No. 24-3051

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, ET AL.

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Certified Constitutional Question from the
United States District Court for the Southern District of Ohio

BRIEF OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF DEFENDANT–APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-3051 Case Name: Nat'l Repub. Senatorial Comm. v. FEC

Name of counsel: Tara Malloy

Pursuant to 6th Cir. R. 26.1, Campaign Legal Center & Citizens for Resp. and Ethics in Wash.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No publicly held non-party corporation has a financial interest in the outcome of this appeal.

CERTIFICATE OF SERVICE

I certify that on April 11, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Tara Malloy

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Pages**

Statutes and Regulations:

Other Authorities:

GLOSSARY

Bipartisan Campaign Reform Act	BCRA
Federal Election Commission	FEC
Federal Election Campaign Act	FECA

INTERESTS OF THE AMICI[1]

Amici curiae Campaign Legal Center (CLC) and Citizens for Responsibility and Ethics in Washington (CREW) are non-partisan, non-profit organizations that work to strengthen the laws governing campaign finance and political disclosure. Amici have participated in several of the Supreme Court cases underlying the claims herein, including *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 572 U.S. 185 (2014). Amici have a demonstrated interest in the issues raised here.

SUMMARY OF ARGUMENT

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), the U.S. Supreme Court affirmed that the party coordinated spending limits, 52 U.S.C. § 30116(d), defuse attempts to circumvent the contribution limits at the heart of the Federal Election Campaign Act (FECA), and thereby advance the same governmental interest that contribution limits do, namely, preventing quid pro quo corruption and its appearance.

The gravamen of the challenge brought by Plaintiffs-Appellants National

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), CLC and CREW affirm that no counsel for a party authored this brief in whole or in part, and no person other than CLC and CREW or their counsel contributed money that was intended to fund the preparation or submission of this brief. No party opposes the filing of this amicus brief.

Republican Senatorial Committee, et al. (collectively, "NRSC") to the coordinated spending limits is that *Colorado II* "does not control in this case," *see* NRSC Br., ECF No. 22, at 22, because, allegedly, the Supreme Court has altered the governing jurisprudence, Congress has materially amended the relevant statutes, and "the limits also now operate against a different factual backdrop," *id*. at 6.

While certainly, neither the law nor the "factual backdrop" has remained identical over the last two decades, *amici curiae* submit this brief to explain why the changes that NRSC highlights do not undermine the validity of *Colorado II*'s holding. Instead, recent developments confirm the Supreme Court's concern that party fundraising practices can facilitate circumvention of the base contribution limits.

First, although the Supreme Court has in recent years reevaluated certain tenets of its campaign finance jurisprudence, particularly in the area of independent spending, it has also reaffirmed the anti-corruption and anti-circumvention rationales underpinning *Colorado II*, as well as the constitutionality of various restrictions on party fundraising. *See Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) (*RNC*), *summarily aff'd*, 561 U.S. 1040 (2010) (reaffirming constitutionality of limits on party soft money); *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86, 89 (D.D.C. 2016), *summarily aff'd*, 581 U.S. 989 (2017) (reaffirming constitutionality of limits on state party use of soft money for federal election

activities).

Nor has the statutory or factual backdrop changed in any way that would undercut *Colorado II* or the interests justifying limits on party coordinated expenditures. To the contrary, Congress has relaxed the limits on certain contributions to party committees, *see Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533, 552 (D.C. Cir. 2019) (en banc), effectively putting *more* weight on the challenged coordinated spending limits to serve as a first-line defense against quid pro quo corruption and its appearance. And factually, evolving campaign practices—such as the sharp rise of joint fundraising by candidates and party committees following the 2014 *McCutcheon* decision—have led to a surge of million-dollar contributions entering party coffers. Indeed, the total amount of money raised through joint fundraising has more than doubled in the past ten years to hit a staggering $2.6 billion in the 2020 election, heightening the risk that party committees will serve as vehicles for circumvention of the base contribution limits. *Total Joint Fundraising Committees, 1990-2024*, OpenSecrets.org, https://www.opensecrets.org/joint-fundraising-committees-jfcs. *See also* Part II.B *infra*.

But even if the changes to the jurisprudence or the "factual backdrop" were more significant, this Court would have no "warrant" to "disregard a directly applicable holding of the Supreme Court based on a supposition that a subsequent

decision might call into question the viability of the Court's rationale." *Repub. Party of La.*, 219 F. Supp. 3d at 95 (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The Supreme Court alone retains the "prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Colorado II controls here. This Court should follow binding precedent and reaffirm the constitutionality of FECA's limits on coordinated party spending.

ARGUMENT

I. The Anti-Circumvention Rationale Relied Upon by *Colorado II* Concerns the Prevention of Quid Pro Quo Corruption and Has Not Been Questioned by More Recent Supreme Court Decisions.

FECA treats all expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate" as in-kind contributions to that candidate, 52 U.S.C. § 30116(a)(7)(B)(i), because they "are as useful to the candidate as cash," *Colorado II*, 533 U.S. at 446. Since *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has repeatedly affirmed this approach, holding that the federal coordination restrictions "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions," and thereby further the government's interest in preventing quid pro quo corruption and the appearance of corruption. *Id*. at 46-47.

NRSC does not dispute the anti-corruption interest in treating *non*-party coordinated expenditure as contributions, but argues that unlike an outside donor, a party committee cannot "corrupt" its own candidates by providing in-kind contributions in the form of coordinated expenditures. NRSC Br. at 31. But the chief concern animating the party coordinated spending limits is not that a party itself will corrupt candidates, but instead that parties "whether they like it or not . . . act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452. Donors can circumvent the current $3,300 limit on direct contributions to candidates by giving up to $41,300 annually to the national party committees often "with the tacit understanding that [their] favored candidate will benefit." *Id*. at 458. As *Colorado II* pointed out, if the coordinated party spending limits were eliminated, "the inducement to circumvent would almost certainly intensify" and the individual contribution limits would be further "eroded" by donors funneling many multiples of the base limits to parties to support their preferred candidates. *Id*. at 457, 460.

NRSC labors to characterize the party coordinated expenditure limits as an elaborate "prophylaxis upon prophylaxis" policy, NRSC Br. at 4, but in reality, these limits are the most basic of anti-circumvention measures. They discourage donors from exploiting the much higher party contribution limits to route over ten times the

amount of the individual contribution limits to the party to spend in coordination with their preferred candidate.

To be sure, the law does not entirely bar this tactic: Congress established relatively robust, inflation-adjusted thresholds for coordinated spending to ensure that parties could meaningfully support their candidates' campaigns. *See*, *e.g.*, Coordinated Party Expenditure Limits, FEC, https://bit.ly/3DcUySP (setting party coordinated spending limits at between $55,000 to $109,900 in House races and between $109,900 to $3,348,500 in Senate races). But these limits nevertheless serve as a critical backstop in preventing large-scale abuse of the base contribution limits; in their absence, an unlimited stream of big donors would be permitted to manipulate the parties' higher contribution limits to effectively make an $45,000 contribution—twice in a two-year election cycle—to the candidate of their choice. And this simple circumvention tactic has only been exacerbated by the trebled limits enacted as part of the 2014-15 Cromnibus bill, and the practice of joint fundraising, in which candidates collaborate with federal and state party committees to streamline fundraising for big donors. *See* Parts II.A, II.B *infra*.

Indeed, far from casting doubt on the compelling interests served by anti-circumvention measures, the factual allegations that NRSC makes in its brief further confirm those measures' validity. NRSC complains repeatedly that making

independent expenditures is "expensive," "inefficient," and "ineffective"[2] (Br. at 15, 16, 24, 27), but this is exactly why a donor's contribution of $41,300 to the party, if spent independently, is less valuable to a candidate and less likely to serve "as a quid pro quo for improper commitments," than if it were spent in coordination with the candidate. *Buckley*, 424 U.S. at 47. NRSC thus simply underscores the accuracy of *Colorado II*'s insight that because "[t]here is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate," there is "good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending." 533 U.S. at 464.

1. Governmental interest

NRSC first attempts to cast doubt on *Colorado II's* reliance on an anti-circumvention interest by arguing that the recent decisions in *Citizens United* and *McCutcheon* "made clear that preventing *quid pro quo* corruption or its appearance

[2] A party's independent expenditure is undeniably an "effective" means for the party to express its *own* speech, and the party coordinated spending limits do not inhibit this "core" expressive activity. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996). Thus, at base, NRSC's complaint is not that its spending is "ineffective," but that it does not take the form that is most valuable to the candidate or advantageous to their campaign. *Buckley*, 424 U.S. at 47 (noting that "[u]nlike contributions . . . independent expenditures may well provide little assistance to the candidate's campaign").

is the only interest Congress may pursue through campaign-finance restrictions."[3] NRSC Br. at 5 (internal quotation omitted). This is a red herring. As detailed above, the party coordinated spending limits *are* aimed at quid pro quo corruption. That *Colorado II* relied on an anti-circumvention rationale does not mean the Court embraced a broad theory of corruption comprising "mere" attempts to buy access and influence. Because the party coordinated spending limits prevent evasion of the base contribution limits, they are justified by the same interest in preventing quid pro quo corruption as the base contribution limits themselves.

And there is nothing in *Citizens United* and *McCutcheon* that questions the constitutional validity of the anti-circumvention rationale.[4] Certainly, *Citizens*

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[3] Neither *Citizens United* nor *McCutcheon* questioned *McConnell*'s holding sustaining the limits on soft money contributions to parties, even though this holding rested on concerns that the parties were "*selling . . . preferential access* to federal officeholders and candidates in exchange for soft-money contributions." *RNC*, 698 F. Supp. 2d at 158 (emphasis in original); *see also id*. at 153 ("*Citizens United* did not disturb *McConnell*'s holding with respect to the constitutionality of BCRA's limits on contributions to political parties"); *Republican Party of La.*, 219 F. Supp. 3d at 97 ("Plaintiffs misperceive the reach of *Citizens United* . . . [which] distinguished the soft-money contributions considered in *McConnell*."). NRSC's claim that *Citizens United* and *McCutcheon* radically altered the theory of corruption informing *McConnell* with respect to *contribution* limits is thus without basis.

[4] The Supreme Court has reiterated that reducing circumvention of the contribution limits advances the government's compelling interest in combating corruption and has upheld a broad range of campaign finance laws on this basis. *See McConnell v. FEC*, 540 U.S. 93, 144 (2003) (upholding the party "soft money" restrictions on grounds that "[anti-corruption] interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits"); *California Medical Assn. v. FEC*, 453 U.S. 182, 197-98 (1981) (upholding

United did not cast doubt on this governmental interest; the Court there was reviewing a limit on *independent* expenditures and had no reason to even consider the circumvention of contribution limits via coordinated spending. As the Fifth Circuit explained when rejecting a similar challenge to the party coordinated spending limits: "the Supreme Court's decision in *Citizens United* has no bearing on whether Congress has the power to restrict political parties' coordinated expenditures" because "*Citizens United* addresses only independent expenditures and simply does not address coordinated expenditures." *Cao v. FEC*, 619 F.3d 410, 431, *cert. denied*, 562 U.S. 1286 (2011). "[T]he *Colorado II* Court, as well as the Court's earlier cases," the Fifth Circuit concluded, "clearly held that coordinated expenditures may be restricted to prevent circumvention and corruption." *Id*. at 429.

Although the Court in *McCutcheon* invalidated the federal aggregate contribution limits, it did so because it found it "highly implausible" that donors could significantly circumvent the base limits by aggregate giving, *id*. at 213, or engage in massive joint fundraising operations, *id*. at 214-15. Although subsequent elections cycles made clear that the Court had underestimated the likelihood of these forms of circumvention, *see* Part II.B *infra*, this was a fact-specific finding based on

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limits on contributions to political committees "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*"); *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (holding that federal corporate contribution restriction "hedges against … use [of corporations] as conduits for 'circumvention of [valid] contribution limits'") (quoting *Colorado II*, 533 U.S. at 456).

the record before the Court. The plurality opinion did not question anti-circumvention as a valid theory of corruption.

Therefore, as many lower courts have recognized following *Citizens United*, the "anti-circumvention interest" remains valid as "part of the familiar anti-corruption rationale." *Thalheimer v. City of San Diego,* 645 F.3d 1109, 1124 (9th Cir. 2011), *overruled in part on other grounds*, *Board of Trustees of Glazing Health and Welfare Trust v. Chambers*, 941 F.3d 1195 (9th Cir. 2019). *See also*, *e.g.*, *Ognibene v. Parkes*, 671 F.3d 174, 195 n.21 (2d Cir. 2011), *cert. denied* 567 U.S. 935 (2012) (acknowledging that *Citizens United* preserved the anti-circumvention interest); *United States v. Danielczyk*, 683 F.3d 611, 618 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013) (same).

2. Narrow tailoring

NRSC also argues that *McCutcheon* enhanced the standard of review entailed in "closely drawn" scrutiny, suggesting that *Colorado II* therefore had failed to adequately review whether the party coordinated spending limits were narrowly tailored. NRSC Br. at 42. But this boils down to a quibble about terminology. Regardless of whether the *Colorado II* opinion used the phrase "narrow tailoring," the Court discussed tailoring at great length, including an in-depth review of various possible alternatives to the coordinated spending limits. It detailed the party "tally system," an informal recordkeeping system designed to ensure that candidates

benefited from the money they raised for the party, 533 U.S. at 458-61; it considered whether FECA's "earmarking provision" would be a more narrowly tailored substitute for the limits, but concluded that "given tallying, [it] would reach only the most clumsy attempts to pass contributions through to candidates," *id*. at 462; and it determined that base limits on contributions to parties would not alone alleviate the risk that "unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending," *id*. at 464, thus facilitating further circumvention.

There is no reason to think that the party coordinated spending restrictions would fail a narrow tailoring review today. As NRSC highlights, amendments to FECA in 2014 relaxed the party contribution limits with respect to three accounts, i.e., for party headquarters maintenance, legal and compliance work, and presidential nominating conventions. 52 U.S.C. §§ 30116(a)(1)(B), (a)(9). As a result, the statute is now more narrowly focused on limiting party coordinated spending only when it directly benefits candidates. *See* Part II.A *infra*.

Nor are the earmarking rules, *see* 52 U.S.C. § 30116(a)(8), 11 C.F.R. § 110.6(b), any more effective an anti-circumvention tool today. Even if the party tally system described in *Colorado II* has become less prevalent, new techniques, such as sophisticated joint fundraising, ensure that candidates are credited for the money they raise for or through party committees. *See* Part II.B *infra*. And it is no answer

to say that the FEC could simply tweak the earmarking rule or limit joint fundraising. A key insight of *Colorado II*—and the *McConnell* decision that followed—is that there is a "degree of circumvention" occurring through party committees through a "wink or nod" even "under present law." 533 U.S. at 443, 446-447. For that reason, deference to Congress' expertise in anticipating and cutting off routes of circumvention is critical. *McConnell*, 540 U.S. at 165 ("Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [the new limits] by scrambling to find another way to purchase influence.").[5]

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[5] Because "earmarking" often turns on non-public communications and subjective motives, earmarking rules are easy to evade and difficult to enforce. This is particularly evident in the disclosure context, where FEC regulations allow groups running campaign ads to report only those donors who designate their contributions for specific ads. *See Van Hollen v. FEC*, 74 F. Supp. 3d 407(D.D.C. 2014), *rev'd*, 811 F.3d 486 (D.C. Cir. 2016); *CREW v. FEC*, 971 F.3d 340, 343-44 (D.C. Cir. 2020). Following the FEC's adoption of an earmarking restriction for the reporting of electioneering communications, 11 C.F.R. § 104.20(c)(9), groups financing such communications went from providing near complete donor disclosure to almost none. *See*, *e.g.*, Taylor Lincoln & Craig Holman, *Fading Disclosure: Increasing Number of Electioneering Groups Keep Donors' Identities Secret*, Pub. Citizen (2010), https://www.citizen.org/wp-content/uploads/disclosure-report-final.pdf (finding that, following adoption of rule, only ten percent of $79.9 million spent on electioneering communications in 2010 was reported with donor information).

Groups have openly gamed earmarking rules without fear of FEC enforcement. For instance, it was only discovery that revealed that the 501(c)(4) group American Action Network had earmarked a "general support grant" of $150,000 to another group, Freedom Vote, for then-Representative John Boehner. *See* Reply in Supp. of Mot. to Compel at 5, *CREW v. FEC*, No. 22-cv-0035 (D.D.C. Feb. 9, 2024),

And there is little ground to claim that the FEC can or will vigorously police efforts to circumvent FECA. NRSC Br. at 10 (asserting that "the FEC has a demonstrated history of enforcing the earmarking rule"). To the contrary, the FEC has been criticized for decades—often by its own Commissioners—for being unable or unwilling to prosecute violations of federal law.[6] In particular, the Commission has not itself investigated and pursued a single case under its coordination rules since *Citizens United*—either against party committees or outside spenders.[7]

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available at https://www.fec.gov/resources/cms-content/documents/crew-reply-in-supp-mot-to-compel-production-02-09-2024.pdf. Internal records indicated that American Action Network directed Freedom Vote to use the funds to create a doorhanger supporting Boehner's election, but Freedom Vote did not disclose American Action Network's contribution as the FEC rules then required. *Id*.

[6] *See*, *e.g.*, FEC Comm'r Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* 14 (Feb. 2017), https://www.fec.gov/resources/about-fec/Commissioners/ravel/statements/ravelreport_feb2017.pdf; *Oversight of the FEC: Hr'g Before Comm. on House Admin.*, 116th Cong. (2019) (Statement of Adav Noti, Senior Director & Chief of Staff, CLC), https://docs.house.gov/meetings/HA/HA00/20190925/109983/HHRG-116-HA00-Wstate-NotiA-20190925-U1.pdf.

[7] Ellen L. Weintraub, Supplemental Responses to Questions from the Committee on House Administration, at 4 (May 1, 2019), https://www.fec.gov/resources/cmscontent/documents/FEC_Response_to_House_Admin_Attachment_A_Weintraub.pdf. In 2021, the FEC entered into a conciliation agreement with a corporation relating to a prohibited coordinated expenditure, but that was based on facts uncovered through a Department of Justice investigation and publicly released in a non-prosecution agreement. Conciliation Agreement, MUR 7324, et al. (American Media, Inc.), https://www.fec.gov/files/legal/murs/7324/7324_26.pdf.

3. Evidentiary record

Finally, NRSC attacks *Colorado II* on grounds that its evidentiary record was insufficient—or more specifically, it alleges that the government has failed to provide evidence of quid pro quo corruption linked to coordinated party expenditures "in this case or in *Colorado II*." NRSC Br. at 32.

But the only authority NRSC cites for the supposedly inadequate record in *Colorado II* is Justice Thomas' *dissent*, *id.* (citing 533 U.S. at 475 (Thomas, J., dissenting)). There, however, Justice Thomas faulted the government for failing to produce evidence that the party *itself* corrupted candidates through coordinated spending—and then repudiated the notion that there was anything suspect about "a political party . . . influenc[ing] its candidate's stance on issues" in the first place. 533 U.S. at 476. But the majority had declined to consider "quid pro quo arrangements . . . between candidates and parties *themselves*," *id.* at 456 n.18 (emphasis added), and instead had rested their decision on an anti-circumvention rationale. And before accepting the latter rationale, the Court considered a significant record of circumvention, including evidence of how the party tally system ensured candidates were allocated the funds they had raised for their party, 533 U.S. at 458-61, as well as testimony describing how candidates and party leaders directed donors who had maxed out their contributions to candidates to the party to "further

help [candidate] campaign[s]," *id*. at 458 (quoting fundraising letter from Congressman Wayne Allard).[8]

Indeed, notwithstanding the dissatisfaction NRSC expresses regarding the record in *Colorado II*, its primary protest is that the FEC, in its view, "adduced no evidence . . . of quid pro quo corruption" in *this litigation*. NRSC Br. at 19. But this is not an evidentiary showing that the FEC must—or even could—make today. "[O]f course we would not expect to find—and we cannot demand—continuing evidence of large-scale quid pro quo corruption," given that coordinated party expenditures have been in place since the 1970's. *Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015) (en banc) (noting lack of corruption connected to federal contractor contributions attributable to fact that "such contributions have been banned since 1940"). *See also Burson v. Freeman*, 504 U.S. 191, 208 (1992) (noting difficulty of finding evidence to support long-enforced statutes).

Instead of requiring evidence of current quid pro quos in these circumstances, both *Colorado II* and *McCutcheon* explained that a court should address "'whether experience under the present law confirms a serious threat of abuse.'" *McCutcheon*, 572 U.S. at 219 (quoting *Colorado II*, 533 U.S. at 457). Here, unbounded

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[8] Justice Thomas expressed skepticism about this evidence as well, but largely because he did not accept that anti-circumvention measures prevented corruption as a matter of law, *see* 533 U.S. at 478, not because he questioned the reliability of the evidence presented.

coordinated spending continues to pose a serious threat of abuse, both as documented by the Commission, *see, e.g.*, FEC Br., ECF No. 38, at 40-43, and as further demonstrated in this amicus brief, *see infra* Part II.B. As was the case in *Colorado II*, "[d]espite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows 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.

II. Developments After *Colorado II* Have Made the Party Coordinated Spending Limits More Central to Preventing Corruption Arising from Party Fundraising and Spending.

A. The Cromnibus amendments moderated the laws regulating party spending.

NRSC argues that "statutory change in the campaign finance arena" also counsels against application of *Colorado II*, or at least supports plenary consideration of its challenge. NRSC Br. at 43 (internal quotation omitted). But the only "statutory change" NRSC raises are amendments to FECA made by the 2014 "Cromnibus" appropriations bill, which it concedes *deregulated* aspects of party fundraising and spending. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772-73 (Dec. 16, 2014) (codified at 52 U.S.C. § 30116(a)-(d)). NRSC cites *McCutcheon* in support of its argument, NRSC

Br. at 43-44, but the Court there considered the reverse situation—concluding that the aggregate limits were less crucial in part because "statutory safeguards against circumvention have been considerably *strengthened* since *Buckley* was decided." 572 U.S. at 200 (emphasis added). By contrast, the 2014 amendments eased certain anti-circumvention measures in federal law, thus placing further weight on the existing party coordination restrictions to serve as the front line against attempts to bypass the base contribution limits.

Recognizing that the Cromnibus had the opposite effect as the changes considered in *McCutcheon*, NRSC attempts to argue that the problem now is that the 2014 amendments render the party coordinated spending limits underinclusive. NRSC Br. at 35-36. But the amendments were already upheld against an underinclusiveness challenge in *Libertarian National Committee*. There, the en banc D.C. Circuit affirmed that Congress made a reasonable choice when it loosened limits on funds raised for certain party objectives unconnected to specific candidates—i.e., to maintain party headquarters, fund legal and compliance work, and run presidential nominating conventions—on grounds that this spending was less likely to lead to corruption and the appearance of corruption. 924 F.3d at 550-551 (noting that *McConnell* had found that contributions "that can be used to benefit federal candidates directly" pose the "greatest risk" of corruption) (internal quotation omitted). NRSC may think there is no "good explanation" for the distinction, NRSC

Br. at 36, but Congress clearly disagreed, and its "empirical judgments" warrant "deference" in this regard. *Libertarian Nat'l Comm.*, 924 F.3d at 552.[9]

Even if this claim had not already been explicitly rejected by at least one Court of Appeals, the Supreme Court has made clear that "the First Amendment imposes no freestanding underinclusiveness limitation." *Williams-Yulee v. Florida Bar,* 575 U.S. 433, 449 (2015). Even under strict scrutiny, courts do not strike down laws because they "conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id*. "There is . . . no constitutional basis for attacking contribution limits on the ground that they are too *high*." *Davis v. FEC*, 554 U.S. 724, 737 (2008) (emphasis added).

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[9] Amicus CLC participated in *Libertarian National Committee* to defend the constitutionality of the amendments even though, as CLC noted, it had "opposed the 'Cromnibus' limits as a matter of policy" when they were enacted. Nevertheless, CLC argued:

> [I]t is one thing to object to higher limits on policy grounds, which *amici* do, and quite another for the LNC to maintain that allowing national parties to accept larger contributions for certain special purposes causes constitutional injury or violates the First Amendment. So long as the current two-tiered system can 'fairly be said' to advance and balance the government's dual commitments to preventing corruption and ensuring candidates and parties have access to adequate campaign resources, then the law is neither underinclusive nor unconstitutional.

Brief of Amick Curiae at 18, *Libertarian Nat'l Comm. v. FEC*, No. 18-5227, ECF No. 1754989 (D.C. Cir., filed Oct. 12, 2018).

The bar for demonstrating underinclusiveness is accordingly high: NRSC must show that federal coordinated spending limits cannot "fairly be said" to advance the government's anti-corruption interest because they provide only "ineffective or remote" support for this goal. *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984). *See also Ill. Liberty PAC v. Madigan*, 904 F.3d 463, 473-74 (7th Cir. 2018) (rejecting claim that state's "more generous" contribution limits as to certain groups "undermines the anticorruption rationale" for other, lower contribution limits). NRSC has not even attempted to make such a showing—perhaps because it is fatally self-contradictory to claim that the coordinated spending limits *both* "inhibit . . . parties and candidates [from] collaborating to communicate their message," NRSC Br. at 4, *and* fail to inhibit such collaboration and circumvention it enables. In the wake of the Cromnibus amendments, FECA is more closely tailored to regulate precisely the types of party coordinated spending deemed mostly likely to corrupt: those coordinated expenditures that "benefit federal candidates directly." *Libertarian Nat'l Comm.,* 924 F.3d at 550 (quoting *McConnell*, 540 U.S. at 167).

NRSC also notes that the Bipartisan Campaign Reform Act of 2022 (BCRA)—and its comprehensive limits on party soft money—was enacted after *Colorado II* was decided. It references BCRA, however, only to argue that it "further diminished parties' power." NRSC Br. at 46. It does not, and could not, suggest that

BCRA marked a relevant statutory change with respect to the constitutional analysis in *Colorado II* because contributions to national party committees were already subject to limits—$20,000 at the time of the decision—which of course was key to *Colorado II*'s theory of circumvention. 533 U.S. at 458. To be sure, BCRA significantly broadened restrictions on the party's solicitation and use of unregulated "soft money," but largely did so to close loopholes created by the FEC in the existing party contribution limits that were not at issue in *Colorado II*. *See McConnell*, 540 U.S. at 123-24.

B. Changes to the legal and political landscape have made the party coordinated spending limits more, not less, necessary.

NRSC cites *Citizens United* and the "rise of Super PACs," NRSC Br. at 23, as part of the changed factual background that would support a reconsideration of *Colorado II*,[10] but fails to mention other key developments that have deregulated

[10] NRSC stresses the parties' supposed loss of power and fundraising capacity, NRSC Br. at 23, 46-47, but this is neither relevant to the constitutional analysis, nor remotely accurate. In the 2008 election cycle, the last presidential election before *Citizens United*, Democratic Party federal committees raised a total of $960 million and Republican Party federal committees raised $920 million. *Party Committee Totals, 2008*, OpenSecrets.org, https://www.opensecrets.org/political-parties?cycle=2008. By 2020, well after the supposedly fatal blow of Super PAC involvement in federal elections, the total amount raised by the parties shot up to *$1.81 billion* and *$2 billion* for the Democratic and Republican parties respectively. *Party Committee Totals, 2020*, OpenSecrets.org, https://www.opensecrets.org/political-parties?cycle=2020. While overall spending in elections likewise rose in the same time period—amplified by the large amounts

party fundraising and heightened concerns that parties will serve as conduits for influence buying.

First, as discussed above, the 2014 Cromnibus amendments both relaxed the coordination rules and tripled the limits for contributions to three "special accounts" for party headquarters, legal work, and nominating conventions. 52 U.S.C. §§ 30116(a)(1)(B), (a)(9), (d)(5). In the 2023-24 election cycle, a donor can give up to $123,900 to each of these accounts. *Contribution limits for 2023-2024 federal elections*, FEC, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/.

These amendments amplified the effects of the Supreme Court's 2014 decision in *McCutcheon*, which eliminated the individual aggregate contribution limits and reinvigorated the practice of joint fundraising. The total amount of money raised through joint fundraising skyrocketed from $1.1 billion in 2012 to $2.6 billion in 2020. *Total Joint Fundraising Committees, 1990-2024*, OpenSecrets.org, https://www.opensecrets.org/joint-fundraising-committees-jfcs. Together these developments dramatically increased the amount of money that can flow through party committees to benefit donors' preferred candidates, checked now only by the

spent by Super PACs—it is simply inaccurate to claim that the major parties are ailing.

base contribution limits and the coordinated party spending limit under challenge here.

In the 2014 election cycle, a single donor was limited to contributing $123,200 in aggregate to all candidates, party committees, and other PACs, and within this cap, to contributing $70,800 to political party committees. *McCutcheon*, 572 U.S. at 194. *McCutcheon* invalidated these limits, allowing donors to give —within the base limits—unlimited amounts *in aggregate* to all candidates and party committees aligned with their preferred political party, as well as to party-aligned outside PACs.

This newfound capacity was quickly capitalized upon by candidates and parties through the practice of joint fundraising, wherein a candidate's campaign creates a "joint fundraising committee" with multiple federal and state party committees and other PACs to enable big donors to write a single "joint" check up to the amount of all the committees' contribution limits combined. Although the joint fundraising committee must then distribute these funds among all the various "joined" committees, *see* 11 C.F.R. §§ 102.6(a)(1), 110.3(c)(2), party committees may transfer unlimited amounts of money to other party committees of the same party without triggering the otherwise applicable contribution limits, *see* 52 U.S.C. § 30116(a)(4); 11 C.F.R. §§ 102.6(a)(1)(ii), 110.3(c)(1). Thus, nothing prevents the party committees from consolidating this implicitly "earmarked" money back into a single party committee to be used for the benefit of the relevant candidate, who of

course will be well aware of which donors contributed to the joint effort most generously.

Federal candidates had for many years engaged in joint fundraising efforts with other candidates and federal and state party committees,[11] but until *McCutcheon*, this practice was constrained by the aggregate limits; the maximum number of committees that could be joined was capped.[12] But the decision predictably led to the formation of new "super joint fundraising committees," which supersized this practice by adding ever more party committees to the effort. Peter Olsen-Phillips, *Joint fundraisers ballooning after McCutcheon decision*, Sunlight Foundation, Oct. 29, 2014, https://sunlightfoundation.com/2014/10/29/joint-fundraisers-ballooning-after-mccutcheon-decision/. Within months of *McCutcheon*, two new "super joints" were formed with over 20 recipient committees. *Id*. One was

[11] Although FECA only authorizes joint fundraising by candidates, the Commission's joint fundraising committee regulation has long permitted any political committee to "engage in joint fundraising with other political committees or with unregistered committees or organizations." 11 C.F.R. § 102.17(a)(1)(i).

[12] In the 2012 election, President Barack Obama raised much of his money through Obama Victory Fund, a joint fundraising effort between his campaign committee, the DNC, and several swing-state Democratic party committees. Obama Victory Fund Summary, OpenSecrets.org, https://www.opensecrets.org/jfc/summary.php?id=C00494740&cycle=2012. However, because the aggregate contribution limits were in effect, the Victory Fund was capped at a maximum contribution of $75,800 from any individual donor.

the Democratic Grassroots Victory Project, a 26-recipient super joint, to which just 12 donors gave over $1.1 million. *Id*.

By the 2016 election, joint fundraising had further ballooned. Hillary Clinton set up a joint "victory fund" with the DNC and "an unheard-of 32 state parties," allowing a single donor give up to $356,100 *annually* (in each of the two years of the election cycle). Matea Gold, *Here's how a wealthy Trump supporter could give $783,400 to support his campaign and the RNC*, Wash. Post, May 19, 2016, https://www.washingtonpost.com/news/post-politics/wp/2016/05/19/heres-how-a-wealthy-trump-supporter-could-give-783400-to-support-his-campaign-and-the-rnc/?postshare=5271463674395707. Exploiting the new Cromnibus limits, the national parties also "rolled out expensive packages for their biggest backers that come with perks like access to top officials and premium convention passes," provided they reached the highest donor tier by funding the parties' convention, legal, and headquarters accounts as well. *Id*.

In this election cycle, joint fundraising operations between parties and candidates have become yet more extreme. Donald Trump has launched a joint fundraising operation with his own leadership PAC, the RNC, and 40 state Republican Party committees that seeks donations of up to $814,600. Daniel Strauss & Fredreka Schouten, *Donors to new Trump fundraising outfit can obtain 'Ultra MAGA' status with maximum contribution*, CNN, Mar. 29, 2024,

https://www.cnn.com/2024/03/29/politics/trump-fundraising-ultra-maga/index.html. Donors who reach the maximum will receive the title "Ultra MAGA." *Id*. Half of the maximum contribution—$413,000—is designated to be received by the RNC, a huge amount only made possible by combining the $41,300 maximum contribution to the party committee with the $123,900 maximum contributions to each of the party's three special accounts. Maeve Reston & Marianne LeVine, *Joint committee allows Trump to raise money for legal bills, huge checks for RNC,* Wash. Post, Mar. 21, 2024, https://www.washingtonpost.com/politics/2024/03/21/trump-joint-fundraising-committee-rnc/.

President Biden has established a similar joint fundraising operation, the Biden Victory Fund, together with the DNC and the party committees of all 50 states; it discloses that it can accept "contributions of up to $929,600 from a person." Biden Victory Fund, https://secure.joebiden.com/a/bvf. The committee is flush off the "the most successful political fundraiser in American history" in March 2024, bringing in a haul of $25 million from a single event, fueled by $500,000-a-seat tickets. Matthew Medsger, *Biden, Clinton, Obama joint fundraiser the 'most successful' in American history*, Boston Herald, Mar. 28, 2024, https://www.bostonherald.com/2024/03/28/biden-clinton-obama-joint-fundraiser-the-most-successful-in-american-history/.

The rise of joint fundraising can also be seen in Senate and congressional campaigns. *See* Eliza Newlin Carney, *Costly Midterms Fuel Hundreds of Joint Fundraising Committees*, Roll Call, May 28, 2024, https://rollcall.com/2014/05/28/costly-midterms-fuel-hundreds-of-joint-fundraising-committees/. Indeed, by the 2020 elections, it was standard practice for Senate candidates—particularly incumbents—to set up joint fundraising committees to either support their own campaigns or advance their party leadership ambitions by fundraising for other candidates in their party. *See Joint Fundraising Committees*, OpenSecrets.org, https://www.opensecrets.org/jfc/top.php?type=C&cycle=2020. *See also* Alexander Bolton, *Senate GOP leadership fight may pivot on who fundraises the best*, The Hill, Mar. 11, 2024, https://thehill.com/homenews/senate/4521407-fundraising-looms-large-in-battle-to-replace-mcconnell/ (quoting Senators who received contributions from Senator Cornyn's joint fundraising committee as saying this "will be an important factor in the leadership race").

Compounding corruption concerns, joint fundraising is dominated by large donors. Absent the aggregate limits, a single donor can give eye-popping amounts to the joint fundraising operations of the candidates, party committees, and PACs that align with their personal politics. In the 2020 elections, 17 donors each gave over $2 million in aggregate to joint fundraising committees supporting candidates

of their chosen party; the Republican's biggest donor gave $3,206,010 to Republican joint fundraising committees and the Democrat's biggest donor gave $2,350,680 to the equivalent Democratic committees. *Top Individual Contributors*, OpenSecrets.org, https://www.opensecrets.org/jfc/top_individuals.php?cycle=2020. In essence, these committees "act as one-stop shops for donors willing to write large checks." Bridget Bowman, NBC News, *Presidential candidates use joint fundraising committees. So what are they?*, Apr. 20, 2023, https://www.nbcnews.com/meet-the-press/meetthepressblog/presidential-candidates-use-joint-fundraising-committees-are-rcna80498.

These new or expanded fundraising techniques give lie to NRSC's claim that intervening real-world developments have fatally weakened parties and alleviated concerns that parties could serve as vehicles for quid pro quo exchanges. The practice of joint fundraising implicitly "earmarks" funds raised through joint fundraising committees as for the candidate who headlined the effort—without running afoul of the federal earmarking rules that NRSC claims are a viable alternative to the challenged limits. NRSC Br. at 9, 29-30. Indeed, reinforcing what *Colorado II* held with respect to the earlier "tally system" of the parties, current joint fundraising techniques confirm that the earmarking rules capture only the "the most clumsy attempts to pass contributions through to candidates," 533 U.S. at 462. And

now, free of the aggregate limits—and with the benefit of the trebled special account limits—parties can take in ever larger contributions from well-heeled donors that are "shadow earmarked" for the candidates who raised the money.

At the moment, however, the coordinated spending limits continue to restrain the parties from "act[ing] as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452. Political party committees can only spend a prescribed amount of their money in direct coordination with a candidate, moderating the risk that a party committee could simply forward on every six-figure check collected via joint fundraising to the headlining candidate in the form of coordinated expenditures. The party instead must spend a sizable portion of such funds independently, "alleviat[ing] the danger that [these expenditures] will be given as a quid pro quo for improper commitments from the candidate." *Buckley*, 424 U.S. at 47. But if the coordinated party spending limits were eliminated, "the inducement to circumvent would almost certainly intensify" and the individual contribution limits would be greatly "eroded." *Colorado II*, 533 U.S. at 457, 460.

CONCLUSION

For the foregoing reasons, this Court should reaffirm the constitutionality of FECA's limits on coordinated party spending, 52 U.S.C. § 30116(d), and decide the certified question in favor of the Commission.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6459 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Tara Malloy
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April 2024, I caused the foregoing BRIEF *AMICI CURIAE* to be filed electronically using this Court's CM/ECF System and sent via the ECF electronic notification system to all CM/ECF registered counsel of record.

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