No. 24-3051

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*,
Plaintiff-Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendant-Appellees.

On Certification from the United States District Court
for the Southern District of Ohio (Cole, J.)
District Court Case No. 1:22-cv-639

THIRD BRIEF OF PLAINTIFF-APPELLANTS NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, J.D. VANCE, AND STEVEN CHABOT

Jessica Furst Johnson
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
2300 N Street, N.W.
Suite 643A
Washington, DC 20037
Phone: (202) 737-8808
jessica@holtzmanvogel.com

Counsel for Plaintiff-Appellants National Republican Senatorial Committee & National Republican Congressional Committee

Noel J. Francisco
Donald F. McGahn II
John M. Gore
E. Stewart Crosland
Brinton Lucas
Charles E.T. Roberts
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Phone: (202) 879-3939
njfrancisco@jonesday.com

Sarah Welch
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114
Phone: (216) 586-3939
swelch@jonesday.com

Counsel for Plaintiff-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The FEC agrees there is "only one permissible ground for restricting" coordinated party expenditures—"the prevention of '*quid pro quo*' corruption or its appearance." *FEC v. Cruz*, 596 U.S. 289, 305 (2022); *see* FEC Br. (Br.) 22. Yet it identifies *no* evidence that FECA's limits on those expenditures actually prevent *quid pro quos*—whether from the record here, materials from cases long past, or the smattering of articles it has recently curated from the internet.

Instead, the FEC gestures at an alleged "intolerable risk" of *quid pro quos* inherent in coordinated party spending, Br. 3, but never claims there is any threat that candidates will be bought by *their own parties*. Rather, its sole argument is that it must cabin this core political speech of *parties* to prevent *donors* from seeking to launder *quid pro quos* through party committees. Specifically, the FEC speculates that donors might "circumvent the base limits" on candidate contributions by donating to parties; parties, in turn, might funnel the funds to candidates through coordinated expenditures; and candidates, in exchange, might do the donors' bidding in office. Br. 27, 32-36. But the base limits on contributions to candidates and parties "are themselves prophylactic measures" against such arrangements—as are disclosure requirements and FECA's earmarking rule. *Cruz*, 596 U.S. at 306. The FEC's "prophylaxis-upon-prophylaxis" approach is therefore "a significant indicator" of a First Amendment violation. *Id.*

The FEC offers nothing to dispel this constitutional concern. It never faces the fact that Congress enacted these limits not to prevent *quid pro quos* (by circumvention

or otherwise), but to limit money in politics. It never provides evidence of this supposed Rube Goldberg circumvention being *attempted*, let alone occurring. And it never explains why the onerous limits are needed when less burdensome tools are available.

In an effort to distract from these failures—each of which is fatal—the FEC accuses Plaintiffs of "relitigat[ing]" *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*). Br. 2. But contrary to the FEC's insinuation, *see* Br. 2-3, *Colorado II* did not address whether the challenged limits actually prevent *quid pro quo* corruption, much less upheld them on that basis, *see* NRSC Br. 41-42. Moreover, as the FEC admits, "Congress amended FECA" 13 years after *Colorado II* to allow *unlimited* coordinated spending—of contributions *triple* the usual amount—on other campaign activities of comparable value to candidates. Br. 18. Plaintiffs' challenge thus involves "a different statute" and different legal standards, and accordingly warrants "plenary consideration." *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (plurality). And there can be no serious question that the current limits fail under current law.

Nor can *Colorado II*'s rejection of a *facial* challenge to an earlier framework control Plaintiffs' *as-applied* challenge to current caps on party coordinated communications. "Courts do not resolve unspecified as-applied challenges in the course of resolving a facial attack," *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 476 n.8 (2007) (opinion of Roberts, C.J.), so *Colorado II*'s holding that *some* applications of the prior scheme were valid—including applications further removed from core political speech—in no way establishes that *this* application of the current scheme is.

ARGUMENT

I. THE COORDINATED PARTY EXPENDITURE LIMITS VIOLATE THE FIRST AMENDMENT

The FEC does not seriously dispute that the challenged limits burden Plaintiffs' First Amendment rights. NRSC Br. 24-27. It even admits the limits hamper the ability of NRSC and NRCC to speak effectively and impose substantial compliance costs on the speech in which they do engage. *See* Br. 34-35, 57 & n.8. The FEC therefore "'bears the burden of proving'" the limits are "'constitutional[].'" *Cruz*, 596 U.S. at 305. Even under "closely drawn" scrutiny, it must show that the limits both prevent *quid pro quo* corruption and are narrowly tailored. It has done neither.

A. The Limits Do Not Prevent *Quid Pro Quo* Corruption

The FEC—for good reason—never contends that the limits are necessary to prevent direct *quid pro quos* between candidates and parties. NRSC Br. 31. Instead, the FEC's sole defense is that it needs the limits to thwart "donors from circumventing" the base limits—"'themselves … a prophylactic measure'" against *quid pro quos*. Br. 54. This *quid pro quo*-by-circumvention theory is no more persuasive than a direct one.

1. Congress did not enact the limits to check *quid pro quos*

For starters, contrary to the FEC's suggestion, Congress did not cap coordinated party expenditures to "reduce the potential for corruption," Br. 47; *see* Br. 31-32, 35-36, but to "reduc[e] what it saw as wasteful and excessive campaign spending," *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (plurality) (*Colorado I*);

see NRSC Br. 30. That is the only conceivable explanation for FECA's adoption of *different* coordinated expenditure limits for *different* candidates. NRSC Br. 2. The FEC never explains why Congress would adopt varying limits if it were seeking to prevent what the Commission warns is a *universal* threat of *quid pro quos*-by-circumvention of FECA's *uniform* base limits. *See* Br. 22 (warning of alleged risks "inherent" in party coordinated expenditures).

Instead, the FEC asserts that the alleged risk of *quid pro quos*-by-circumvention arises through "large contributions" in "competitive races." Br. 39. But even if true, this assertion would only illuminate the FEC's failure to carry its burden. After all, the FEC never claims that the statutory factors used to compute the limits—office sought, state, voting-age population, and inflation—bear any connection to whether a race is "competitive" (or otherwise poses a risk of *quid pro quos*-by-circumvention). *Id.* Nor could it: California—which has not had a Republican Senator since 1992 and whose last Senate election was decided by a 21-point margin, https://perma.cc/5MHR-XANK—has the highest coordinated expenditure limit for Senate races in the country. *See* FEC, *Coordinated Party Expenditure Limits*, https://perma.cc/T9N9-9VJP. Thus, on the FEC's theory, Congress, in the name of preventing *quid pro quos*-by-circumvention, tolerated a *greater* risk of such schemes for some candidates (*e.g.*, over $3.7 million for California Senate candidates) than others (*e.g.*, under $1.4 million for Ohio Senate candidates), by enacting higher coordinated expenditure limits based on inapposite factors. *See id.* That theory makes no sense.

The FEC also never denies that its anticircumvention theory must be Congress's "'genuine'" reason for the limits rather than a "'*post hoc*'" litigation invention. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022); *see* NRSC Br. 31. But its trawl through legislative history uncovers nothing to prove that is the case. The best the FEC can dredge up are floor statements of individual legislators about a different bill that never became law. *See* Br. 51-52. Yet even when it comes to enacted legislation, "a few stray floor statements" cannot carry the FEC's constitutional burden. *Cruz*, 596 U.S. at 310.

In any event, "[n]othing these legislators said … constitutes actual evidence that the [limits are] necessary to prevent *quid pro quo* corruption or its appearance." *Id.* Rather, they voiced support for "subject[ing] party committees to the same spending limits as other political committees," Br. 52 n.7, which are banned from coordinating *any* expenditures with candidates beyond their base limits. So if anything, this history cuts *against* the FEC: had Congress wanted to foreclose *quid pro quos* through coordinated party expenditures, it would have outlawed those expenditures entirely. Congress's decision to permit them—especially through an underinclusive scheme that permits unlimited spending in certain areas, *see infra* at 14-18—illustrates it acted for reasons unrelated to the rationale the FEC offers now. *See Colorado I*, 518 U.S. at 618.

Finally, the FEC cannot—and never even *tries* to—support its bald assertion that Congress saw coordinated party expenditures as "indistinguishable from [individuals'] contributions made directly to the candidate" and thus as "rais[ing] all the quid pro quo corruption risks stemming from any excessive contributions to candidates" by

individuals. Br. 32. That claim makes no sense: had Congress harbored that view, it would have banned the parties (which rely entirely on donor contributions) from engaging in any coordinated spending with candidates—just as it banned contributions above the base limit. It instead allowed coordinated party expenditures, subject to underinclusive limits, for the (impermissible) purpose of "reducing the allegedly skyrocketing costs of political campaigns." *Buckley v. Valeo*, 424 U.S. 1, 57 (1976).

2. The FEC offers no evidence justifying the limits

The FEC's inability to establish that its rationale was Congress's actual reason for enacting the challenged limits alone is fatal. *Kennedy*, 597 U.S. at 543 n.8; NRSC Br. 31. Yet its revisionist account also fails on its own terms. The FEC identifies no "'record evidence' … demonstrating the need to address" a constitutionally compelling problem through the limits. *Cruz*, 596 U.S. at 307. Indeed, for all the FEC's boasts of a "robust record," Br. 22, neither the district court's 178-paragraph factual findings nor the Commission's brief contains any evidence that the limits are necessary to prevent *quid pro quos*-by-circumvention. Findings, R.49-1 ¶¶ 1-178, PageID##5496-5537. The FEC has therefore failed to justify the current coordinated party expenditure regime's "prophylaxis-upon-prophylaxis approach." *Cruz*, 596 U.S. at 306.[1]

[1] The FEC tries to recast the challenged limits as "a corollary" of the base limits rather than another "prophylaxis[]," Br. 52, but *McCutcheon* rejected the same move. Despite *Buckley*'s description of the aggregate limits "as 'no more than a corollary' of the base limit," *McCutcheon* concluded the "aggregate limits" were a "'prophylaxis-upon-prophylaxis approach'" because they were "layered on top" of the "prophylactic" base limits "to prevent … circumvention." 572 U.S. at 200, 221.

a. As its chief "'evidence' of corruption," the FEC points to proposed findings the district court rejected and a handful of internet articles. Br. 40; *see* Br. 40-43. These examples fail to discharge its burden for at least three reasons.

First, as the FEC's expert conceded, *none* involves coordinated party expenditures being used as part of a *quid pro quo*. *See* Krasno Dep. Tr. 107:16-109:25, R.41-4, PageID##4280-82; *see also* Krasno Rept., R.36-1 at 13, PageID#411 ("coordinated expenditures do not feature prominently in [my] examples"); La Raja Dep. Tr. 44:14-15, R.41-5, PageID#4667 (Plaintiffs' expert: "The examples [the FEC] gave …[don't] have anything to do with coordinated expenditures."). This is unsurprising, as parties make their own decisions about how to spend their funds and are particularly unlikely to join in three-way conduit deals involving a candidate and donor. NRSC Br. 32-33.

The FEC had plenty of obvious places to look for such examples—and still came up empty-handed. For instance, it identifies no examples from its experience with the types of unlimited coordinated party spending FECA has permitted for decades. *See* Br. 40-43; NRSC Br. 35. It likewise identifies no *quid pro quos* associated with unlimited coordinated expenditures under the 2014 amendment, *see* Br. 40-43; NRSC Br. 35, as its expert again conceded, *see* Krasno Dep. Tr. 161:17-162:1, R.41-4, PageID##4334-45. And it comes up dry on examples in States lacking analogous limits on coordinated spending. *See* Br. 40-43; NRSC Br. 34-35 & n.4; Ohio Br. 14-15; IFS Br. 5-10; *see also* Krasno Dep. Tr. 164:2-165:11, R.41-4, PageID##4337-38 (FEC's expert unable to offer any example from these States). If the FEC were correct that "[u]nlimited

coordinated spending … presents a substantial and foreseeable risk of quid pro quo corruption," Br. 31, surely it could come up with *some* real-world examples. Its failure to do so dooms its defense. *See Cruz*, 596 U.S. at 305-08.

Second, even on the FEC's telling, many of its examples do not involve *quid pro quos*—"a direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192; *see also* La Raja Dep. Tr. 44:13-14, R.41-5, PageID#4667 (Plaintiffs' expert: "I haven't seen that kind of quid pro quo corruption."). For instance:

- The examples of "party donors" publicly calling for tax legislation and "Samuel Bankman-Fried's alleged attempts to obtain a favorable regulatory environment," Br. 41, reflect at most attempts to garner "'greater influence with or access to the candidate,'" which are "not the type of *quid pro quo* corruption the Government may target," *Cruz*, 596 U.S. at 307-08, even when they involve spending "large sums of money in connection with elections," *McCutcheon*, 572 U.S. at 208. Indeed, of the many charges made against Bankman-Fried, bribery of U.S. candidates or officeholders was not among them.
- The FEC's examples from Connecticut, New York, Louisiana, Massachusetts, and Wisconsin do not involve *quid pro quos*, but instead are alleged violations of other state campaign-finance laws. Br. 42-43.

Third, the FEC treats "report[ed]," "apparent," and "accused" improprieties as fact, Br. 40-43—often invoking unreliable sources and failing to tell the whole story.

Indeed, in rejecting the proposed findings the FEC now resurrects, the district court noted "the serious hearsay problems" with relying on "reporting" or "so-called factual findings in other cases," as such sources have not been "tested through discovery *here*." Cert. Order, R.49 at 31-32, PageID##5484-85. That criticism applies with full force to the FEC's newly-unearthed internet pieces. For instance:

- The FEC's own source describes patronage allegations regarding the 2014 Tsunis ambassadorship nomination, as "less clear-cut," FEC Exh. 147, R.39-27, PageID#3655-57, and the FEC fails to mention Tsunis is a Senate-confirmed ambassador, an unlikely post for someone involved in a publicly alleged "pay-for-play," Br. 41; *see* U.S. Embassy & Consulate in Greece, *Ambassador George J. Tsunis*, https://perma.cc/JTZ9-KLRV (last visited May 3, 2024).
- According to the FEC's proposed findings (and contrary to its brief), the Tamraz contributions were "not ultimately successful" in prompting official action, as the National Security Council "opposed" his efforts. FEC Proposed Findings ¶ 91, R.43, PageID##5146-47; *see* Br. 40-41.
- The Nixon matter, Br. 40, pre-dated FECA and would not be possible today due to the Act's base limits, earmarking rule, and disclosure requirements, *see* 52 U.S.C. §§ 30101(8)(A)(i); 30116(a)(8).

- The guilty pleas from Wisconsin and Ohio, Br. 42, involve unavailable or disputed facts, *see In re Chvala*, 730 N.W.2d 648, 649 (Wis. 2007); Dkt. No. 1:09-cr-317, ECF Nos. 8, 22 (N.D. Ohio) (sealed plea agreements).
- The Louisiana "accus[ations]" found on the internet, Br. 43, were first published by an advocacy group dedicated to "nvestigative [sic] journalism" and involved intraparty allegations surrounding the Democratic Party's support for two candidates in the same race, not allegations of illegal conduct. S. Sneath, *Louisiana Democratic Party "Funneled" Utility Donations To Climate Candidate's Challenger*, LA. ILLUMINATOR (Jan. 25, 2023), https://perma.cc/2SH2-YDR4.
- The Connecticut, New York, Louisiana, and Wisconsin matters, Br. 42-43, did not lead to prosecution or enforcement actions, suggesting the accused "were not guilty—a possibility that the [FEC] does not entertain," *McCutcheon*, 572 U.S. at 217.

Notably, the FEC never says that *it* took action in any of these cases, underscoring just how weak this evidence is. *See id.* These examples therefore wholly fail to justify the extra prophylaxis of the challenged limits. *See Cruz*, 596 U.S. at 305-08.

b. The FEC fares no better in observing that parties and their candidates are "'inextricably intertwined … in the conduct of an election.'" Br. 36. If anything, that truism proves that limiting coordinated expenditures between them is nonsensical; if their interests are one and the same, it is difficult to understand how one could improperly influence the other. *See* NRSC Br. 52-53.

The FEC's follow-on claim that parties' "structures and objectives pose risks of quid pro quo corruption that Congress perceived," Br. 36, fares no better. The FEC identifies no evidence of such "risks," much less that Congress "perceived" any when it enacted the coordinated party expenditure limits for other reasons. *See* Br. 36-39. More to the point, the FEC offers no evidence of parties acting as *quid pro quo* conduits for *donors*, and thus, no instances of donors using "party fundraising … to leverage party contributions over officeholders to extract improper quos." Br. 37.

In fact, the FEC's various insinuations about how parties' "structures and objectives" create this alleged risk, Br. 36, are puzzling at best and disingenuous at worst. The FEC warns that "[o]fficeholders and candidates know who the major donors to their parties are," Br. 37—but so does every person with an internet connection, thanks to the Commission's practice of posting parties' disclosures online "almost immediately after they are filed," *McCutcheon*, 572 U.S. at 224. Nor is there anything suspect in "[j]oint fundraising" committees. Br. 38. "Lest there be any confusion, a joint fundraising committee is simply a mechanism for individual committees to raise funds collectively, not to circumvent base limits or earmarking rules" or disclosure requirements. *McCutcheon*, 572 U.S. at 215. And if Congress were concerned that candidate participation in party committees created an unacceptable risk of *quid pro quos*-by-circumvention, *see* Br. 37, it would have banned, not permitted, coordinated party expenditures above the base limits.

Finally, the passages the FEC cites (Br. 36-37) from *McConnell v. FEC*, 540 U.S. 93 (2003), do more to prove Plaintiffs' case than the Commission's. Those passages addressed the 2002 ban on unlimited "soft money" contributions to parties. *Id.* at 147, 155. They thus say nothing about any "risks" of donors "leverag[ing] party contributions" under the current base limits "to extract improper quos." Br. 37. Rather, the post-*Colorado II* soft-money ban is another changed circumstance warranting plenary review of the current coordinated expenditure regime. NRSC Br. 6-7, 46-50.

c. Lacking any record evidence in *this* case, the FEC resorts to the record in *Colorado II*, seizing on the "tallying" system the Democratic Senatorial Campaign Committee (DSCC) used over two decades ago. Br. 33. But that system was "legal," *Colorado II*, 533 U.S. at 459 n.22, as *the FEC itself acknowledged* two years after *Colorado II*, *see* Seventh General Counsel's Report, Matters Under Review 4831/5274 at 3 n.2 (Oct. 10, 2003), R.41-11, PageID##4806-10. It therefore is not proof of (illegal) circumvention. And even if it were, it would *disprove* that the coordinated expenditure limits prevent circumvention because those limits did not restrict that tally system "in any way." *Colorado II*, 533 U.S. at 480 (Thomas, J., dissenting).

Moreover, the FEC points to no record evidence of any similar system *now*. That omission is critical: "'current burdens'" on constitutional rights "'must be justified by current needs.'" *Shelby Cnty. v. Holder*, 570 U.S. 529, 536 (2013); *see, e.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 802 (1988). Thus, the FEC cannot defend against this challenge by pointing to the *Colorado II* majority's reliance upon a 2001 tallying system

to uphold the then-existing limits. *See* Br. 33. That would be true even if it had properly quoted *Colorado II*—which it did not. In particular, the FEC points to a passage about "assur[ing]" a candidate "that donations through a party could result in funds passed through to him for spending on virtually identical items as his own campaign funds." *Id.* (quoting *Colorado II*, 533 U.S. at 460). That passage was not discussing the tallying system, but rather a hypothetical the *Colorado II* majority acknowledged would be covered by the "earmarking" rule. 533 U.S. at 460 n.23.

In any event, the *Colorado II* majority thought the DSCC's tallying system indicated the base limits "could be" evaded but for the coordinated expenditure limits, *id.* at 459 n.22, but the Supreme Court has since made clear that such "speculati[on]" cannot sustain a First Amendment burden, *McCutcheon*, 572 U.S. at 210. And the *Colorado II* majority's concerns that the system "multiplied" "the donor's influence" and ensured "the needier candidates who receive the benefit of party spending know whom to thank," 533 U.S. at 460 n.23, are no longer constitutionally relevant, NRSC Br. 42. The DSCC's 2001 tallying system in *Colorado II* is a relic both factually and legally; it cannot justify the current limits.

d. Ultimately, the FEC is left complaining that it is impossible to provide evidence that *quid pro quos* would be rampant but for the challenged limits. Br. 39-40. The Supreme Court has met such arguments without sympathy. Even though "no data can be marshaled to capture perfectly the counterfactual world in which [the] limits do not exist," the FEC must still supply evidence that "'confirms a serious threat of abuse,'"

not "speculation" about "'subtle'" and "'complex'" mechanisms "'of achieving circumvention.'" *McCutcheon*, 572 U.S. at 217-19. Yet at best, the latter is all the FEC offers. And "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Wisconsin Right To Life*, 551 U.S. at 474 (opinion of Roberts, C.J.).

3. The limits are fatally underinclusive

Finally, that the limits are "wildly underinclusive when judged against [their] asserted justification" of foreclosing *quid pro quos*-by-circumvention "is alone enough to defeat" them. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011); *see* NRSC Br. 35-36. FECA's longstanding exemptions allow parties to make *unlimited* coordinated expenditures for voter registration and get-out-the-vote activities (GOTV) on behalf of presidential candidates and to publicly disseminate certain campaign materials. NRSC Br. 13. And the FEC has long recognized that such activities "ensure the active participation of political parties in advancing the election of their nominees." FEC Br. at 44, *FEC v. Americans for Change*, 455 U.S. 129 (1982) (No. 80-1067), 1981 WL 390476.

The FEC's attempt to change its tune now falls flat. In a cryptic footnote (Br. 47 n.6), it suggests these *campaign activities* are less valuable or constitutionally protected than *campaign advertisements*. But it offers no support for this counterintuitive proposition. The FEC notes (*id.*) the *McConnell* majority believed campaign advertisements "benefit directly federal candidates." 540 U.S. at 170. But the same is true of "voter registration, voter identification, GOTV, and generic campaign activity," which the *McConnell* majority said "all confer substantial benefits on federal candidates." *Id.* at 168. Congress

nonetheless has long allowed *unlimited* coordinated expenditures on such activities—including non-generic, candidate-specific voter-registration and GOTV far more beneficial to a candidate than the generic party activity at issue in *McConnell*—which only underscores the limits' underinclusivity on the FEC's own theory. NRSC Br. 13.

The FEC likewise accepts that Congress's 2014 amendment lets parties engage in unlimited coordinated spending on presidential nominating conventions (subject to a $20 million total cap), party infrastructure, and candidate legal fees in all manner of "legal proceedings"—all from accounts with base-contribution limits *three times* higher than those for general operating accounts. *Id.* at 14 & n.3. It nevertheless waves away these expenditures as "*inapposite*" on the premise they do "not … *influence federal elections*." Br. 28. But Congress thought otherwise: all funds entering these accounts are "contributions" and all funds spent from them are "expenditures" under FECA, 52 U.S.C. § 30116(d)(5), meaning they are raised and spent "for the purpose of influencing an[] election for Federal office," *id.* §§ 30101(8)(A)(1), (9)(A)(1). Indeed, Congress exempted payments out of these new accounts from the coordinated *expenditure* limits, *id.* § 30116(d)(5), confirming the limits would otherwise apply.

The FEC's assertion also blinks reality. "There can be no serious doubt that the nominating conventions of the major parties" "are closely connected to elections" and implicate "the same corruption risks." *Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533, 555-57 (D.C. Cir. 2019) (en banc) (*LNC*) (Griffith, J., concurring in part and dissenting in part). Elections can likewise be "influenced by … election recounts and litigation

(which resolve whether an actual candidate wins or loses a particular election)." *Id.* Indeed, the FEC has long accepted campaign litigation can be "as much an effort to influence an election as is a campaign advertisement derogating [one's] opponent." Advisory Op. 1981-16 at 3 (June 25, 1980), https://perma.cc/7LRF-BGY5.

To prop up its puzzling argument to the contrary, the FEC invokes (Br. 28) identical floor statements from two legislators asserting that "many" of these expenditures, "such as recount and legal proceeding expenses, are not for the purpose of influencing Federal elections." 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (Rep. Boehner); *id.* at S6814 (daily ed. Dec. 13, 2014) (Sen. Reid). Even if such remarks could have any bearing on whether this spending falls within the *statutory* scope of "contribution" or "expenditures," 52 U.S.C. § 30101(8)(A)(1), (9)(A)(1), they cannot change the *reality* that such expenditures *do* carry that purpose.

In any event, even spotting the FEC its flawed premise, the question here is not whether coordinated expenditures from these accounts *can influence federal elections*, but whether they *raise concerns about quid pro quos* under the Commission's theory. They obviously do: the FEC warns without qualification (or support) of a "specific risk of corruption posed by unlimited coordinated party expenditures." Br. 51; *see* Br. 31-32 ("financing campaigns without limiting coordinated expenditures prompts unchecked opportunities for donor-candidate quid pro quos."); Br. 54 ("Without party coordinated expenditure limits, base limits would be entirely undermined."). It further argues that a risk of *quid pro quos*-by-circumvention lurks in the fact that the base limit on

contributions to party general operating accounts ($41,300) is "*more than 12 times*" higher than the base limit on contributions to candidates ($3,300). Br. 32. But the 2014 amendment creates a far *larger* disparity: a donor can give $123,900—*over 37 times* the $3,300 base limit—to each segregated account. 52 U.S.C. § 30116(a)(1)(B), (a)(9).

Yet the coordinated spending from these accounts is almost entirely unlimited. And the FEC never explains why a $123,900 contribution "'funneled'" to a candidate's litigation efforts (or nominating convention) is any less of a base-limit evasion than a $41,300 contribution used for his campaign ads. Br. 36. If anything, because these larger contributions are cabined to specified purposes (and hence more easily identifiable), they are arguably *more* susceptible to "'tacit understanding[s]'" among donors, parties, and candidates. Br. 17. Thus, as the FEC's own *amici* proclaim, the 2014 amendment "dramatically increased the amount of money that can flow through party committees to benefit donors' preferred candidates." CLC Br. 21. As a result, "[a]s a means of" preventing *quid pro quos*-by-circumvention, FECA's remaining limits are "so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002).

Finally, the FEC suggests NRSC and NRCC "acknowledged" in a prior comment to a proposed rulemaking that the 2014 amendment "does not bear on the coordinated party expenditure limit." Br. 28-29. That comment says precisely *nothing* about the limits. *See* Comment (Jan. 30, 2017), Notice 2016-10, https://perma.cc/2XJU-6QRD. It merely explained that the 2014 amendment "did not introduce any new concepts to the

law" in defining "convention funding, building and legal funds" and therefore encouraged the FEC not to undertake rulemaking to define those terms. *Id.* The FEC's desperate attempt to mischaracterize the comment only highlights it has no persuasive response to the limits' underinclusivity in light of the 2014 amendment.

B. Even If The Limits Sought To Stop *Quid Pro Quo* Corruption, They Would Not Be Narrowly Tailored

The limits also fail "closely drawn" scrutiny for a lack of "'narrow[] tailor[ing]." *McCutcheon*, 572 U.S. at 218; *see* NRSC Br. 38-41. While the FEC protests that "closely drawn" scrutiny does not require the "least restrictive" response, Br. 23-24 (cleaned up), heightened scrutiny can require that a law "be narrowly tailored" without demanding "the least restrictive means," *Ams. for Prosperity Found v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (*AFP*). And as the FEC does not deny, the limits would be "poorly tailored"—and thus not closely drawn—so long as "alternatives [are] available" to prevent *quid pro quos*-by-circumvention "while avoiding 'unnecessary abridgment' of First Amendment rights." *McCutcheon*, 572 U.S. at 218, 221. The FEC, however, fails to "demonstrate its need for [the limits] in light of any less intrusive alternatives." *AFP*, 141 S. Ct. at 2386. In fact, three readily available alternatives would suppress less speech while preventing (the speculative risk of) *quid pro quos*-by-circumvention.

First, Congress could simply "'tighten'" the "base limits" on contributions to parties. Br. 55; *see* NRSC Br. 39-40; McConnell Br. 13-14. The FEC's own expert *agreed* lowering this limit to the figure applicable to contributions to candidates would reduce

the "danger" of *quid pro quos* through "coordinated expenditures." Krasno Rept., R.36-1, at 16, PageID#414; *see* Br. 55. That solution would also better fit the FEC's anticircumvention goal by targeting "the delinquent actor"—*the donor* seeking to evade base limits—rather than reducing *the party's* speech. *McCutcheon*, 572 U.S. at 222. And it would better address the FEC's supposed examples of corruption, all of which focus on donor contributions. *See supra* at 7-10. While the FEC claims this approach "would be less closely drawn" and "much more" harmful to parties than the coordinated expenditure limits, it offers nothing to support that claim. Br. 55. Contrary to the FEC's speculation, this proposal would trade a potential reduction in *quantity of contributions* for a boost in *quality of expenditures*, since coordination enables parties to speak more effectively. NRSC Br. 24-27.

Second, the FEC ignores the efficacy of disclosure requirements. *Id.* at 40. "[D]isclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech," and is "effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided" now that the FEC posts disclosures online "almost immediately." *McCutcheon*, 572 U.S. at 223-24. Indeed, the FEC never suggests disclosure of contributions to and coordinated expenditures by parties is insufficient to allow it and third-party watchdogs to identify potential *quid pro quos*-by-circumvention. NRSC Br. 33. Instead, its supposed examples of corruption only underscore the effectiveness of disclosure requirements. *See supra* at 7-10.

Third, the FEC dismisses the current "anti-earmarking" rule as an "[in]complete response" to circumvention because it does not capture "understandings like 'tally' schemes and other latent arrangements." Br. 55. Setting aside both the lack of evidence that any party today uses the (lawful) tallying system described in *Colorado II* and the vagueness of unspecified "other latent arrangements," the solution is to strengthen the earmarking rule if necessary. *See McCutcheon*, 572 U.S. at 222-23. And the FEC's argument that *Colorado II* "foreclosed" reliance on FECA's earmarking provision as an alternative, Br. 56, misses the mark. Even if the existing *statutory* "earmarking provision does not define 'the outer limit of acceptable tailoring,'" courts can consider the possibility of "tighter" earmarking *regulations*, "especially when adopted in concert with other measures." *McCutcheon*, 572 U.S. at 223 (quoting *Colorado II*, 533 U.S. at 462). That possibility—which the FEC has not even *tried*—demonstrates that the coordinated expenditure limits violate the First Amendment.

II. *COLORADO II* CANNOT SAVE THE CURRENT LIMITS

With no defense under current law or facts, the FEC is left insisting *Colorado II* "forecloses" Plaintiffs' challenges. Br. 2. But in facially upholding coordinated expenditure limits as they stood in 2001, *Colorado II* did not purport to resolve whether a *different* statutory scheme—let alone its *application* to coordinated political advertising—would comply with the First Amendment. NRSC Br. 49. The FEC therefore seeks to extend, not defend, *Colorado II*.

A. *Colorado II* Does Not Control Plaintiffs' Facial Challenge

The FEC's hyperbole aside, Plaintiffs are not asking this Court to "substitute its judgment for that of the Supreme Court." Br. 3. They bring a facial challenge to a *different statutory regime* based on *different precedents* and *different facts* than those existing in 2001. Those three distinctions make all the difference.

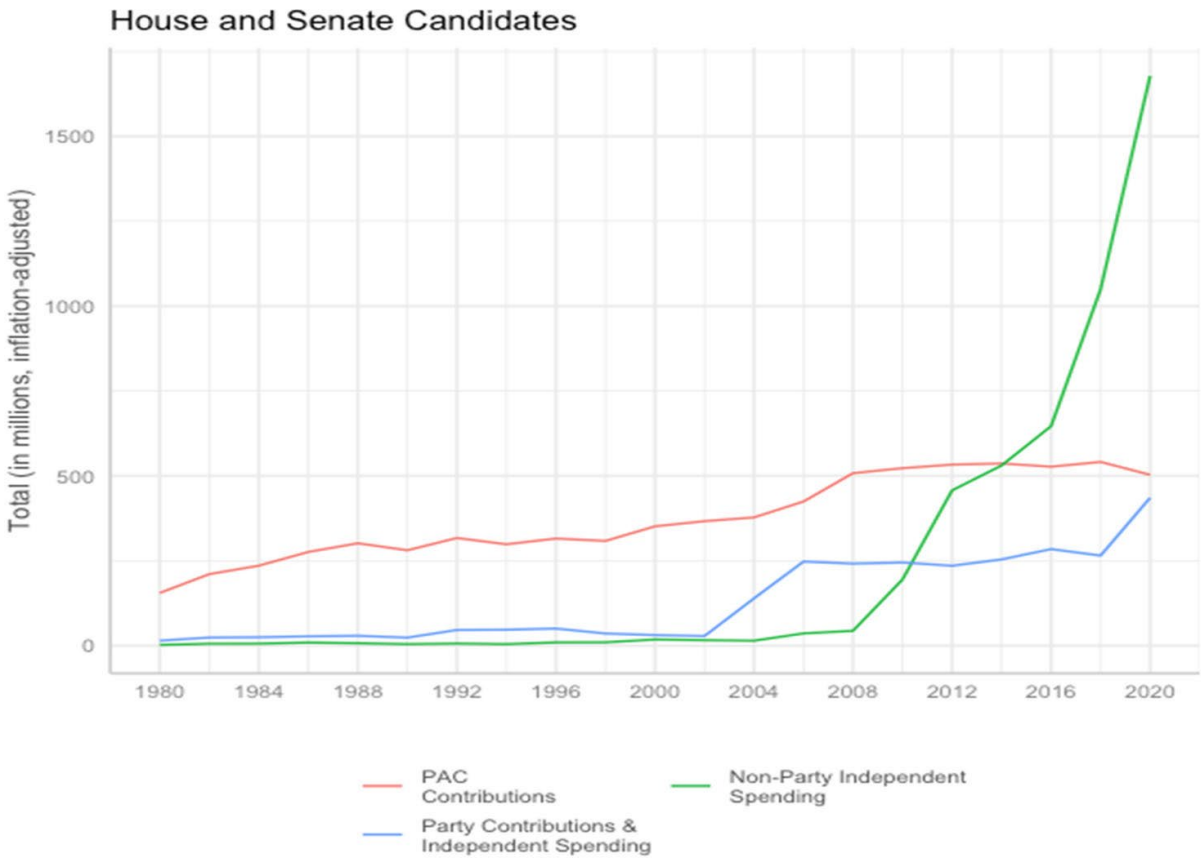
First, the FEC does not dispute that *Colorado II* no longer controls if Congress has materially amended FECA's coordinated expenditure regime. NRSC Br. 43-44; *see McCutcheon*, 572 U.S. at 200 (*Buckley*'s "conclusion about the constitutionality of the aggregate limit in place under FECA does not control" a facial "challenge to the aggregate limits in place under BCRA" in light of Congress's amendments bearing on the FEC's "circumvention" theory). Instead, it dismisses the 2014 amendment as immaterial, Br. 27-29; but that strategy fails for the reasons above, *see supra* at 15-18.

The FEC also mischaracterizes *LNC*, which made clear the 2014 amendment did effect "a change[] [in the] legal landscape" warranting plenary consideration. Br. 29-30. To be sure, *LNC* held that "*McConnell* foreclose[d]" an argument that the 2014 "amendment 'transformed' FECA's contribution limit into an expenditure limit" because it made no meaningful change to the operative statutory definition. 924 F.3d at 547. But *LNC* analyzed the "underinclusivity" created by the 2014 amendment at length, declining to treat *McConnell* as resolving that question for all time. *Id.* at 549-52. *LNC* thus proves that this Court should give plenary consideration to this challenge.

Second, the FEC does not dispute that in confronting this new statutory scheme, this Court must apply current Supreme Court precedent, which has placed *Colorado II*'s free-ranging views of "corruption" and tailoring firmly out of bounds. NRSC Br. 41-43. Instead, it insists the Supreme Court "reaffirm[ed]" *Colorado II* by declining to review a 2010 Fifth Circuit decision rejecting a different challenge to the limits years before *McCutcheon*, *Cruz*, and the 2014 amendment. Br. 18; *see In re Cao*, 619 F.3d 410 (5th Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1286 (2011). "But this kind of action (or inaction) 'imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" *DeBoer v. Snyder*, 772 F.3d 388, 402 (6th Cir. 2014), *rev'd on other grounds sub nom. Obergefell v. Hodges*, 576 U.S. 644 (2015). And *this* denial is particularly unilluminating, as the FEC claimed the challengers had "failed to preserve below a central argument in the petition." Br. in Opp. at 9, *Cao v. FEC*, No. 10-776 (Feb. 11, 2011), 2011 WL 493949; *see also Cao*, 619 F.3d at 434-35 (discussing waiver).

Third, the FEC does not dispute that this Court also must analyze Plaintiffs' challenges in light of current facts, including that political parties have been supplanted by Super PACs and other non-party groups. NRSC Br. 45-48. Instead, it touts (Br. 58-59) the parties' recent fundraising successes, flatly ignoring that in recent years "contributions from political action committees to federal campaigns [have] consistently exceeded the contributions and expenditures made by party-affiliated committees to federal campaigns." Findings, R.49-1 ¶ 171, PageID#5535. That is an understatement: "coordinated party expenditures in House races," for instance, "have

never exceeded 1% of total expenditures by general election candidates." La Raja Rept., R.41-3 at 14, PageID#4135. And while party contributions to candidates have barely budged, non-party independent expenditures (including by Super PACs) have shot up by over 114 times in inflation-adjusted dollars since 2004. *Id.* at 29, PageID#4150.



Id. at 29 & Figure 3, PageID#4150.

The FEC's bald claim that the parties "have prospered," Br. 58, thus cannot cloud what is obvious to virtually everyone else: "The current mix of statutes, regulations, and court decisions has left a campaign finance system that reduces the power of political parties as compared to outside groups." *Republican Nat. Comm. v. FEC*, 698 F. Supp. 2d 150, 160 (D.D.C. 2010) (Kavanaugh, J.), *aff'd*, 561 U.S. 1040 (2010).

Far from a mere "policy" point, Br. 59, the undeniable and growing disparity between parties and Super PACs undercuts the FEC's professed *quid pro quo*-by-circumvention concerns. As both the federal government and Supreme Court have recognized, today, one should expect "fewer cases of conduit contributions directly to … parties, because [donors] who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted. Instead, they are likely to simply make unlimited contributions to Super PACs." *McCutcheon*, 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 "spen[d] unlimited funds on independent expenditures" supporting his preferred candidate through a Super PAC. *Id.* at 213-14.

B. *Colorado II* Does Not Control Plaintiffs' As-Applied Challenge

At minimum, *Colorado II* does not foreclose Plaintiffs' challenge to the current limits as applied to "party coordinated communications." 11 C.F.R. § 109.37; *see* NRSC Br. 48-49. The FEC does not deny that *Colorado II* expressly left the door open for as-applied challenges. 533 U.S. at 456 n.17. Nor does it seriously defend against Plaintiffs' as-applied challenge on the merits, such as by trying to show the parties' unlimited coordinated expenditures on political advertising would pose a lesser burden on speech or greater threat of *quid pro quos* than unlimited coordinated expenditures on other political advocacy or candidate legal fees. NRSC Br. 37.

Instead, the FEC argues *Colorado II* closed off *this* as-applied challenge because political advertisements represent the "overwhelming majority" of coordinated party expenditures. Br. 44. But the Commission made—and lost—a similar attempt to defend against as-applied challenge in *Wisconsin Right To Life*. There, the FEC claimed "*McConnell*'s holding that [a BCRA provision] is facially constitutional" foreclosed an as-applied challenge covering "'a substantial percentage'" of the provision's applications. 551 U.S. at 498 (Scalia, J., concurring in part and concurring in the judgment). The controlling opinion rejected that argument—and agreed with the as-applied challenge. As it explained, "[c]ourts do not resolve unspecified as-applied challenges in the course of resolving a facial attack," even if the later as-applied challenge covers "the 'vast majority' of a statute's applications." *Id.* at 476 n.8 (opinion of Roberts, C.J.).

Nor is the Fifth Circuit's *Cao* opinion to the contrary. *See* Br. 46-47. *Cao* predates *McCutcheon*, *Cruz*, and the 2014 amendment, so it does not even bear on Plaintiffs' *facial* challenge. *See supra* at 22. The *Cao* challengers also conceded their "as-applied" challenge did not target the limits' application to a subset of coordinated expenditures, but rather to *any* speech by a party. 619 F.3d at 425. The *Cao* majority therefore concluded this was actually a facial challenge because *all* coordinated *party* expenditures necessarily involve *party* speech. *Id.* at 425-30. It thus rejected the lawsuit under *Colorado II* but "left open the possibility for an as-applied challenge." *Id.* at 430.

Thus, even on its pre-2014 terms, *Cao supports* Plaintiffs' as-applied challenge. In fact, it is the FEC's position that "'would effectively eviscerate,'" Br. 46, the expressly

limited scope of *Colorado II* by "eras[ing] the distinction between facial and as-applied challenges" in this context, *Cao*, 619 F.3d at 450 (Jones, C.J., concurring in part and dissenting in part). If parties cannot challenge the limits as applied to the "core political speech" of political advertisements, *id.*, it is hard to see what as-applied challenge could ever proceed. "If the First Amendment means anything, it means that political speech is not the same thing as paying a candidate's bills for travel, or salaries, or for hamburgers and balloons," *id.* at 453 (Clement, J., concurring in part and dissenting in part), yet under the FEC's theory, *Colorado II* rules them all.

CONCLUSION

This Court should hold that FECA's coordinated party expenditure limits under 52 U.S.C. § 30116(d) are unconstitutional facially and as applied to party coordinated communications as defined in 11 C.F.R. § 109.37. To the extent the Court concludes that existing precedent controls these questions, the Court should promptly so hold to permit Plaintiffs to seek Supreme Court review.

May 3, 2024

Respectfully submitted,

/s/ Noel J. Francisco

Noel J. Francisco
Donald F. McGahn II
John M. Gore
E. Stewart Crosland
Brinton Lucas
Charles E.T. Roberts
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Phone: (202) 879-3939
njfrancisco@jonesday.com

Sarah Welch
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114
Phone: (216) 586-3939
swelch@jonesday.com

Counsel for Plaintiff-Appellants

Jessica Furst Johnson
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
2300 N Street, N.W.
Suite 643A
Washington, DC 20037
Phone: (202) 737-8808
jessica@holtzmanvogel.com

Counsel for Plaintiff-Appellants National Republican Senatorial Committee & National Republican Congressional Committee

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,464 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1), as counted using the word-count function on Microsoft Word 2016 software.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016, in Garamond style, 14-point font.

Dated: May 3, 2024

/s/ Noel J. Francisco
Noel J. Francisco

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2024, I electronically filed the original of this brief with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Noel J. Francisco
Noel J. Francisco