 424 U.S. at 57, not to advance any anticorruption interest.

That is not a permissible purpose. Balancing the speech of parties relative to other speakers and reducing waste have nothing to do with preventing *quid pro quo* corruption or its appearance. *Contra Cruz*, 596 U.S. at 305. To the contrary, this Court has held in "case after case" that the Government may not restrict speech in the name of "improving, or better balancing the marketplace of ideas." *Moody v. NetChoice, LLC*, 603 U.S. 707, 732–33 (2024); *see also McCutcheon*, 572 U.S. at 207 ("it is not an acceptable governmental objective to 'level the playing field'"); *Buckley*, 424 U.S. at 48–49; *Citizens United*, 558 U.S. at 350.

Because no "contemporaneous" anticorruption justification supports the coordinated party expenditure limits, they are invalid and cannot be saved by a "*post hoc*" rationale. *Kennedy*, 597 U.S. at 543 n.8.

B. No Conceivable Anticorruption Interest Could Justify The Coordinated Party Expenditure Limits.

In the proceeding below, the Government claimed that contrary to what the contemporaneous legislative record shows about Congress's actual purposes, the coordinated party expenditure limits in fact serve an

anticorruption interest. Even if the Court were to consider that *post hoc* anticorruption rationale, the coordinated party expenditure limits violate the First Amendment.

For starters, the coordinated party expenditure limits face an uphill battle because our nation's "history" shows them to be "anomalies." *Chiafalo v. Washington*, 591 U.S. 578, 596 (2020). Judge Bush's survey of the historical evidence below revealed that enactment-era Americans "imposed no restrictions on how the emerging political parties communicated to the public who their candidates were and where they stood on the issues." JA767–68. To the contrary, "in the period leading to the American Revolution, coordination of speech was necessary to rally the American colonies, later states, in their fight for independence." JA756–57. And this practice of political coordination continued after the nation won its independence. Early political movements freely coordinated "financial support" for initiatives, including "messaging through news media." JA763–64. Thus, free coordination between and among political movements to deliver their messages to the public has a deep Founding Era pedigree.

The coordinated party expenditure limits are anomalous not only historically, but doctrinally too. This Court has consistently recognized robust protections for political-party expression and association. For example, in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Court held unconstitutional a law that required "voters in any party primary to be registered members of that party," *id.* at 210–11, 229, because it impermissibly "limit[ed] the Party's associational opportunities," *id.*

at 216. In *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214 (1989), the Court struck down a law that prohibited "political parties from endorsing candidates in party primaries," *id.* at 216, because it "directly hamper[ed] the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues," *id.* at 223 (collecting cases). And in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), the Court held unconstitutional limits on independent expenditures by parties, *id.* at 608, recognizing that "expression of a political party's views is core First Amendment activity," *id.* at 616 (quotations omitted).

The Court broke from this historical and doctrinal practice in *Colorado II*. There, five members of the Court rejected a facial challenge to an earlier version of the coordinated party expenditure limits. *Colorado II*, 533 U.S. at 437. Before that sharply divided decision, this Court had "never upheld an expenditure limitation against political parties." *Id.* at 475 (Thomas, J., dissenting). And it has rejected such limits since then. *See Randall v. Sorrell*, 548 U.S. 230, 259 (2006) (plurality) (holding unconstitutional "contribution limits" that "would reduce the voice of political parties … to a whisper") (quotations omitted). Thus, the coordinated party expenditure limits and *Colorado II* should be recognized for what they are: a First Amendment aberration.

The coordinated party expenditure limits also plainly run afoul of the First Amendment. This Court has repeatedly indicated that such limits may be subject to strict scrutiny, *see Cruz*, 596 U.S. at 305; *McCutcheon*, 572 U.S. at 199, or, at the very least,

"'closely drawn' scrutiny," *Cruz*, 596 U.S. at 305 (citing *Buckley*, 424 U.S. at 25). The coordinated party expenditure limits fall far short "under either standard." *See ibid.*

Consider first the heavy First Amendment burdens imposed by the limits. As explained above, political-party speech is inextricably bound with the expression of the parties' candidates and adherents. The relationship between party and candidate is the paradigmatic form of political free association the First Amendment was designed to protect, and it is an essential component—perhaps *the* essential component—of American democracy. These features of political-party speech place it in the heartland of the First Amendment, *see supra* section I.C, and therefore demand the strongest level of constitutional protection. Indeed, this Court has recognized that "it is particularly egregious where the State censors the political speech a political party shares with its members." *Eu*, 489 U.S. at 224. The same goes for "freedom of association." *Ibid.*; *accord Colorado II*, 533 U.S. at 471 n.3 (Thomas, J., dissenting) (explaining that coordinated party expenditure limits require "an intrusive and constitutionally troubling investigation of the inner workings of political parties").

The Government cannot justify these burdens because it fails to show that the coordinated party expenditure limits prevent "'*quid pro quo*' corruption or its appearance." *Cruz*, 596 U.S. at 305. As Judge Thapar recognized, "it doesn't make any sense to think of a party as 'corrupting' its candidates." JA734. After all, "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the

candidate takes office or is reelected, his votes." *Colorado II*, 533 U.S. at 476 (Thomas, J., dissenting). That relationship between party and candidate is not corruption, but protected association. Tellingly, the Government below "point[ed] to nothing in the certified record demonstrating quid pro quo corruption tied to donations to party committees." JA857 (Readler, J.).

But even if the coordinated party expenditure limits acted in some way to prevent *quid pro quo* corruption, they are a poor "fit" for that purpose. *McCutcheon*, 572 U.S. at 199. Petitioners and the decisions below persuasively explain that the anticircumvention theory of preventing corruption relies on a "prophylaxis-upon-prophylaxis-upon-prophylaxis-upon-prophylaxis-upon-prophylaxis approach" that strongly suggests "the regulation may not be necessary for the interest it seeks to protect." Pet. Br. 23; JA737. The lower court's fit analysis also ignores obvious, less burdensome alternatives, such as the "earmarking" rule that already prevents donors from circumventing candidate-contribution limits through party contributions. Pet. Br. 31–33. Whether assessed under interest or fit, the outcome is the same: the coordinated party expenditure limits contravene the First Amendment.

The Government can—and must—police corruption. Nobody disputes that. But the Government cannot use unfounded fears of corruption as a pretext for restricting speech and association protected by the First Amendment. And yet the record shows that to be the case here because "[d]espite having decades to look for" evidence that the coordinated party expenditure limits prevent

corruption, the findings are "paltry," and the purported solution "nonsensical." JA739 (Thapar, J.).

III. THE COURT SHOULD NOT HESITATE TO OVERRULE *COLORADO II* IF NECESSARY.

As Petitioners explain, this Court can strike down the coordinated party expenditure limits without overruling *Colorado II*. Pet. Br. 34–40. But if the Court disagrees, it should not hesitate to take that step. Indeed, "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 917 (2018) (quotations omitted). Here, *Colorado II* is not only offensive to the First Amendment on its own terms, but its persistence threatens to undermine free expression more broadly.

Indeed, allowing the coordinated party expenditure limits to persist would endanger more than just political parties. These restrictions risk impeding the ability of all Americans to associate with their fellow citizens "through coordination of messaging, candidates, and supporters." JA755 (Bush, J.). It is not hyperbole to suggest that such restrictions threaten the very fabric of American democracy itself.

Just like political parties, the business community in the United States, including the Chamber and its members, exercises its right "to inquire, to hear, to speak, and to use information"—activities that,

regardless of speaker, are "an essential mechanism of democracy" and "a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. Indeed, "political speech does not lose First Amendment protection simply because its source is a corporation." *Id.* at 342 (quotations omitted).

Just like political parties, the business community and other speakers' expression is protected by the Constitution's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Cruz*, 596 U.S. at 302; *see Citizens United*, 558 U.S. at 343 ("Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster") (quotations omitted). These speakers, just like political parties, also enjoy a protected "freedom of association." *Ams. for Prosperity Found.*, 594 U.S. at 606. And all of these speakers generate expression that individuals have "the right to receive." *Kleindienst*, 408 U.S. at 762; *accord Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

While non-political-party speakers enjoy First Amendment rights to speak and associate in the political arena, they also face threats to those rights. The Chamber knows this firsthand. In *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), the Chamber and the American Medical Association were forced to challenge an FEC

rule that dramatically limited the degree to which the organizations were able to politically coordinate with their members. The D.C. Circuit recognized that this would "burden" the organizations' "First Amendment right to communicate with [their] members." *Id.* at 605 (quotations omitted) (citing *United States v. CIO*, 335 U.S. 106, 121 (1948)). The resulting "constitutional difficult[y]" led the Court to invalidate the FEC's rule. *See ibid.* Thus, just like political parties, other speakers face attempts to unconstitutionally restrict their political expression and association with their own members.

If this Court tolerates a constitutionally repugnant restriction on political parties' right to freely speak and associate, it could give lower courts license to uphold similarly wrongful limits on other speakers—or worse. Indeed, this Court has previously found that a campaign-finance statute was *more* constitutionally suspect when it "plac[ed] identical limits upon contributions to candidates, whether made by an individual or by a political party." *Randall*, 548 U.S. at 259. The Court reasoned, in part, that the law failed to respect the special role of political parties, and it expressly highlighted that the contribution limits in *Colorado II* were higher for political parties than for other entities. *Id.* at 258–59. *Colorado I* similarly hinted at particularly strong First Amendment protections for political parties, finding that the Constitution would not "deny … to political parties" a right that it "grants to individuals, candidates, and ordinary political committees." *Colorado I*, 518 U.S. at 618. The upshot is that lower courts may misread this Court's political-party precedents to mean that the Government has an even broader license to inhibit non-party entities' political

speech and association. *See also supra* section I.C; JA825 (finding FEC's argument particularly "weak[ ]" because it regulated "not just any speaker, but political parties, whose primary mission is to promote candidates for office"). Thus, if this Court allows onerous speech restrictions on political parties to stand, other political speakers may have to prepare for worse to come.

Indeed, there is evidence that *Colorado II* has already sprung a leak in this Court's First Amendment jurisprudence. *See* Pet. Br. 45–46. For example, in *Corren v. Condos*, 898 F.3d 209 (2d Cir. 2018), the Second Circuit upheld limits on "comparatively benign" party contributions. *Id.* at 226. It expressly relied on *Colorado II* to distinguish this Court's teaching in *Randall* that such restrictions "threaten harm to a particularly important political right, the right to associate in a political party." *Id.* at 224–25 (quoting *Randall*, 548 U.S. at 256). In *Alabama Democratic Conference v. Broussard*, 541 F. App'x 931 (11th Cir. 2013) (per curiam), the Eleventh Circuit declined to enjoin a law that "prohibits all transfers of funds from one PAC to another"—even transfers "used only for independent expenditures." *Id.* at 932. It cited *Colorado II* for the proposition that "candidates, donors, and parties test the limits of the current law" and thus accepted the State's assertion that a PAC recipient could simply lie and use for "campaign contributions" funds earmarked for "independent expenditures." *Id.* at 934–35. But that move cannot be squared with this Court's teaching that it has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Cruz*, 596 U.S. at 307 (quoting *McCutcheon*, 572 U.S. at 210). In *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir.

2011), the Second Circuit upheld an election restriction after citing *Colorado II* for the proposition that limiting "undue influence" was a legitimate aim for regulating election contributions. *Id.* at 186–87 (emphasis omitted). But this Court has "consistently rejected attempts … to limit the general influence a contributor may have over an elected official" as a justification "to restrict campaign speech." *Cruz*, 596 U.S. at 305. In *Republican Party of New Mexico v. Torrez*, 687 F. Supp. 3d 1095 (D.N.M. 2023), a district court relied heavily on *Colorado II* to find that contributions between state parties and candidates created a "risk of circumvention" due to the "close relationship between … parties and their candidates," even where there was no "specific evidence" that the relationship facilitated circumvention. *Id.* at 1131–34. But this Court has refused to credit "circumvention concerns" based on "speculation" devoid of "real-world" evidence. *McCutcheon*, 572 U.S. at 217–18

Lower courts continue to cite *Colorado II* for dubious constitutional principles and to uphold election restrictions beyond just the coordinated party expenditure limits at issue in this case. The Court should thus declare unconstitutional the coordinated party expenditure limits, and it should not hesitate to overrule *Colorado II* if necessary to reach that result.

CONCLUSION

The Court should reverse.

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Respectfully Submitted,

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