No. 24-3051

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

FOURTH BRIEF
BRIEF OF THE FEDERAL ELECTION COMMISSION

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INTRODUCTION

The Federal Election Commission's ("Commission" or "FEC") opening brief demonstrated why the Court should reject Appellants' attempt to overturn the Supreme Court's holding in *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("*Colorado II*"), which held that the Federal Election Campaign Act's ("FECA" or "Act") coordinated party expenditure limits are constitutional. *Colorado II* forecloses Appellants' facial and as-applied challenges. Furthermore, the coordinated party expenditure limits are closely drawn to carefully balance the constitutional rights at stake with the critical governmental interest in combating corruption and its appearance. For these two overarching reasons, each independently sufficient, the Court must reject Appellants' challenge.

The Third Brief of Plaintiff-Appellants ("Appellants' Reply" or "App. Reply") wrongly suggests that this en banc Court should disregard judicial hierarchy, affronting basic principles of stare decisis. Appellants also err in contending that *Colorado II* left open an as-applied challenge to the *same limits* on the *same kind* of proposed party-candidate coordination that the Supreme Court carefully considered and upheld. Appellants' claim that Congress enacted the limits for an improper purpose contradicts the Supreme Court's analysis, which validated Congress's anticircumvention rationale, and Appellants' attempt to

discredit the FEC's extensive evidence mostly underscores how extensive and compelling that evidence is. Appellants' answer to the potential resurgence of a corruptive tallying system is no answer at all: their argument that such a scheme would be legal if they win validates Congress's concerns necessitating the challenged limits. Finally, Appellants' tailoring arguments and proposed blunt alternatives illustrate that Congress's chosen means of preventing the actuality and appearance of corruptive exchanges between donors and candidates, via the national parties, is closely drawn and constitutional. The certified question should be decided in the Commission's favor.

ARGUMENT

I. *COLORADO II* CONTROLS THE CASE BEFORE THIS COURT

A. The Court Must Reject Appellants' Facial Challenge

Appellants acknowledge that the Supreme Court "facially uph[eld FECA's] coordinated expenditure limits" (App. Reply at 20), but insist that "three distinctions make all the difference" to support their claim that this Court should nevertheless rule contrary to *Colorado II*. (*Id.* at 21). Not only do these claims invite the Court to act in a manner directly contrary to Supreme Court and this Circuit's own precedent, but the distinctions Appellants spotlight are unpersuasive. The Court must reject them.

Attempting to frame *Colorado II*'s holding as stale (*see* Compl., R.1, ¶¶ 9, 82, PageID##4, 22 ("*Colorado II* was wrongly decided"); *see also* App. Reply at 21-24), Appellants urge the Court to defy the Supreme Court's clear command that when a Supreme Court precedent has "direct application in a case," courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc*., 490 U.S. 477, 484, (1989)). Indeed, this Court is bound to follow *Colorado II*, even if it "appears to rest on reasons rejected in some other line of decisions." *Id.*

This Circuit has repeatedly reaffirmed this important principle. *See, e.g.*, *Taylor v. Buchanan*, 4 F.4th 406, 408 (6th Cir. 2021), *cert denied*, 142 S. Ct. 1441 (2022) ("Even where intervening Supreme Court decisions have undermined the reasoning of an earlier decision, we must continue to follow the earlier case if it 'directly controls' until the Court has overruled it."); *Richardson v. Wayne State Univ.*, 587 F. App'x 284, 286 (6th Cir. 2014) ("Richardson argues those cases were wrongly decided, but we cannot overrule the Supreme Court.").[1] Appellants' facial challenge "simply ignore[s] the doctrine of stare decisis." *United States v. Davis*, 591 F. App'x 473, 475 (6th Cir. 2015).

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[1] *See also, e.g.*, *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continued vitality.").

In any event, Appellants' three claimed distinctions wither under scrutiny. First, Appellants claim that "Congress has materially amended FECA's coordinated expenditure regime" through the 2015 Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772-73 (Dec. 16, 2014). (App. Reply at 21.) But Congress did not in fact amend the challenged coordinated expenditure limit in that legislation; the "change" Appellants focus on is Congress's decision to establish separate, higher-limited national party accounts for specifically limited purposes — parties' funding of conventions, buildings, and legal proceedings. (Second Brief of the FEC ("FEC Br.") at 28-29.) There is a material difference between a donor's $30,000 contribution to fund her preferred candidate's TV ads through a party committee and the same donor's $100,000 contribution to help the NRSC renovate its headquarters lobby. The coordinated party expenditure limits that Congress established in FECA insightfully capture the notion that functionally contributing to a candidate through a party, as the FEC's opening brief diagrammed (FEC Br. at 33), or engaging in an informal tally scheme (*id.*), would eviscerate the $3,300 base limit on direct contribution to candidates. The fact that Congress has allowed higher limit accounts for specific purposes that by law are "'not . . . for the purpose of influencing an election,'" (*id.* at 28 (quoting Advisory Opinion 2019-02 at 4 (Bill Nelson for Senate) (https://www.fec.gov/files/legal/aos/2019-02/2019-02.pdf)), does not create any sort of meaningful change in the landscape of party

coordinated expenditures that *are* for the purpose of influencing elections – a distinction that Appellants completely fail to acknowledge.

Second, Appellants argue that the *Colorado II*'s "free-ranging views of 'corruption' and tailoring" are "firmly out of bounds" in light of "current Supreme Court precedent." (App. Reply at 22.) As an initial matter, this argument is foreclosed for the reasons outlined above. *See supra* p. 7; *Agostini*, 521 U.S. at 237. Additionally, although Appellants make glancing mention of *McCutcheon v. FEC*, 572 U.S. 185 (2014), *FEC v. Cruz*, 596 U.S. 289 (2022), and the 2015 Appropriations Act, (App. Reply at 22), they conspicuously decline to elaborate on the cases undergirding this supposed change in law. That is because no such change has occurred. *Colorado II* relied on the anticorruption principle of preventing the circumvention of FECA's base contribution limits. 533 U.S. at 464-65; *see also Buckley*, 424 U.S. at 46-47. *McCutcheon* and *Cruz* reiterated that those base contribution limits are constitutionally sound and appropriately tailored, serving the "compelling" interest of limiting quid-pro-quo corruption and its appearance. (FEC Br. at 48 (quoting *McCutcheon*, 572 U.S. at 199).) *Colorado II* thus remains fully consistent with the Supreme Court's most recent decisions.

In arguing otherwise, Appellants do not seem to dispute that preventing circumvention is a valid theory of corruption (*e.g.*, App. Reply at 1-2 (suggesting parenthetically that circumvention is a conceivable theory of corruption).) Instead,

they have chosen to argue that circumvention was not actually Congress's purpose in enacting the challenged limits. (*Id.*) But the Supreme Court itself has described this view as unserious, specifically noting in *Colorado II* that "neither the dissent nor the Party seriously argues that Congress was not concerned with circumvention of contribution limits using parties as conduits." *Colorado II*, 533 U.S. at 457 n.19.

Third, Appellants continue to stress that the national parties' alleged eclipsing by Super PACs is bad policy. (App. Reply at 22-24.) The Commission has already shown that Appellants' claims of being overtaken by Super PACs are factually overstated. (FEC Br. at 58-59 (reciting, *inter alia*, the *billions* of dollars of parties' funding in recent cycles).) But even if Super PAC funding has "shot up" in recent years (App. Reply at 23), Appellants fail to address the Commission's point (FEC Br. at 56) that the current constitutionally sound legal landscape is resultant from the Supreme Court's determination in *Citizens United v. FEC*, that *independent* spending—the defining feature of Super PACs—is fundamentally different than entirely different party *coordinated* spending at issue here. 558 U.S. 310, 357-60 (2010). Super PACs and party committees have different limits because they are different kinds of organizations and present different corruption risks. The Supreme Court has "consistently rejected" the kind of "level[ing of] the playing field" that Appellants seek here, *e.g.*, *McCutcheon*,

572 U.S. at 207 (cleaned up), and has repeatedly rebuffed the national parties' efforts to avoid FECA's contribution limits, including in the case Appellants cite, *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) (*RNC*), *aff'd*, 561 U.S. 1040 (2010) (cited in App. Reply at 23); *see also Republican Party of La. v. FEC*, 219 F. Supp. 3d 86, 89 (D.D.C. 2016) (*LAGOP*), *aff'd*, 581 U.S. 989 (2017). Appellants' policy arguments do not alter the legal analysis for constitutionality, and the Court must follow the Supreme Court's lead in rejecting them.

B. The Court Must Reject Appellants' As-Applied Challenge

Appellants' as-applied challenge is equally foreclosed by *Colorado II*. This is for the simple reason that Appellants' party coordinated communications challenge falls squarely within the activity the Court contemplated in its detailed *Colorado II* decision. *See Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 522 (6th Cir. 2012) ("Plaintiffs label their claims as both facial and as-applied challenges to the Act, but because the 'plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs,' the claims that are raised are properly reviewed as facial challenges to the Act." (citing *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010))).[2] But this case does not merely

[2] Appellants' reliance on *Wisconsin Right to Life, Inc. v. FEC* is also misplaced. The footnote Appellants cite simply reiterates that *McConnell v. FEC*, 540 U.S. 93, 158 (2003), had "not purport[ed] to resolve future as-applied

challenge the limits as applied to some narrow subset of "specific expenditures" that the Court was not considering when it decided *Colorado II*. 533 U.S. at 456 n.17. Indeed, the relief Appellants seek, which includes a judgment that the coordinated party expenditures limits, including party coordinated communications regulated under 11 C.F.R. § 109.37, are unconstitutional and therefore unenforceable (Compl., R.1 at 26, Prayer for Relief, PageID#26), would extend well beyond the "particular" circumstances of Appellants, and indeed "would effectively eviscerate the Supreme Court's holding in *Colorado II*." *Cao*, 619 F.3d at 428.

Appellants do not dispute either that most of their spending on party coordinated *expenditures* are for "party coordinated *communications*." Compl., R.1 ¶ 65, PageID#16 (emphasis added) ("Traditionally, coordinated party expenditures under 52 U.S.C. § 30116(d) have primarily consisted of expenditures on so-called 'party coordinated communications.'") (citing 11 C.F.R. § 109.37).

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challenges," to a part of BCRA regulating "electioneering communications." 546 U.S. 410, 411-12 (2006) (per curiam). Nor does Appellants' specious argument that the Supreme Court's denial of certiorari in *In re Cao*, 619 F.3d 410 (5th Cir. 2010) (en banc), "support[]" their as-applied challenge (App. Reply at 25) stand to reason. Similarly here, the alleged as-applied challenge in *Cao* subsumed the whole. 619 F.3d at 430 (rejecting "as-applied" claim where it relied on the same principles rejected in *Colorado II*, "namely the broad position that coordinated expenditures may not be regulated"). Furthermore, the denial of certiorari is not evidence of that supports Appellants' challenge against *Colorado II* here.

Their past spending is a matter of public record. (FEC Br. at 44-47.) Nor do they dispute that such communications were what the Supreme Court was focusing on when it decided the legality of the party coordinated expenditure provision in *Colorado II*. (App. Reply at 24-26.)

Because media expenses represent such a large portion of campaign expenditures, it follows that any "exception [to coordinated expenditure limits] that allowed parties and candidates to coordinate on media" would "effectively destroy any remaining limits on coordinated expenditures," thus creating the same problems that caused the *Colorado II* Court to believe that parties could become vehicles for donors to circumvent contribution limits. (FEC's Proposed Findings of Fats ("FEC Facts"), R.43, ¶ 246 PageID#5208 (citing Krasno *Cao* Report, R.36-3 at 11, PageID#490).) Applying a "different characterization," *Colorado II*, 533 U.S. at 456 n.17, to Appellants' proposed activities would not be appropriate, and would effectively require this Court to impermissibly overturn that case. The Court should not entertain a purported as-applied exception that would swallow the rule. That Appellants themselves acknowledge the possibility that the Court will "conclude[] that existing precedent controls" the questions at issue, in urging a prompt ruling in that event (App. Reply at 26), recognizes the force of stare decisis in this case.

II. FECA'S COORDINATED PARTY EXPENDITURE LIMITS ARE CONSTITUTIONAL

Even if this Court could consider the merits of the constitutional question anew, or as applied to a vast subset of all coordinated party expenditures, the Court should uphold FECA's coordinated party expenditure limits because the dispositive features of *Colorado II*'s reasoning hold true today. First, the limits continue to properly target quid pro quo corruption by attacking a clear avenue for donors to circumvent candidate base contribution limits. The record compiled by the FEC demonstrates the risk of abuse inherent in a system permitting unlimited coordinated party spending. Second, the limits are a closely drawn means of accomplishing this anticorruption aim, carefully tailored to limit only funds Congress determined most acutely risk corrupting candidates while not inhibiting valuable party activity apart from coordinated spending.

A. The Coordinated Party Expenditure Limits Target Quid Pro Quo Corruption and Its Appearance by Limiting Circumvention of Candidate Base Limits

Appellants do not contest, nor could they, that campaign finance law has long served to limit the potential and appearance of donor-candidate quid pro quos facilitated by donor contributions. *See Buckley*, 424 U.S. at 26-28; *McCutcheon*, 572 U.S. at 208; *Cruz*, 596 U.S. at 306. Yet, Congress relying *solely* on candidate base contribution limits to achieve that goal would fall short. That is because there exist other avenues of campaign spending that allow candidates to control the

disposition of donors' funds even where those candidates receive no direct contribution from the donor. Party coordinated spending is a paradigmatic example, and thus, the challenged limits precisely regulate the line between party committees and candidates. (FEC Br. at 51-53.) Because candidate base limits are themselves valid in targeting quid pro quo corruption, and because coordinated party expenditures reinforce those limits by preventing their circumvention, coordinated party expenditure limits target the same sort of quid pro quo corruption risk.

1. Targeting Circumvention of Candidate Base Limits Remains a Valid, Constitutionally Sound Approach to Reduce Quid Pro Quo Corruption

The Supreme Court in *Colorado II* held that the coordinated party expenditure limits were constitutional because they aimed to reduce circumvention of candidate base limits. *Colorado II*, 533 U.S at 456 ("unlimited coordinated spending by a party raises the risk of corruption (and its appearance) through circumvention of valid contribution limits"). That determination remains correct because, first, Congress enacted the challenged limits with anticircumvention as its aim, and second, anticircumvention measures operate as a corollary of the base limits, not a duplicative layer of prophylaxis.

Appellants' Reply leads off with the unsupported claim that the only "conceivable explanation" for Congress enacting coordinated party expenditure

limits is the impermissible purpose of "reduc[ing] what it saw as wasteful and excessive campaign spending." (App. Reply at 3-4 (citing *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (plurality) (*Colorado I*).) This conjecture is explicitly contradicted by the Supreme Court, which later clarified that the language Appellants erroneously rely on related only to Congress's enactment of FECA's limits on parties' *independent expenditures*, which was consistent with its findings in *Buckley* on limiting other actors' independent spending. *See Colorado II*, 533 U.S. at 457 n.19. "As for the Party Expenditure Provision's application to *coordinated expenditures*, on the other hand," the Court continued, "the evidence . . . suggests that the anticircumvention rationale that justifies other coordinated expenditure limits, *see Buckley*, 424 U.S. at 46-47 . . ., is at work here as well." *Id.* (emphasis added). As discussed above, the Court specifically explained that the argument Appellants now make, "that Congress was not concerned with circumvention of contribution limits using parties as conduits," is not worth taking seriously. *Id.*

The evidence demonstrating that circumvention was at issue includes the testimony of Mr. Robert Hickmott, Senator Timothy Wirth, Mr. Leon Billings, and Senator Paul Simon, included in the record here, in addition to the pre-enactment floor statements of Senators Charles Mathias, Edward Kennedy, and John Pastore (FEC Br. at 51-52), all attesting to practical concerns of using party contributions,

coupled with unlimited coordinated expenditures, to circumvent base limits. (*See* FEC Facts, R.43, ¶¶ 105, 106, 108, 212, 226, 233, 318, PageID##5152-54, 5196, 5201, 5203, 5233-34.) Appellants' claim of an improper purpose is belied by the Supreme Court's explicit contrary determination and their inability to present compelling evidence of another purpose.

Equally baseless is Appellants' effort to find fault in Congress's coordinated party expenditures formula, which provides limits in different dollar amounts in different Senatorial races. (App. Reply at 4-5.) The formula-based limits make sense (*contra id.* at 4) following the intuitive notion that smaller-population constituencies, where less money is needed to convey an electoral message to a similar proportion of voters as larger-population constituencies, would provide a riskier context for quid pro quos if the limits were uniform across jurisdictions. Accordingly, those risks are directly mitigated through comparatively lower coordinated expenditure limits. Because the limits are premised on only a portion of party contributions being allocated to coordinated spending (*see* FEC Br. at 31, 51), a greater number of donors in a jurisdiction enables greater coordinated spending before rising to a level risking corruption. Far from Appellants' claim that "tolerat[ing] a greater risk of such schemes for some candidate[s] . . . than others" renders the challenged limits suspect (App. Reply at 4), anchoring the limits, in part, to voting-age population is evidence of Congress carefully targeting

corruption, recognizing proportionately more coordinated spending can occur in large-population states before an intolerable specter of quid pro quo arises.[3]

Neither does Congress's decision not to ban coordinated party expenditures establish that it was not targeting quid pro quo corruption and circumvention. (App. Reply at 5-6.) Section 30116(d), structured as limits rather than a complete prohibition, reflects Congress's careful balancing that respects both the Act's anticorruption imperative and First Amendment rights of speech and association. The limits "ensure that parties could meaningfully support their candidates' campaigns." (Br. of *Amicus Curiae* Campaign Legal Ctr. and Citizens for Responsibility and Ethics in Washington in Supp. of Def.-Appellee at 6 (Doc. No. 41) ("CLC & CREW Br.").) Even if permitting no coordinated spending activity would likewise target corruption, that approach would be considerably less closely drawn to targeting corruption than permitting some coordinated spending. *See infra*, Part II.B. That Congress set out to "foreclose *quid pro quos* through coordinated party expenditures" (App. Reply. At 5), by less heavy-handed means than a complete ban reflects its "empirical judgments" about "the precise

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[3] Appellants also misapprehend the Commission's invocation of competitiveness. (*See* App. Reply at 4.) The Commission pointed to concentrated spending in competitive races to show an especially high potential for quid pro quo corruption, if *unlimited* coordinated spending were allowed, in those races where candidates' fundraising needs become acute enough for donors to leverage into extracting improper commitments or actions. (FEC Br. at 38-39.)

restriction necessary to carry out the statute's legitimate objectives." *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 30). In a constitutional challenge where tailoring is at issue, Appellants plainly err in suggesting that Congress should have used a chainsaw instead of a scalpel.

Finally, *McCutcheon*'s fact-specific determination that the aggregate limit was an unnecessary layer of prophylaxis, not a corollary of the candidate base limits, does not disavow the Supreme Court's anticorruption and anticircumvention rationales more broadly. (App. Reply 3-6, n.1.) As described in the Commission's opening brief, coordinated party expenditure limits are not the sort of "prophylaxis-upon-prophylaxis" that is "layered on top" of base limits, *McCutcheon*, 572 U.S. at 221, as in *McCutcheon* and *Cruz*. (FEC Br. 53-55.) The limits instead attend to a separate transaction (between parties and candidates) to ensure the effectiveness of candidate base limits. (*Id*. at 51-56.) Because the anticircumvention and quid pro quo corruption rationales originated from *Buckley*, 424 U.S. at 27-28, 45-48, and were reaffirmed in *Colorado II*, this justification for the limits is far from a "post hoc litigation invention." (App. Reply at 5.) Indeed, targeting quid pro quo corruption through anticircumvention measures has remained sound since *Colorado II* in cases where courts have upheld restrictions related to party soft money. *See McConnell v. FEC*, 540 U.S. 93, 137 (2003); *RNC*, 698 F. Supp. 2d at 153-54; *LAGOP*, 219 F. Supp. 3d at 89-90.

2. Coordinated Party Expenditure Limits Reduce a Cognizable Threat of Quid Pro Quo Corruption

The Commission's opening brief illustrated a "cognizable risk of corruption" — a "risk of quid pro quo corruption or its appearance," *McCutcheon* 572 U.S. at 210 — stemming from would-be unlimited coordinated party expenditures. (FEC Br. at 31-44.) To be sure, "[t]he quantum of empirical evidence needed [to uphold a limit] will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000). Here, the record well establishes how donors can use party committee accounts, combined with parties' coordinated spending capacity, to provide higher sums to candidates in exchange for official action. That threat of corruption if coordinated spending were unlimited is more than "mere conjecture," *id*. at 392, and certainly not "illusory," *Buckley*, 424 U.S. at 27. Incredibly, Appellants say actual record evidence of the corruptive potential that Congress was concerned about — namely, the tallying system addressed by the Court in *Colorado II* — can be ignored because it was "legal," making it somehow "not proof of (illegal) circumvention." (App. Reply at 12.) Eradicating the specter of *illegal* corruption surely would be easier by declaring the trading of dollars for political favors to be *legal*, but the fact remains that tallying systems — which one would expect to resurface if Appellants prevail — are ripe for facilitating actual and apparent corruption. Congress and the Supreme Court certainly thought so.

In claiming that "[t]he FEC offers no evidence justifying the limits," Appellants spend a large portion of their brief going through several of the "no evidence" examples the FEC offered, and why all of this "no evidence" supposedly should be discounted. (App. Reply at 6-14.) In truth, just as in *Colorado II*, the FEC's record demonstrates the requisite "'serious threat of abuse.'" *McCutcheon*, 572 U.S. at 217-19 (citing *Colorado II*, 533 U.S. at 457); *Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 14 (D.C. Cir. 2015) (en banc).

Appellants argue, in conclusory fashion, that the FEC's examples do not "involv[e] coordinated expenditures being used as part of a *quid pro quo*" (App. Reply at 7-8), and "do not involve *quid pro quos*" (*id.* at 8). This is incorrect. Party donors requesting tax legislation exceeds mere access and influence; it is exactly the concern that Congress perceived, and the Supreme Court has endorsed, namely specific legislative action as a condition of contributing — "'dollars for political favors.'" *McCutcheon*, 572 U.S. at 192 (citing *FEC v. NCPAC*, 470 U.S. 480, 497 (1985)). That Samuel Bankman-Fried, or any donor engaging in a quid pro quo, is not charged with criminal bribery is immaterial — restrictions on contributions and coordinated expenditures have long been permissible notwithstanding concurrent "prohibitions on bribery . . . [that] address only the 'most blatant and specific' attempts at corruption." *Colorado II*, 533 U.S. at 463 n. 26 (citing *Buckley*, 424 U.S. at 28). The scope of actual and apparent quid pro quo

needed to sustain campaign finance limits is not coextensive with whether a bribe can be proven beyond a reasonable doubt. *See Buckley*, 424 U.S. at 27-28; *Shrink Missouri*, 528 U.S. at 388-89.

Appellants intimate that the FEC's state examples from Connecticut, New York, Louisiana, Massachusetts, and Wisconsin "do not involve *quid pro quos*" but violate other campaign finance laws. (App. Reply at 8.) These are not mutually exclusive: quid pro quos, depending on the particulars of a given arrangement, could well violate a number of campaign finance provisions. Further, Appellants fail to articulate why these are not quid pro quo scenarios, when the examples plainly illustrate how sums of money may be provided to political parties from donors and used as leverage to induce action from officeholders. (*See* FEC Br. at 42-43.) Appellants argue in a similar vein that the Connecticut, New York, Louisiana, and Wisconsin matters did not lead to prosecution or enforcement actions. (App. Reply at 10.) But whether a prosecution or enforcement action is brought is not a prerequisite for whether an instance prompts concerns of actual or apparent corruption. At a minimum, such examples show how the challenged limits support Congress's goal of preventing corruption and its appearance.

Appellants also take issue with the FEC's sources that "have not been tested through discovery *here*." (*Id*. at 8-10.) Their claim that the District Court

"reject[ed]" the FEC's evidence of corruption in making its Findings of Fact (*id.* at 9) is wrong. The Court made clear these legislative facts — concerning actors *outside* the present litigation — were to be reserved for *this* en banc Court to review in the first instance, and thus, expressly limited its findings to adjudicative facts pertaining only to the parties. (FEC Br. at 19-21 (citing Opinion & Order, R.49, at 29-35, PageID##5482-88).) That Appellants opposed discovery entirely in the District Court, (*see* Pls.' Reply in Supp. of Mot. to Certify, R.27, PageID##333-40), but now cast doubt on these sources by maintaining they needed *more* discovery to test their propriety is as audacious as it is contradictory.

Appellants' remaining point regarding an alleged lack of conclusiveness of the Tsunis, Tamraz, and Chvala scandals (App. Reply at 9-10), only further supports the need for coordinated party expenditure limits. There regularly exists the "practical difficulty of identifying and directly combating circumvention under actual political conditions," which greenlights quid pro quo arrangements. *Colorado II*, 533 U.S. at 462. What the Commission's examples show is that when "contributions g[o] into a general party treasury, and candidate-fundraisers are rewarded with something less obvious than dollar-for-dollar pass-throughs (distributed through contributions and party spending)," risks of circumventing

base limits arise, but are "obviously very hard to trace." *Id.*[4] That continuing finding — which Appellants do not counter — only bolsters *Colorado II*'s decision sustaining the challenged limits recognizing the difficulty of enforcement.

Even though the FEC has illustrated the corruptive risk through numerous examples, Appellants also fail to acknowledge that the challenged limits themselves have deterred many corruptive examples that could have been cited, had the limits not been in effect. It is one thing to object to the "failure to adduce empirical data that can readily be obtained," but "something else to insist upon obtaining the unobtainable." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009). Because the coordinated expenditure limit has been in place for nearly 50 years, "no data can be marshaled to capture perfectly the counterfactual world in which [such] limits do not exist." *McCutcheon*, 572 U.S. at 219.

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[4] Appellants take issue with FEC's observation of the Supreme Court's finding that parties being "inextricably intertwined with federal officeholders and candidates," *McConnell*, 540 U.S. at 155 (quoting 148 Cong. Rec. H409 (Feb. 13, 2002)), can heighten the corruptive potential of coordinated party expenditures. (App. Reply at 10-11.) But their rejoinder that this unity of interest makes coordinated party expenditure limits "nonsensical" (*id*. at 10), reflects a distorted view. Appellants themselves argue that coordinated spending is "more efficient and effective." (First Br. of Pl.-Appellants at 24.) This is because candidate input or control informs how they should spend funds to further their unified interests of winning elections and attaining governing majorities. (*See* FEC Br. at 36-39.) In this sense, exploring parties' "structures and objectives" only crystalizes how donors could contribute to party committees, unbound by coordinated spending limits, to pursue the same end-in-mind of obtaining favorable official action as through direct contributions to candidates exceeding base limits. (*Id.*) The FEC's evidence illustrates this reality.

Appellants cite *Cruz* for the proposition that the government must point to "record evidence" to justify the limits. 596 U.S. at 307. But that partial quote actually comes from *Colorado I*, in the context of explaining that the government there "did not point to any record evidence or legislative findings suggesting any special corruption problem in respect to *independent party expenditures*." 518 U.S. at 618 (emphasis added) (explaining the need to show a distinctly high or "special" fear of corruption in that context because *Buckley* had previously determined other limits on independent spending were unjustified). Knowing well its decision only a few years prior that arose out of the same litigation, the *Colorado II* Court found, in stark contrast, that there was "substantial evidence" of corruption through circumvention that justified limits on coordinated party expenditures. 533 U.S. at 457. Appellants' reliance on *Cruz* is therefore misplaced to the extent it suggests that the Commission must identify "evidence" of a corruption problem beyond what the Court recognized in *Colorado II*.

That the limits have been operative for nearly the past half-century hinders amassing "record evidence" of the exact strain of corruption at issue — particularly at the federal level — precisely because the limits may well work — a possibility that Appellants do not entertain. As this Court has acknowledged, however, it is unnecessary to "require [the state] to 'experience the very problem it fears before taking appropriate prophylactic measures.'" *Schickel v. Dilger*, 925

F.3d 858, 871 (6th Cir. 2019) (citing *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011)); *see id*. at 870 ("A state need not produce evidence of actual instances of corruption.") (citing *Ognibene*, *supra*, at 183 ("It is not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption.")); *see also Lair v. Motl*, 873 F.3d 1170, 1180 (9th Cir. 2017) ("[A state] need not show any completed quid pro quo transactions to satisfy its burden.").

Accordingly, the Court should reject Appellants' insistence that whatever quantum of evidence the FEC offers, more is needed, especially when "there is no recent experience with unlimited coordinated spending" because "the Government's contentions" have already been found to be "ultimately borne out by evidence." *Colorado II*, 533 U.S. at 433, 447. Apart from aiming to shift the burden to the FEC to re-validate what the Supreme Court already found, Appellants, who challenge those determinations, highlight no evidence of changed circumstances rendering *Colorado II*'s corruption findings now unpersuasive.

B. The Coordinated Party Expenditure Limits are Closely Drawn

Appellants insist the challenged limits are unconstitutional by offering a policy-laden critique that Congress could have, and should have, regulated more. But in addressing the risk of corruption and its appearance, Congress is not required to comprehensively address all areas of party spending and can legislate

incrementally over time. (FEC Br. 44-47 (explaining scope of coordinated party expenditure limits and party coordinated communications).) The fit between the government interest and the means must be reasonable and proportional, not necessarily perfect. *McCutcheon*, 572 U.S. at 218. The FEC has shown Appellants' claim of underinclusiveness fails to account for Congress's reasonably drawn distinctions between different types of party spending. (FEC Br. at 47 n.6; *see also* CLC & CREW Br. at 17-20.)

Appellants argue that the limits are underinclusive (App. Reply at 14-18), yet "the First Amendment imposes no freestanding underinclusiveness limitation." *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)); *see also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) (the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' . . . warrants considerable deference" (internal citation omitted)). Congress need not address all aspects of party spending and can act incrementally. *Williams-Yulee*, 575 U.S. at 449 ("policymakers may focus on their most pressing concerns"). Thus, the Supreme Court has upheld legislation that could have reached further into an area a legislature or Congress sought to address, but instead left a portion of their stated interest unregulated or regulated differently. *Id*; *see also Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533, 550 (D.C. Cir. 2019) (en banc) (upholding contribution

limits for special purpose accounts); *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995) (rejecting challenge to limitations on contributions by municipal security professionals, noting that "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech . . . could be more effective"); *Wagner*, 793 F.3d at 32 (concluding that contractor contribution ban was not "fatally underinclusive").

In *Williams-Yulee*, judicial candidates were prohibited from personally soliciting contributions, but allowed to set up committees that solicited contributions for their campaign. The Court upheld the judicial conduct rule because it sought to insulate candidates from the solicitation and receipt of funds while leaving open alternative means for candidates to raise resources necessary to run their campaigns. As in this case, Congress addressed the most pressing aspect of a problem while leaving other areas less regulated. *Compare supra* pp. 20-26 (showing risk of corruption or its appearance), *with Libertarian Nat'l Comm.*, 924 F.3d at 550 (finding special purpose accounts "equally benign" and greater risk of corruption from contributions used to benefit candidates directly).

Appellants err in arguing that the coordinated party spending provisions improperly limit spending on advertising while not reaching special purpose accounts (*e.g.*, presidential nominating conventions, building accounts, or legal funds), and get-out-the-vote and voter registration efforts. (App. Reply at 14-15

(quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011).) In *Brown*, a non-FECA case, a California law attempted to restrict video game sales to minors but not other media that contained similar violent content, like Saturday morning cartoons. *Id*. at 801-02. Here, in contrast, Congress made a reasonable assessment about whether non-analogous forms of party spending entail a comparable risk of corrupting candidates. (*See* FEC Br. 47 n.6). The Supreme Court has agreed certain forms of party spending pose a sufficiently distinct corruption danger. (*Id*. (citing *McConnell*, 540 U.S. at 13, 170).) Congress's difference in treatment reflects an intuitive judgment that coordinated party expenditures — directly supporting candidates advocating to win elections — entail a greater danger to corrupt than other party spending that is more attenuated from that goal. *See Buckley*, 424 U.S. at 105 ("[W]e are guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did . . . and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.") (internal quotation marks and citations omitted); *McConnell*, 540 U.S. at 158 (rejecting underinclusiveness argument and noting that "we respect Congress's decision to proceed in incremental steps in the area of campaign finance regulation"). Appellants' disagreement with that legislative decision is merely policy preference and has no application here.

Next, Appellants argue that FECA could employ alternative means to accomplish its anticorruption interest. (App. Reply 18-20.) These policy disagreements miss the mark, and importantly, do not signal constitutional infirmity of Congress's well-tailored arrangement. Appellants mistakenly suggest lower party base limits, earmarking prohibition, and disclosure requirements are "'alternatives available'" to prevent circumvention "'while avoiding 'unnecessary abridgment' of First Amendment rights.'" (App. Reply at 18 (citing *McCutcheon*, 572 U.S. at 218, 221).) But these other measures do not *prevent* the sort of corruption with which Congress was concerned arose from unlimited coordinated spending.

First, Congress instituted dual measures of comparatively high party base limits with coordinated party expenditure limits, rather than lowering party base limits to $3,300 to prevent the risk of pass-through corruption. (FEC Br. at 54-55.) Appellants suggest they would prefer a "reduction in *quantity of contributions* for a boost in *quality of expenditures*" (App. Reply at 19), but meanwhile stress existing fundraising disparities with Super PACs that lowering contribution limits would only exacerbate. The challenged limits instead evidence that Congress crafted a more closely tailored approach, allowing parties to raise and use substantial funds in various ways beyond coordinated spending (including general party-building activity, get-out-the-vote and party registration activities, dissemination of certain

campaign materials, nominating conventions, party headquarters, legal proceedings, and, of course, highly-valued independent spending in support of candidates), rather than a heavy-handed cap on what party committees may raise. As the *Colorado II* Court put it, "Congress is entitled to its choice . . . between limiting contributions and limiting expenditures whose special value as expenditures is also the source of their power to corrupt." 533 U.S. at 464-65.

Second, the concern with donor-candidate quid pro quos from coordinated party expenditures is precisely that they entail "unearmarked contributions to . . . the candidate's political party." *Buckley*, 424 U.S. at 38. The danger is this: donors contribute to party committees, parties allocate donor contributions to candidate-controlled coordinated spending, and then candidates-turned-officeholders carry out the wishes of the donor. (FEC Br. at 33 (diagramming these steps).) Parties may well be unwitting in their use as an "intermediary or conduit" and unable to "report the original source and the intended recipient of such contribution." 52 U.S.C. § 30116(a)(8). Even the "tight[est]" anti-earmarking statute or implementing regulation (App. Reply at 20), would not capture this unapparent arrangement. And, again, claiming that some circumvention was at one time "legal" (App. Reply at 12-13, 20), only reinforces the Commission's argument that lawful latent mechanisms exist to allocate donors' contributions to coordinated spending with particular candidates, "induc[ing] . . .

more subtle circumvention" from "'understandings' regarding which donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote," all of which facilitates opportunities for donor-candidate exchanges. *Colorado II*, 533 U.S. at 460 n. 23, 462.

Third, "disclosure of contributions to and coordinated expenditures by parties" (App. Reply at 19), is undoubtedly insufficient to prevent or deter the avenue for quid pro quo at issue. Party committees only disclose that they received contributions from certain donors and made certain coordinated expenditure with candidates; disclosure would not illuminate how specific coordinated expenditures could have been financed by a particular donor to facilitate the sort of possible quid pro quo of which the Commission warns. Thus, disclosure does not offer "a particularly effective means of arming the voting public with information" that is relevant to revealing these corrupt exchanges. *McCutcheon*, 572 U.S. at 224.

CONCLUSION

For the foregoing reasons, the certified question should be decided in favor of the Commission.

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I hereby certify, on this 24th day of May, that:

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/s/ *Shaina Ward*
Shaina Ward

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I hereby certify that on this 24th day of May, 2024, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Sixth Circuit by using the Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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