No. 00-191

IN THE
# Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
*Petitioner,*
v.
COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit**

## BRIEF FOR RESPONDENT

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## OPINIONS AND ORDERS BELOW

The May 5, 2000, opinion of the United States Court of Appeals for the Tenth Circuit is reported at 213 F.3d 1221 and is reproduced at Pet. App. 1a-53a. It affirmed the February 18, 1999 order and memorandum decision of the United States District Court for the District of Colorado, reported at 41 F. Supp. 2d 1197 and reproduced at Pet. App. 54a-91a that, on remand, declared unconstitutional the limits imposed upon coordinated party spending by 2 U.S.C. § 441a(d)(3).

The June 26, 1996 opinion of this Court, referred to herein as *Colorado I*, is reported at 518 U.S. 604 and is reproduced at Pet. App. 92a-142a. *Colorado I*, which held that political parties freely may engage in independent speech, also vacated the first opinion of the Court of Appeals in this matter, which is reported at 59 F.3d 1015 (Pet. App. 143a-162a), and remanded for further development the issue of the constitutionality of limits on coordinated party spending.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, the Party Expenditure Provision of the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. § 441a(d), as well as other relevant parts of FECA, appear in the Brief for Petitioner ("FEC Brief") at 2-3.[1] A further provision of FECA, not found in the FEC Brief, is the "Anti-Earmarking Provision," § 441a(a)(8), which states that:

> For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including

[1] Section references within this brief are to Title 2 of the United States Code unless otherwise noted.

> contributions which are in any way earmarked through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

## STATEMENT OF THE CASE

### Preliminary Statement

The Colorado Republican Federal Campaign Committee ("Colorado Party") would face serious criminal penalties if, in cooperation or consultation with its own candidate for Congress, it were to pay for a single letter to each eligible Colorado voter, or even to each registered Colorado Republican, explaining how electing that candidate would advance the Party's platform and values. The Party Expenditure Provision limits at issue in this case, § 441a(d)(3), forbid a party to spend more than 7 cents per voter in cooperation or consultation with, or at the request of, its own candidate for Senate or the House of Representatives.[2] Since postage alone is 34 cents per first class letter, and postage is but a fraction of the cost of a mailing, even a single coordinated letter to each voter is a crime.

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[2] The 2000 Senate Limits appear in the FEC *Record* (Vol. 26, No. 3, March 2000), at 15, available at <www.fec.gov>. The limit varies widely, from a low of $67,560 for Delaware, Hawaii, Idaho, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont to $1,636,438 for California, $929,355 for New York, and $967,797 for Texas. Colorado's 2000 Senate limit was $202,072. The House limit is $33,780 in most states, but is double that ($67,560) in states with only one representative, i.e., Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming. These limits apply separately to state and national party committees. A state committee may assign its limit to the national committee, or vice versa. *See, FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981).

These stringent limits on a party's coordinated political speech apply even though the Party may spend only "hard money" to fund coordinated speech. Hard money consists of voluntary contributions that a party receives in limited amounts (typically under $100) from individuals and political committees (not corporations and labor unions), and that are fully reported and publicly disclosed pursuant to FECA. Disclosures are accessible online at <www.fec.gov> and <www.tray.com>. So-called "soft money" is not regulated as to amount and source, but it cannot be used for coordinated speech and is not at issue here.[3]

The Colorado Party grounds its First Amendment challenge to the Party Expenditure Provision on three propositions. First, requiring a political party to sever its natural, strong, pre-existing ties to its candidate as the price of unrestricted political speech directly, substantially, and uniquely burdens the party's core First Amendment rights. Second, assuming arguendo that a sufficiently compelling showing might sustain such a burden, the FEC has not made such a showing—despite having many years to do so. Third, even if a sufficient interest were shown, FECA's limits on coordinated party speech are not closely drawn to the interests asserted.

For these reasons, the Colorado Party contends, and the Tenth Circuit and the district court agree, that FECA's stringent categorical limit on coordinated party speech cannot stand.

**This Court's Earlier Ruling And Remand**

In *Colorado I* this Court held that the First Amendment invalidated FECA's restrictions on a political party's use of hard money to fund its independent speech on behalf of its candidates. Four Justices also were prepared to hold

[3] "Soft money" is not a term of art. In this brief, it describes funds that are not subject to FECA prohibitions or dollar limits and are received by national party committees. Nonfederal state party receipts, however, are regulated by applicable state law.

immediately that FECA's restrictions on coordinated speech are invalid. (Pet. App. 114a, 119a). The controlling plurality, however, preferred to remand the issue of coordinated spending restrictions for further factual and legal development. (Pet. App. 113a).

On remand the district court allowed the FEC a further year and a half of discovery to supplement the four years of discovery previously allowed. Thus, the FEC had a total of five and one-half years of discovery to develop evidence to justify the Party Expenditure Provision limits.

The FEC's discovery effort was extensive and exhaustive. It included interviews with many persons involved in the political process, preparation of their declarations, submission of expert reports, and depositions of political party leaders and experts. The FEC also subpoenaed documents from many third parties.

**FECA's Party Expenditure Provision**

FECA acknowledges that the relationship between political parties and their candidates is unique. It defines "political party" as an association that "nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association . . ." § 431(16).[4] Moreover, subsection (1) of the Party Expenditure Provision "exempt[s] political parties from the general contribution and expenditure limitations," *Colorado I*, Pet. App. 96a, stating that a party may make expenditures "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions." § 441a(d)(1). There is no dispute that the term

[4] FECA also defines "national committee" and "state committee" of political parties. §§ 431(14), (15). Such party committees are distinct from political action committees (PACs), which FECA refers to as "separate segregated funds." *See* § 431(4)(B).

"expenditures" in this provision includes expenditures that a party coordinates with its congressional candidates.[5]

The Party Expenditure Provision sets limits on party expenditures, including coordinated expenditures, that, adjusted for inflation, allow only about 7 cents per voter, as is discussed above. *See* § 441a(d)(3).[6] In setting these limits, Congress balanced its purpose of "reducing what it saw as wasteful and excessive campaign spending" against its goal of maintaining "an important and legitimate role for political parties." *Colorado I*, Pet. App. 104a. FECA's legislative history does not reflect any concern by Congress that party spending might be corruptive.

**The Factual Record**

Most of the materials developed during the extensive discovery process, including depositions of numerous officials of both major parties, were placed into the summary judgment record. In this Court, however, the FEC largely abandons the evidentiary record that it compiled. Instead, the FEC Brief relies on speculation (*e.g.*, at 23, "It is reasonable to assume . . .") and citation to publications (*e.g.*, at 36, 38, 46, 48, and 49) that were not subjected to the rigors of

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[5] Until *Colorado I* the FEC took the position that all expenditures by a party in connection with an election were coordinated. Thus, the Party Expenditure Provision was understood to regulate all party spending. *Colorado I* held that parties are capable of making independent expenditures, but it simultaneously held that FECA cannot restrict such expenditures.

[6] The Party Expenditure Provision limits were established in 1974. The limits on House races are $10,000 adjusted annually by the Consumer Price Index ("CPI"). § 441a(c)(1). Limits on party spending in Senate races and states with a single congressional district are based on the voting age population or $20,000 and are also adjusted annually for population and CPI. § 441a(d)(3)(A). The Senate limits are discussed further *supra* at 2 n.2. These limits "substitute" for the limits from which parties are "exempted" by § 441a(d)(1). *Colorado I* at 96a.

discovery and adjudication. The FEC fails to cite its own experts, perhaps because their testimony supports the position of the Colorado party. Pet. App. 83a (district court opinion, *citing* Sorauf/Krasno Report). The FEC Brief adds nothing material to what the Court knew at the time of *Colorado I.*

The Colorado Party deposed two of the FEC's affiants, both former United States Senators. These Senators testified that they had never been subjected to corruption or untoward influence by the party with which they chose to associate.[7] The Party also introduced into evidence the expert reports by Professors Anthony Corrado and Herbert E. Alexander which are reproduced at JA 106-157 and 170-243. The FEC deposed the authors of those reports at length. It has never asserted that these depositions undermined the reports.

Once discovery was concluded, the Colorado Party moved for summary judgment accompanied by a comprehensive statement of undisputed facts to which the FEC was obliged to respond with specificity, identifying any basis for disagreement. The FEC's response appears at JA 26-89. The Colorado Party's submissions, and the FEC's responses were relied upon by the courts below, and offer detailed insight into the unique relationship between political parties and their candidates.

The district court opinion reviews the record in detail and sets out the undisputed facts (Pet. App. 54a-91a). The FEC

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[7] When asked if party support had corrupted him, Senator Paul Simon replied, "I have never promised anyone anything." (JA 282). Similarly, Senator Tim Wirth had no example of ever having been corrupted. Neither Senator identified any other member of Congress who had been corrupted by his or her party. Similarly, none of the *Amici* members of the House and Senate assert that they have been corrupted by their respective political parties, let alone that they were corrupted by coordinated party expenditures. This lack of corruption is noteworthy since each of the Amici Senators benefitted from party coordinated expenditures. *See infra* at 12 n.10.

Brief makes no attempt to take issue with the district court's careful factual analysis or to grapple with the evidentiary record that the FEC insisted be compiled. Summarized below are some of the key undisputed facts.

**The Unique Relationship Between Political Parties And Their Candidates**

Political parties are voluntary associations formed to support candidates and promote policies. (JA 31-33, at ¶¶ 5-6). Parties are unique in their close relationship with and dependence on their candidates. (JA 32-33, 48, at ¶¶ 8, 28). Parties recruit and promote their candidates, work with their candidates to define party messages for the voters, and through their candidates seek to win elections in order to govern. (JA 34-39, at ¶¶ 11-12, 14, 16). Voters know parties by their candidates, and know candidates by their party affiliations. (JA 32-36, 58-59, at ¶¶ 8, 12, 44-45). Without their candidates, parties would be just another political interest group. (JA 54-55, 58-61, at ¶¶ 38, 44-45, 48).

The unique role of the modern political party in our democracy is widely recognized. (JA 30-36, at ¶¶ 4-13). Election laws accommodate party needs for primaries or other devices to nominate the party candidates. (JA 33-35, at ¶¶ 9-11). Typically name and party affiliation are the only ways a candidate is identified on the ballot. (JA 59, ¶ 45). Consistent with all of this, FECA identifies political parties by their unique role in nominating candidates who appear on the ballot as the candidate of the nominating group. § 431(16). Moreover, subpart (1) of the Party Expenditure Provision confirms the unique character of parties, exempting their expenditures from FECA's general limits. *Colorado I*, Pet. App. 96a.

The relationship between a political party and its candidates is so close that, until *Colorado I*, the FEC viewed parties as incapable of engaging in campaign speech

independent from their candidates. (JA 48-49, at ¶ 29). Forcing a party to engage in campaign speech independent of its candidate is an "unnatural act." (JA 48-52, at ¶¶ 28-32). The FEC's own experts acknowledged this "unique" relationship and the strain caused by separating party from candidate. (JA 50-51, at ¶ 31).

Following *Colorado I*, some political parties attempted the separation necessary to permit independent expenditures. (JA 51-52, at ¶ 32). They found that such an effort entails duplication, inefficiency, and expense. *Id.* Moreover, the resulting inability to coordinate the party's message with that of its candidate impairs effective communication and results in public confusion. (JA 55-56, at ¶ 39). The FEC's own experts concede that coordinated speech is far more effective and attractive to parties than independent speech. (C.A. App. 511-13). They also concede that political parties would engage in much more coordinated speech if they were not inhibited by FECA. (C.A. App. 511).

**The Operation Of Political Parties**

Political parties establish national and state level committees to act for the parties with respect to federal campaigns. § 431(14), (15). The Republican and Democratic national parties each have national, senatorial, and congressional campaign committees. Pet. App. 59a n.19. Similarly, the Republican and Democratic parties in each state maintain federal campaign committees. (JA 32-33, ¶ 8). These party committees are distinct from the campaign committees of the individual candidates, though cooperation is common. (JA 48, ¶ 28). Plaintiff/respondent here is the federal campaign committee of the Colorado State Republican Party. (JA 29-30, ¶ 3).

In contrast to days past, modern political parties operate in a fish bowl. To comply with FECA, the federal committees of political parties typically maintain segregated federal (*i.e.*, "hard money") accounts. 11 C.F.R. § 102.5. The restrictions

imposed on the receipt and use of hard money are detailed below at 14-17.

Political party committees also maintain state accounts subject to state regulation. For instance, in Colorado no person can contribute more than $25,000 to the Colorado Republican Party per year. Colo. Rev. Stat. § 1-45-105.3(2)(a). Thus, unlimited "soft money" contributions are not permitted in Colorado. Colorado also requires disclosure of all contributions, and the party's reports are available online at <www.sos.state.co.us/pubs/election/main.htm>.[8]

Party disclosures are closely scrutinized by opposing parties and candidates, public interest groups, and the media. Political parties are accountable to the public. The hint of scandal has immediate adverse repercussions, both for contributions and at the ballot box. *See* (JA 39-40, 61, at ¶¶ 17, 48).

Political parties engage in political speech. State and national committees of a party work together to assist party candidates and to communicate the party message to voters. "Party committees offer candidates a wide range of election-related services, including organizational consulting, issue research, polling, mail services, and media production and advertising assistance." (JA 207). Some national committees "have state-of-the-art television and radio production facilities on their premises, which are used to give candidates technical

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[8] The Brief of State Attorneys General *Amicus Curiae* notes that political parties are subjected to a variety of regulations under state law. *See* Brief *Amicus Curiae* of the States of Missouri, Colorado, Hawaii, Montana, New York, Oklahoma and Vermont In Support of Petitioner at 2 n.1. The constitutionality of these restrictions is not at issue here. According to the Attorneys General, at one time 20 states limited party support of candidates but today only 17 do so, with 33 now imposing no such limit. Thus, the trend is to eliminate such limits, and the substantial majority position among states disfavors such limits.

and editorial assistance in producing television and radio ads." (JA 209). With respect to coordinated party expenditures, "*[o]ver 90 percent of the monies spent by national party committees on behalf of their candidates is spent on political communication.*" (JA 210-11) (emphasis added).[9] All coordinated campaign speech paid for by a party is required to disclose the party's sponsorship both by FECA, § 441d, and by federal communications law, 47 U.S.C. § 317.

Party committees may make only limited cash contributions directly to a candidate or campaign. A state party such as the Colorado Republican Party may contribute only $5,000 per candidate per election. § 441a(a)(2). Certain national party committees, in combination, may also contribute up to $17,500 to any candidate for the United States Senate per six-year election cycle. § 441a(h). Expenditures made and controlled by a party committee, however, are *not* subject to these contribution limits. As the FEC repeatedly reemphasizes, "*coordinated party expenditures . . . are not contributions.*" *See, e.g.*, 62 Fed. Reg. 50,708, 50,712 (1997); FEC Press Release of March l, 2000 at <www.fec.gov>. As the FEC complaint in this case illustrates, the FEC treats excessive coordinated expenditures as violative of the Party Expenditure Provision, not of the contribution limit of § 441a(a)(2).

The FEC's experts explain that political parties generally do not allocate support to candidates in return for policy positions; instead, their objective is "to win or maintain control of the chamber and the powers of the majority

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[9] The FEC's Reply Brief for Petitioner concerning certiorari stated (at 4-5 n.5) that the FEC was "unaware of any record material(s) that would support the 90% figure." The 90% figure appears in the expert report of Professor Anthony Corrado (JA 210), and was *admitted* by the FEC in the district court (JA 57, ¶ 42).

legislative party." (C.A. App. 483). Thus, parties allocate their support "for electoral reasons—a chance to win a seat, the danger of losing a seat," rather than to coerce particular decisions. (C.A. App. 485). Several of the *Amici* political scientists confirm this. *See infra* at 27 n.17. Discovery did not identify any instance in which a political party changed a candidate's vote by offering or withholding campaign support.

"One of the major problems in the campaign finance system is the inability of challengers [as opposed to incumbent candidates] to raise the monies needed to wage viable campaigns." (JA 204). "Party money is the only major source of funds in the political system that challengers can rely on to help counter the overwhelming resource advantage incumbents enjoy as a result of their greater success in fundraising [and] the privileges that accompany their position in government, such as the franking privilege." (JA 205). The statements of the FEC and Colorado Party experts are confirmed by the following statistics, which the FEC admitted (JA 76-77):

> In both parties in 1996, the majority of party coordinated expenditures were made on behalf of non-incumbents. The Democrats devoted 85 percent of their total coordinated expenditures in Senate races to challengers (31 percent) and open seat candidates (54 percent). In House races, 80 percent was spent on behalf of non-incumbents, with challengers (56 percent) receiving more than twice the share that went to open seat candidates (24 percent). . . .
>
> The Republicans' coordinated activity also favored non-incumbents. Even with [an] unusually large number of threatened incumbents, the Senate and House committees each disbursed close to two-thirds of their coordinated funds on races involving non-incumbents.

(JA 201-202).[10] Party support of challengers in the 2000 election will equal or exceed the figures for the 1996 election according to preliminary figures that can be found in the FEC's own Press Release of November 2, 2000 at <www.fec.gov>. In short, political parties are "essential to the vitality of American democracy," (JA 173), as they make political races more competitive and meaningful by identifying and assisting non-incumbent candidates. (JA 75-81, at ¶¶ 74-80).

Since 1974, the Consumer Price Index ("CPI") has increased by over 328%, so that $10 in 1974 is equivalent to about $33 today.[11] However, the cost of campaigning has increased much more than the CPI. For instance, while the

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[10] The history of party coordinated spending for *Amici* Senators confirms that parties tend to support non-incumbents and those incumbents who need party assistance.

For example, in his 1998 campaign, Senator John McCain received no party coordinated expenditures. He raised over $4 million and was reelected with 68% of the vote (Senator McCain had almost $2 million left over which he transferred to his 2000 campaign for the Republican presidential nomination). In 1992, however, following the so-called Keating Five scandal, Senator McCain had a more challenging race, raised only $3.3 million and was the beneficiary of $302,528 in party coordinated spending, which equaled almost 10% of his funding. Similarly, Senators Max Cleland and Russell Feingold in their first campaigns as challengers against incumbent Senators in 1996 and 1992 received party coordinated support which equaled 22.3% and 19.1% of their total campaign receipts or $638,939 and $353,210, respectively. In 1998, coordinated expenditures declined to 2.9% of Senator Feingold's funding. Freshman Senator Charles Schumer who also beat an incumbent in 1998, has the distinction among *Amici* of receiving the highest amount of party support ($2.5 million) from three political parties (Democratic, Liberal, and Independence Parties), which accounted for over 15% of his funding. Data for all *Amici* Senators is contained in Addendum A to this Brief.

[11] *See supra* at 2 n.2, showing the FEC's inflation calculation that $20,000 in 1974 dollars equal $67,560 in year 2000 dollars.

CPI rose about 40 percent between 1976 and 1980, the cost of "such basic items as mass media, television commercials, and air travel, grew by 50, 100, and 300 percent." (JA 194). These campaign costs have continued to escalate much faster than the rate of inflation. *Id*.

FECA's limits on coordinated party expenditures prevented parties during 1996 from employing "significant amount of media broadcast time" to engage in effective communication:

> Generally the § 441a(d) limits prevent the parties from purchasing the broadcast time needed to air more than one or two ads effectively on a statewide basis. For example, in 1996, the national party organizations were permitted to spend $168,707 in South Carolina under the § 441a(d) ceiling. The estimated cost to air *one* thirty-second campaign ad in South Carolina on a statewide basis with enough frequency that it would penetrate the viewing audience and have its message understood by voters was approximately $186,000.

(JA 214.) The comparable 1996 costs in Colorado for one 30-second ad for a Senate candidate was "$123,750 against a limit of $170,932." *Id.* In short, party spending limits "make it impossible for [party] committees to pay for a very extensive or intensive amount of campaign speech." *Id.* Indeed, "[a]t this level of funding, party committees could not afford to pay the postage on one letter to each eligible voter in a district or state, never mind the cost of the stationary and printing needed to produce the letter." (JA 193).

## The Sources Of Party Committee Funding: Hard Money And Soft Money

### *Hard Money*

Party committees obtain their funding exclusively from voluntary contributions (JA 39-40, at ¶ 17) and transfers of excess hard money funds from their own federal candidates. Hard money—the only money that parties can spend in

connection with federal elections—may come only from individuals or political action committees ("PACs"), or from federal candidate committees. § 441a(a) and § 439a. Contributions from corporations or unions are prohibited. § 441b. For both Republican and Democratic party committees, the majority of hard money comes in increments of less than $100. (JA 44-45, at ¶¶ 23-24), Pet. App. 63A-64a (district court opinion).[12] As the FEC *admitted* below, "hard money contributions overwhelmingly result from direct mail solicitations." (JA 45, at ¶ 24).

*Limits On Individuals*

- Individuals may contribute only $5,000 to a political party per calendar year for use in connection with the party's federal activities, including the making of coordinated expenditures. § 441a(a)(1)(C).

- Individuals may contribute only $1,000 per election to a candidate for federal office. § 441a(a)(1)(A).

- Individuals may contribute up to $20,000 per calendar year to a national political party committee. § 441a(a)(1)(B).

- Individuals also are subject to a $25,000 per calendar year limit on contributions to the federal accounts of *all* candidates and political committees, including PACs. § 441a(a)(3). If the full $25,000 is contributed to committees, then nothing may be given to individual campaigns, and vice versa. § 441a(a)(3).

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[12] The Brief of *Amicus Curiae* National Voting Rights Institute (at 2-3) suggests, without confirmable citation, that the average hard money contributions in the 2000 election cycle was over $200. This figure encompasses contributions to candidates, including presidential candidates, who raised record amounts of $1,000 contributions this election. It is not the average for hard money contributions to political parties. The record shows that the majority of hard money contributions to political parties are under $100.

- Once a contributor reaches a limit, FECA forbids the contributor from "earmarking" any additional contributions to a candidate through any other source, including a political party. § 441a(a)(8). Contributions to a party that "are in any way earmarked or otherwise directed" to a candidate or campaign must be reported by the party and count against the individual's $1,000 limit. § 441a(a)(8).

*Limits On Corporations And Labor Unions*

- Corporations and labor unions are prohibited from making *any* contributions in connection with any federal election. § 441b. They may establish PACs for their personnel but may not themselves contribute to the PACs. § 441b(b)(2)(C).

*Limits On PACs*

- Like individuals, political action committees, which must register with the FEC pursuant to § 433, may contribute no more than $5,000 per calendar year to a party committee. § 441a(a)(2)(C).
- Multicandidate political action committees ("PACs") may contribute $5,000 per candidate per election. § 441a(a)(2)(A). Otherwise, political action committees are also subject to the $1,000 per candidate per election limit found in § 441a(a)(1)(A).
- PACs may contribute $15,000 to the national political party committees. § 441a(a)(2)(B).
- PACs are also subject to the restrictions on earmarking found in § 441a(a)(8).
- All individual and PAC contributions discussed above must be fully reported by the recipient committees pursuant to § 434.

*Transfers From Candidates*

- Federal candidate committees are permitted to transfer unlimited amounts of their own excess hard money funds to political party committees. § 439a.

- In the 2000 election cycle, Democratic *candidates* donated $7.7 million to the Democratic party committees, more than these party committees spent on coordinated expenditures. *See* Jonathan D. Salant, *More House Races Exceed $1 Million To Run Campaigns*, The Detroit News, Dec. 27, 2000, at 13, *available at* 2000 WL 30260249. In addition, Republican *candidates* donated $18 million in excess campaign funds *to* the national party committees. Again, more than the amount spent on coordinated expenditures. *Id.* These candidate donations are in addition to the type of candidate fundraising for parties discussed in the FEC Brief (at 31-32 n.14).

*Enforcement and Sanctions*

- A knowing and willful violation of FECA involving over $2,000 is a crime punishable by up to one year's imprisonment and a fine of up to $25,000 or 300 percent of any involved contribution or expenditure. § 437g(d).

- In a civil enforcement action, the court may impose an injunction and a civil penalty equal to the greater of any contribution or expenditure involved or $5,000. § 437g(a)(6)(B). If the violation is knowing and willful, the potential civil penalties double. § 437g(a)(6)(C).

*Soft Money*

Present FEC regulations allow national party committees to receive soft money contributions in unlimited amounts from any source, including corporations and unions. *See* 11 C.F.R. Parts 102, 103, and 106.[13] States, including Colorado, restrict

[13] The most recent FEC statistics show that 53% of all national Democratic Party receipts, and 42% of Republican receipts, is soft money. FEC Press Release, November 3, 2000. Moreover, the FEC data reflects that soft money revenues are increasing at triple digit rates (247% from 1992-96 and 100% from 1996-2000) while hard money revenues from 1996 to 2000 are almost flat. *See* Anthony Corrado, *Introduction to*

soft money receipts and use. *See, e.g.*, Colo. Rev. Stat. § 1-45-105.3(2)(a); Conn. Gen. Stat. § 9-333s(b), t(b). *Soft money cannot be spent in connection with federal elections or for coordinated expenditures*, Pet. App. at 23, but is instead used to assist candidates running for state office, *see* § 431(8)(A)(i) (limiting FECA to contributions in connection with a federal election), for voter registration and "get out the vote" drives, *see* § 431(8)(B)(xii), or for "issue ads." 11 C.F.R. § 106.5(a)(2)(iv).[14]

The FEC is conducting a rulemaking to determine whether soft money should be curtailed or eliminated. 63 Fed. Reg. 37,722 (1998). Nothing in FECA affirmatively authorizes parties to receive soft money. The FEC's general counsel has advised the agency that it has the power to eliminate soft money if it so chooses. *Id.* Also, bills were introduced in the last Congress to "ban" soft money.[15]

**The Effectiveness Of Current FECA Limits**

The record is entirely barren of evidence that FECA's limits on contributions are ineffective or readily are subject to circumvention. There is no showing that contributions are not accurately reported or that excessive contributions are not detected and remedied. Declarations obtained by the FEC

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*Chapter 6: Party Soft Money in* Campaign Finance Reform: A Sourcebook, 165, 167-177 (Anthony Corrado, et al., eds. 1997); FEC Press Release dated June 23, 2000 *available at* <www.fec.gov>.

[14] The plurality in *Colorado I* noted that soft money may be used for certain party building activities but, in general, "may not be used to influence a federal election." Pet. App. 102a. More precisely, soft money may not be used to finance coordinated activity or for purposes of "express advocacy," which means speech that uses explicit language to advocate electoral action (e.g., "vote for" or "defeat"). *Buckley*, 424 U.S. at 44 & n.52.

[15] *E.g.*, S. 1593 (McCain-Feingold); H.R. 417 (Shays-Meehan) (passed by the House on September 14, 1999); H.R. 399, H.R. 715, S. 26, S. 982).

and excerpted in its Brief (at 31-32 n.14) reveal that parties are scrupulous in obeying FECA's earmarking constraints.

**Public Perception Of Campaign Finance**

The FEC offered evidence that some members of the public are cynical about the election process and the role of money. In particular, FEC expert Clyde Wilcox asserted that there is a public concern about "large" contributions, giving examples of which all involved soft money.

Prof. Wilcox conceded that the general public has little understanding of FECA's requirements and restrictions, such as the restricted sources and amounts in which hard money is raised, or the fact that only hard money can be spent in connection with a federal election. (C.A. App. 529-30). Nor does the public draw any distinction between independent and coordinated party spending. *Id.*

The FEC offered no evidence that, if all independent party spending instead were coordinated, the public would either understand or care about the difference. Nor did the FEC address the possibility of educating the public as to the true role of parties in the political process. *See* Pet. App. at 89a (district court opinion).

**Claimed Corruption**

*The FEC offered no evidence that any modern political party has corrupted any member of Congress.*[16] It asserted below (FEC C.A. Br. at 51-52) four claimed instances in

[16] The FEC introduced a declaration from Senator Simon that "big donors have a "leg up" in the legislative process. (JA 270). Presumably, this was a reference to soft money donors; it certainly did not identify the party as the corrupting entity. *See* Pet. App. 16a (court of appeals opinion). Senator Simon otherwise was unable to support corruption charges. (JA 282-85). The FEC offered documents, intended to show that large soft money donors may obtain increased access to, and opportunities to persuade members of Congress. Pet. App. 85a (district court opinion.) The FEC Brief did not press this line of argument.

which a party or its leaders threatened to withhold party support to affect candidate behavior. (C.A. App. Under Seal 91-94, at ¶¶ 234, 238, 239, 240). However, in none of the instances was the party request corrupt, and in none did the candidate accede to the request. The FEC Brief largely abandons before this Court any claim of actual corruption.

## SUMMARY OF ARGUMENT

Under FECA's Party Expenditure Provision, a political party is forbidden to spend more than 7 cents per voter on speech that the party coordinates with its candidate for Congress—far less than the cost of a single letter to each voter. Over 90% of the spending that is limited by the Party Expenditure Provision finances political communication. If a party wishes to engage in more speech in connection with the election, it must do so independently of its candidate. Moreover, to avoid controversy and enforcement proceedings, the separation of the party from its candidate must be clear and obvious. This Court repeatedly has held that limits on the money that may be spent on speech are limits on speech itself; that is the law of this case as established in *Colorado I*, and the FEC Brief does not challenge this settled principle.

Because a political party naturally has close and strong ties to its candidate, creating the conditions that permit unrestricted independent speech is exceptionally burdensome. Moreover, because the public perceives party speech as that of the candidate, and vice versa, differences between candidate and independent party speech create voter confusion and inhibit effective communication. The FEC does not dispute that independent party speech is much inferior to coordinated speech.

A party and its candidate are uniquely and strongly bound to one another because:

- A party recruits and nominates its candidate and is his or her first and natural source of support and guidance.

- A candidate is identified by party affiliation throughout the election, on the ballot, while in office, and in the history books.
- A successful candidate becomes a party leader, and the party continues to rely on the candidate during subsequent campaigns.
- A party's public image largely is defined by what its candidates say and do.
- A party's candidate is held accountable by voters for what his or her party says and does.
- A party succeeds or fails depending on whether its candidates succeed or fail.

No other political actor shares comparable ties with a candidate. FECA recognizes the uniqueness of the party/candidate relationship by (i) defining a "political party" as an entity that "nominates a candidate" who then "appears on the election ballot as the candidate of such [entity]," § 431(16), and (ii) providing that a party's spending in support of its candidates is not subject to FECA's general limits but must be addressed separately. Indeed, until *Colorado I*, the FEC conclusively presumed that all party spending in connection with a federal election was coordinated with the party's candidate, a presumption it applied to no other entity.

For these reasons, requiring a party to sever its candidate ties as the price for engaging in unrestricted political speech uniquely, directly, and substantially burdens the party's First Amendment rights of speech and association. This Court's precedents establish that any provision that directly and substantially burdens political speech triggers strict scrutiny. Accordingly, FECA's limits on coordinated party speech must fall unless the FEC shows that they are necessary and narrowly tailored to serve a compelling governmental interest in the least restrictive way, a showing the FEC Brief does not even claim to make.

Rather than attempting to satisfy strict scrutiny, the FEC mistakenly argues that FECA classifies all coordinated spending as a "contribution" and that limits on contributions are subject to a lesser standard defined in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Nixon v. Shrink Missouri Government PAC* ("*Shrink Mo.*"), 120 S. Ct. 897 (2000). Actually, the Party Expenditure Provision refers to its limits on coordinated party spending as "expenditure" limits, not contribution limits. But more fundamentally, both *Buckley* and *Shrink Mo.* set the standard of review based on an evaluation of the First Amendment effects of the particular limits at issue.

The contribution limits at issue in *Buckley* and *Shrink Mo.* applied to individuals or PACs, which typically do not have a political party's strong natural ties to a candidate. *Buckley* and *Shrink Mo.* found that, for individuals and PACs, coordination with a candidate was just one of many freely available avenues of political expression, and that individuals and PACs thus experienced only "marginal" and "limited" First Amendment burden from the limits at issue. 424 U.S. at 20-21; 120 S. Ct. at 903. That finding—not a "contribution" label—was the predicate for a lesser standard of review.

By contrast, party/candidate coordination is not just one of many equally available options for a party. Instead, a party's natural state is to be closely tied to its candidate, and these natural ties are exceedingly burdensome and difficult for a party to sever.

Limits on party coordination are best compared to limits that the original FECA imposed on a candidate's use of personal resources in coordination with his or her own campaign committee. Although the *Buckley* Court of Appeals found those limits comparable to contribution limits and sustained them, this Court applied strict scrutiny and struck them down. 424 U.S. at 53. *Buckley* did this even though a candidate's wealth may stem from narrow economic interests,

while a party's hard money comes entirely from a broad base of voluntary donations.

Because limits on party coordination directly and substantially burden party speech, the rationale of *Buckley* and *Shrink Mo.* calls for traditional strict scrutiny here. But even if the lesser standard described in *Shrink Mo.* applies here, the FEC still would have to show that FECA's limits on coordinated party spending are "closely drawn" to serve a "sufficiently important interest," 120 S. Ct. at 899. The Court of Appeals correctly held that the FEC did not meet either aspect of that lesser standard.

Throughout most of this litigation, the FEC asserted that FECA's limits on coordinated party speech prevent actual or perceived corruption. Yet, despite years of discovery – four years before *Colorado I* and a year and a half on remand – the FEC anticorruption rationale is without support. Tacitly conceding this, the FEC Brief asserts (at 23) that Congress could "*assume*" that limiting coordinated party spending prevents corruption.

In fact, Congress made no such assumption—much less a legislative finding—and it did not view parties as corruptive. Congress had a positive view of parties; it limited coordinated party spending as part of an effort to reduce overall campaign spending levels. *Colorado I*, Pet. App. 108a. The isolated fragments of a 1973 floor debate cited by the FEC Brief concern an unenacted bill and hinge on features that are not present in FECA.

Nor is the FEC's proposed assumption plausible. To begin with *FECA requires a party to use hard money for coordinated spending*. Hard money is raised in limited amounts from individuals and PACs and is fully reported and publicly disclosed. Scholars agree that a party's hard money is the cleanest available to candidates. Present law also permits parties to receive soft money in unlimited amounts

from corporations, unions, and other sources. *But soft money cannot be used for coordinated spending*. Any concerns over large contributions can be addressed directly, *Colorado I*, Pet. App. at 102a, as the FEC presently is considering in a pending soft money rulemaking. 63 Fed. Reg. 37,722 (1998), and Congress in proposed legislation.

Moreover, a political party's overriding objective is to elect its candidates and attain majority status so it can govern. While a party also has a platform and shared policy objectives, parties focus their campaign support on races that are in doubt, and on non-incumbent candidates who lack the independent sources of funding that incumbents soon develop. The FEC offered largely hearsay reports of four alleged instances in which an attempt was made to use party campaign support to affect candidate conduct: no attempt succeeded, and none involved a corrupt goal.

The scenario of candidate office-holder as party victim is untenable. A party's members of Congress form a strong party leadership group. Because they have independent financial support, they usually do not need or receive party coordinated spending. Indeed, they are net party contributors, and are most unlikely to be pushed around by their party, or by individual party leaders.

As post-remand discovery failed to support an anti-corruption justification, the FEC shifted to a theory that limiting party coordination prevents circumvention of FECA's limits on individuals and PACs. There is no indication that Congress adopted the party limits for that reason, however, and FECA otherwise effectively prevents circumvention.

FECA backs up limits on individual and PAC contributions to particular candidates with limits on their contributions to parties and with aggregate annual limits. It establishes comprehensive reporting and disclosure requirements,

assuring that a vigilant press (and vigilant opponents) may police conduct. FECA also forbids using "earmarked" contributions to intermediaries to circumvent limits, and it provides stringent penalties, including criminal penalties, for violations, which are further reinforced by the political consequences of violations.

These provisions are effective. Despite five and a half years of discovery, the FEC has no evidence that circumvention is a problem that might justify restricting coordinated party speech as a cure. The most the FEC offers is a lengthy footnote (at 31-32 n.14) discussing the "tally system" of the Democratic Senatorial Campaign Committee ("DSCC") that encourages party candidates, particularly incumbents, to solicit contributions to the party and keeps track of how much each candidate raises.

However, the FEC itself concluded that a tally system complies with FECA. Moreover, the very declarations cited by the FEC consistently emphasize that (i) tallied funds are not earmarked for the credited candidate but rather are allocated to win close races, and (ii) the one committee using a tally system has been scrupulous to comply with FECA. If problem still exists, it could be solved directly by clarifying the law.

In sum, FECA's limits on coordinated party spending serve no interest that might justify their burden on party speech. Nor are the limits closely drawn to the speculative interests the FEC proposes. Rather, FECA's limits on coordinated party spending are an anachronistic holdover from a pre-*Buckley* attempt to reduce the overall level of campaign speech, an attempt *Buckley* rejected. They needlessly interfere with party speech and other important party functions, including support of non-incumbent candidates. They diminish the value of hard money vis-à-vis soft money. They violate the First Amendment and should be struck down.

## ARGUMENT

### I. The Party Expenditure Provision Limits Impose A Unique, Direct, and Substantial Burden On The Party's Right Of Free Speech, And A Heavy Burden Of Justification On The FEC

There is no dispute that the Party Expenditure Provision limits party speech. "Over 90% of the monies spent by national party committees on behalf of their candidates is spent on political communication." (JA 57 at ¶ 42, 210-11). And the FEC experts admit that parties would engage in far more coordinated spending if they could (C.A App. 513). *Buckley* was clear that restricting money available for speech restricts speech itself. 424 U.S. 18. *Colorado I* adopted that principle as the law of this case in its ruling that restrictions on independent party expenditures are unconstitutional. Pet. App. 104a. FEC does not seek reconsideration of this holding.

For political parties, which naturally have close ties to their candidates, coordinated speech is not just one of many freely available avenues of expression. Instead, to avoid coordination with candidates, parties must incur significant costs and accept serious inefficiencies. This direct and substantial burden on coordinated party speech imposes on the FEC a correspondingly heavy burden of justification.

#### A. Parties' Strong Natural Ties To Their Candidates Make Restrictions On Coordinated Speech Uniquely And Substantially Burdensome

*Buckley* found that limiting coordinated spending and contributions by an individual or PAC "entails only a marginal restriction upon the contributor's ability to engage in free communication," and only a "limited effect" upon associational rights. 424 U.S. at 21, 28. It stressed that individuals and PACs have many means to express their

views and have no particular need to involve the candidate to do so. *Id*. at 20-21. In particular, nothing hinders individuals and PACs from engaging in unlimited independent speech. *Id.* To speak independently, they do not have to disentangle themselves from a candidate, but merely avoid a relationship that involves coordination. Thus, an individual or PAC experiences "little direct restraint on . . . political communication" from the limits on coordinated spending because the contributor could freely "expend such funds on direct political expression" without involving the candidate. *Id*. at 21-22.

The situation of a political party is very different, as FECA itself recognizes. Section 431(16) defines a "political party" precisely in terms of its unique candidate relationship: a political party is an entity that "nominates a candidate for election . . . whose name appears on the election ballot as the candidate of such [entity]." Moreover, the Party Expenditure Provision starts by "exempting political parties from the general contribution and expenditure limitations." *Colorado I*, Pet. App. 96a. Since FECA itself recognizes that the party/candidate relationship is unique, it would be surprising if *Buckley*'s discussion of individual and PAC support of candidates translated freely into the Party context. It does not.

For a political party, entering into a working relationship with a candidate is not just one of a range of equally available options. To the contrary, party candidates exist because parties nominate them, and from the moment a party makes a nomination a natural, strong, and unique tie is established. Indeed, because many candidates are incumbents who also serve as party leaders, the party/candidate relationship typically predates a particular nomination.

The candidate relationship, moreover, is vital to the historic purpose of political parties. Parties exist precisely to elect candidates that share the goals of their party. They seek to

build majorities that will permit the party to govern. Parties succeed only if their candidates succeed.[17]

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[17] The academics who joined in the Brief of Paul Allen Beck, *et al*. as *Amici Curiae* in Support of Petitioner, recognize the unique and statutory role of parties. "Democracy is unthinkable without parties." Paul Allen Beck & Marjorie Randon Hershey, Party Politics in America 330 (9th ed. 2001). "Most political scientists who study American politics believe that the U.S. political system is a pluralistic democracy with a few majoritarian institutions (namely, elections and political parties)." Anthony Gierzynski, Money Rules: Financing Elections in America 11-12 (2000). Accordingly, the parties are given a "unique legal status" in the government. Leon D. Epstein, Political Parties in the American Mold 156 (1986). As a result, scholars advocate expanded roles for these unique parties. "Give parties freedom to allocate the hard resources that they are able to raise among their candidates for office as they choose and not subject to existing restrictions, in order to provide a robust role for political parties . . . ." Norman J. Ornstein, Thomas E. Mann, *et. al*, *Reforming Campaign Finance* (1997), *in* Campaign Finance Reform: A Sourcebook 380 (Anthony Corrado, Thomas E. Mann *et. al* eds., 1997); "Expand the existing limits on individual contributions to parties." *Id*.

The parties are unique to these scholars because of the way they bring people together. "[P]arty committees . . . are umbrella organizations that represent a broad range of interests." Paul S. Herrnson, Congressional Elections 271 (3rd ed. 2000). *See also* Larry J. Sabato, The Party's Just Begun 5 (1988) (book cited in Daniel M. Shea, Transforming Democracy 165 (1995)) ("The parties are often accused of dividing us; on the contrary, they assist in uniting us as few other institutions do."). "Party appeals must be broad and inclusive; the party cannot afford to be exclusive or to represent only a narrow range of concerns." Beck & Hershey, *supra*, at 15.

> Political parties, with all their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individuals powerless against the relatively few who are individually—or organizationally—powerful.

Walter Dean Burnham, Critical Elections and the Mainsprings of American Politics 133 (1970) (quoted in Beck & Hershey, *supra*, at 330.) "In the process the parties promote political equality in elections through

the representation of those interests and by encouraging participation." Gierzynski, *supra*, at 76. "[T]he two great national parties bring a unifying, centripetal force. . . . Their similar symbols and traditions . . . are a force for unity in governmental institutions marked by decentralization and division." Frank Sorauf, Party Politics in America 15 (5th ed. 1984).

Furthermore, many of the *Amici* political scientists acknowledge that the parties, and their committees, do not force unwanted views or positions upon their candidates. "[Party leaders] believe a party should bolster its candidates' campaigns, not replace them with a campaign of its own." Herrnson, *supra*, at 15. "The party leadership has so far refrained from giving out campaign money and services on the basis of a candidate's support for the party's program." Beck & Hershey, *supra*, at 89. "The central (perhaps sole) end for [legislative campaign committees] is to reelect caucus members and secure more seats." Shea, *supra*, at 63. "Although controlled by incumbent officeholders, [congressional campaign committees] have been able to resist the pressures to serve only the reelection interests of incumbents . . . ." Beck & Hershey, *supra*, at 82. "As several [campaign] participants told us, resource allocation was . . . driven by polling numbers in competitive races." David B. Magleby, *Conclusions and Implications*, *in* Outside Money 219 (David B. Magleby ed., 2000). Indeed, the parties spread out their money and make electoral contests more competitive. "In systems in which parties are strong, money should be distributed more broadly among candidates in competitive contests." Gierzynski, *supra*, at 25. "Parties, more than individuals and PACs, are the campaign finance participants most willing to invest in challengers, . . . ." Magleby, *supra*, at 211. "The national parties target most of their money to candidates in close races." Paul N. Herrnson, *The Revitalization of National Party Organizations*, *in* The Parties Respond 62 (L. Sandy Maisel ed., 2nd ed. 1994). "[Party] organizations are focused almost completely on winning elections in an electoral system in which they must appeal to majorities." Beck & Hershey, *supra*, at 53. "In addition to spending disproportionately on marginal, competitive races, the parties time their spending to assure its strategic value." Frank Sorauf, Money in American Elections 141 (1988).

Indeed, rather than forcing unwanted views upon their candidates, parties are unable to speak apart from their candidates. Mann and his co-authors, in their proposed campaign finance reforms, scoff at "the subterfuge," encouraged by the *Colorado I* decision, that parties "can operate independently of their own candidates." Ornstein, Mann *et. al*, *supra*, at 380.

In important respects, the ties between a party and its candidate are beyond the party's control. The public knows parties through their candidates and candidates through their parties.

> Even before a party candidate is chosen, the public will know a great deal about the candidate because of its knowledge about the party.

*Anderson v. Celebrezze*, 460 U.S. 780, 822 (1983) (Rehnquist, J. dissenting). Unavoidably, a candidate's speech and conduct will be attributed to his or her party, and vice versa. And this is desirable because it creates accountability.

Following *Colorado I*, political parties tried the type of independent speech that *Buckley* found to be a freely available option for individuals and PACs. The undisputed evidence is that parties found establishing and maintaining independence to be complex, expensive, and difficult.[18] Furthermore, the party's independent speech—which the public does not distinguish from coordinated speech (C.A. App. 529-30)—often created voter confusion and even undermined the candidate the party sought to support. (JA 54-56, at ¶ ¶ 36, 39).[19] Thus, independent party speech has proved to be inefficient as well as burdensome and expensive.

The FEC does not deny that political parties find independent speech to be much less effective than coordinated speech. (C.A. App. 511-512). To the contrary,

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[18] In addition to expenses caused by duplication of effort and staff and the like, the district court observed that independent party broadcast advertising is not eligible for the "lowest rates," mandated by the Federal Communications Commission. Pet. App 83a.

[19] As the ads that led to this case exemplify, see *Colorado I* at Pet. App. 97a ("advertisements attacking Congressman Wirth"), because there is less need for coordination in attacking an opposing candidate than in presenting an affirmative case to the voters, independent campaign speech tends to be negative in nature.

the FEC's experts contended that coordinated speech is so much more attractive that, if FECA's limits were lifted, parties would raise a great deal of additional hard money just to engage in such speech. (C.A. App. 513). The FEC's premise that parties do not already raise as much money as they can is questionable, but the recognition that, for a political party, independent speech is much less effective than coordinated party speech certainly is true.

*Buckley* itself recognizes that candidate relationships differ. The original FECA limited the ability of a candidate to support the activities of his or her authorized campaign committee from personal resources. *Buckley* held that, whether viewed as an expenditure limit or a contribution limit, this provision substantially interfered with the candidate's First Amendment rights and was invalid. 424 U.S. at 52. The relationship between a candidate and his or her campaign committee much more closely approximates the party/candidate relationship than the relationship of a candidate with an individual or PAC donor. Moreover, unlike party funding, a candidate's wealth may spring from narrow economic interests while a party's hard money comes from broad-based and limited voluntary contributions. This difference between the sources of candidate wealth and party funding suggests there is less justification for restricting parties. Yet the FEC ignores this aspect of *Buckley*.

In striking down FECA's limits on a candidate's support of his or her own campaign committee, *Buckley* did not hold that candidates have a favored constitutional status. Instead, it held that the factual characteristics of regulated classes must be taken into account in determining if a provision substantially burdens the speech of a given class. Contrary to the FEC Brief (at 39), the Colorado Party here does not claim "favored constitutional status" for political parties. Instead, the Colorado Party simply argues that, given the factual characteristics of political parties, restraints on their

coordinated activity substantially burdens their speech, and does not merely impose a marginal and limited constraint.

The FEC argues that some of the Founders were suspicious of political parties. The Founders were far more suspicious of government regulation of political speech. Hence, the First Amendment and hence the government's heavy burden of justifying any substantial restraints on speech. The issue here is not whether parties have some "exemption" from a governmental right to regulate (FEC Brief at 15, 22), but whether the FEC has justified the burden imposed on party speech by the Party Expenditure Provision limits. It has not.

Requiring individuals and PACs to sit on the left of the campaign train while candidates sit on the right may not much interfere with their journey. But a party and its candidate are joined at the hip. Ordering a party and its candidate to sit on opposite sides of the aisle is a very great imposition indeed. In short, FECA's limits on coordinated spending by a political party uniquely, directly and substantially burden the party's First Amendment rights.

### B. This Direct And Substantial Burden Triggers A High Standard Of Justification By The FEC

*Buckley* applies classic strict scrutiny to all direct and substantial burdens on political speech. 424 U.S. at 44-45. No decision of this Court supports a lesser standard where such a substantial burden is found. As shown above, the Party Expenditure Provision limits directly and substantially burdens party speech. Thus, the FEC must prove that the limits are narrowly tailored to compelling problems that otherwise cannot adequately be addressed. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986); *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997).

The FEC Brief does not even claim to satisfy strict scrutiny. Instead, it argues (at 4) that coordinated party expenditures are classified by FECA as "contributions" and

that "restrictions on contributions require less compelling justification," *citing Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 903-04 (2000).

This Court has been clear, however, that First Amendment analysis turns on actual effects on speech, not on labels. *Colorado I*, Pet. App. 108a. Thus, *Shrink Mo.* looked behind the "contribution" label, finding a close similarity in structure and effect between the contribution limits at issue there and those evaluated in *Buckley*. 120 S. Ct. at 903-04, *citing Buckley*, 424 U.S. at 20-21. That similarity in effect (*i.e.*, only a "marginal" effect on speech) was the critical predicate of the Court's adoption of a lower standard. The direct and substantial burdens imposed by the Party Expenditure Provision limits negate any such similarities here.

But to the extent that labels matter, the FEC's argument still fails. Although FECA classifies most coordinated activity as a contribution, the Party Expenditure Provision uses the term "expenditure" for political party coordinated activities. § 441a(d). Consistent with this statutory classification, the FEC itself recently stressed that "coordinated party expenditures . . . are not contributions." *See supra* at 10.

In this particular case, however, little turns on which standard is applied. *Shrink Mo.* holds that, to justify even a classic *Buckley*-type contribution limit, the government must show that the limit is "closely drawn" (even if not truly "fine-tuned") to serve "a sufficiently important interest." 120 S. Ct. at 899. As the Court of Appeals held, and as we show below, the FEC's attempted justification of the Party Expenditure Limit fails even under the *Shrink Mo.* standard.

## II. The FEC Has Not Shown That The Party Expenditure Provision Limits Prevent Actual Or Perceived Corruption

### A. The FEC Offers No Evidence That A Modern Political Party Ever Has Corrupted A Member of Congress

Despite five and one-half years of discovery, *the FEC failed to identify a single instance in which a modern political party has corrupted a member of Congress*. The FEC, below (FEC C.A. Br. at 51-52), proffered four instances in which a political party or its leaders reportedly tried to affect the behavior of a candidate by withholding support. (C.A. App. Under Seal 91-94, at ¶¶ 234, 238, 239, 240). In three of the examples, the party rejected the proposed withholding. In one case, the Democratic party withheld support in an unsuccessful effort to persuade a candidate to refrain from attacking an opponent's homosexuality. In no example did a candidate change a position as a result. More important, in no example was the party's purpose corrupt.

### B. The FEC's "Assumption" That Coordinated Party Spending Causes Corruption is Unreasonable

Tacitly conceding its lack of evidence to support a corruption rationale, the FEC Brief asserts (at 23) that "[i]t is reasonable *to assume* that large coordinated expenditures by political parties . . . may be used to exert influence over legislators' behavior while in office" (emphasis added). The first problem with this assumption is that, if parties actually used campaign support to influence official behavior, five and one-half years of discovery surely would have revealed abundant evidence. In fact, as just discussed, the FEC's evidentiary cupboard is bare. This lack of evidence is not surprising. To the contrary, there are many good reasons why the FEC's proposed "assumption" is unreasonable.

First, a political party's prime and overwhelming motivation is to elect as many candidates as possible, looking toward a majority that will permit the party to govern. The evidence is clear and undisputed that parties direct their support to candidates that have a chance to win, not to candidates with pliable policy views.

Second, a party's incumbent members of Congress tend to be its leaders. They are unlikely to be pushed around by offers to provide or threats to withhold campaign support. This is particularly true since incumbent members of Congress quickly develop their own sources of funding and typically do not receive substantial coordinated party support. Incumbent officeholders donate *more* excess campaign funds *to* their parties than the parties spend on *all* party congressional candidates combined.[20] This simple fact destroys the FEC's

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[20] During the 1999-2000 election cycle, the National Republican Congressional Committee ("NRCC") reported coordinated expenditures of $3.6 million; and the Democratic Congressional Campaign Committee ("DCCC") reported $2.6 million. *See* reports *available at* <www.fec.gov>. At the same time, many incumbents made substantial transfers of "excess funds" from their campaign committees. The NRCC raised $18 million from its members in the House and the DCCC raised $7.7 million from its incumbents. Jonathan D. Salant, *More House Races Exceed $1 Million To Run Campaigns*, The Detroit News, Dec. 27, 2000, at 13, *available at* 2000 WL 30260249. Filings with the FEC show, for example, that on Mar. 30, 2000, Rep. Dick Gephardt transferred $100,000 to the DCCC. Rep. David Bonior contributed $100,000 to the DCCC on July 25, 2000. Rep. Dick Armey transferred $100,000 on July 26, 2000 to the NRCC and an additional $100,000 on Sept. 13, 2000.

Sen. Trent Lott transferred $200,000 to the National Republican Senatorial Committee ("NRSC") on June 20, 2000. Contributions were not limited to the party's leadership. Rep. Nancy Pelosi contributed $85,000 to the DCCC on Oct. 2, 2000. Retiring Sen. Connie Mack transferred $1.1 million from his campaign account to the NRSC on June 29, 2000.

*Amici* also supported their party. For instance, Rep. Christopher Shays transferred $10,000 to the NRCC on Mar. 1, 1999, and Rep. Sherwood

speculation that political parties use coordinated spending to control the votes of its members of Congress.

Third, and relatedly, non-incumbent challengers and open seat candidates are the primary beneficiaries of party campaign support. For example, in 1996, the Democrats spent 85% of their Senate coordinated expenditures and 80% of their House coordinated expenditures to support non-incumbents. (JA 76 at ¶ 75, 201-02). At the time such non-incumbents are seeking office, they are not in a position to provide official favors.

Fourth, FECA's extensive reporting and disclosure requirements, combined with a vigilant press and our democratic system of government strongly discourage corruption. Parties and candidates who are seen to be engaged in questionable behavior are swiftly punished, both in terms of contributions and votes.

Congress never assumed, much less made a legislative finding, that parties corrupt their candidates. *See infra* at 36-37. To the contrary, in adopting FECA, Congress had a positive view of parties. *Colorado I*, Pet. App. 104a. Nor does *Buckley* or any comparable source justify belief that modern parties corrupt members of Congress. To the extent the public has any relevant concern, it arises from large soft money contributions, as is discussed below.

"Assumptions" are not proof, but even if they were, the FEC's proposed assumption that party spending causes corruption is unreasonable.

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Boehlert made contributions to the NRCC of $15,000 on July 2, 1999, and $25,000 on Oct. 10, 2000. *See* reports of respective candidate committees filed with the FEC.

### C. The Public Perception Of Corruption Discussed By The FEC Traces To Large Contributions Of Soft Money, Not To Coordinated Expenditures Of Hard Money

In the lower courts the FEC strongly stressed public perception of corruption as the key justification for the Party Expenditure Provision limits. In this Court the FEC Brief includes only passing references to "perceived corruption," (at 25 n.9) or "apparent corruption" (at 23). The reason for this shift is simple: the present public concern over money and politics overwhelmingly results from large contributions of soft money. There is absolutely no evidence that the public is concerned about parties' use of hard money to support their candidates. The FEC's proffered concern over public perception is a red herring. *See* Pet App. 88a-89a (district court opinion); (JA 61-64).

### D. Congress Never Found That Coordinated Party Spending Causes Actual Or Perceived Corruption

In another effort to excuse its lack of evidence, the FEC Brief argues (at 47-49) that this Court should defer to Congress' "legislative judgments" concerning "prevention of corruption." However, the FEC Brief *never identifies any evidence of the supposed congressional judgment concerning corruption*.[21] In fact, the Party Expenditure Provision reflects Congress' attempt to reduce the overall level of spending on federal campaigns, not any concern over corruption.[22]

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[21] Similarly, *Amici* members of Congress fail to identify any such evidence. The *Amici* political scientists concede (at 3, 21) that their real concern is with large soft money contributions and that they seek to preserve the present limits on coordinated hard money spending as a legislative bargaining chip.

[22] The expenditure formula belies an anticorruption motive. As noted above, at 2 n.2 & 12 n.10, parties in large states, *e.g.*, California, or New

This issue was fully ventilated in *Colorado I*. There the plurality said (at Pet. App. 104a):

> this Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of restricting what it saw as wasteful and excessive campaign spending. . . In fact, rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections.

It would be perverse to excuse a lack of evidence of a corruptive threat by deferring to a congressional judgment that Congress never made.

The FEC Brief asserts (at 25 n.9), that since Congress reenacted FECA after *Buckley*, it must have concluded that the Party Expenditure Provision was justified as an anti-corruption measure. That assertion simply turns a blind eye to history. *Buckley* left the country with an impending election and no election law. Congress and the administration raced to pull together whatever *Buckley* had not invalidated into emergency legislation to govern the election. There was no reevaluation of provisions that *Buckley* had left standing.[23]

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York, may spend millions of dollars in coordinated speech on behalf of Senate candidates, while the Colorado Party may spend only $202,072. Under the FEC's various theories, the risk of corruption increases with the amount of coordinated spending. Congress apparently saw no such risk.

[23] In presenting the administration's revised FECA to deal with the emergency situation created by *Buckley*, then Assistant Attorney General Antonin Scalia explained: "The whole purpose of our bill is to submerge those issues that are controversial and to do the minimum amount necessary to enable the 1976 elections to proceed." Office of Legal

Casting about for some predicate for congressional deference, the FEC Brief (at 28) offers for the first time in this Court a lengthy quotation from a 1973 floor statement of an individual senator concerning a bill that never was enacted. That senator was concerned that, by allowing individuals to contribute $100,000 to a party (equivalent to over $300,000 today), there might be some temptation to impropriety. Isolated floor remarks concerning an unenacted bill carry no weight. *See Garcia v. United States*, 469 U.S. 70, 78 (1984). But beyond that, the present FECA contribution limits of $5,000 and $20,000 combined with the anti-earmarking provisions clearly eliminate the temptation that concerned the senator.

Moreover, as Justice Thomas pointed out in his *Colorado I* opinion, there are institutional reasons here why this Court should play its traditional independent role in assessing First Amendment burdens. Pet. App. 135a & n.9. As has been discussed above (at 11-12), party support is particularly important to challengers, while FECA was enacted by incumbents. In this particular political area, the deference the FEC seeks would "amount to letting the fox stand watch over the henhouse." *Id*.

Finally, even if Congress made a "legislative judgment" that a spending limit prevents corruption, no deference should be accorded if the judgment is unsupported or insupportable. This Court did not defer to Congress when it struck down limits on candidate contributions (*Buckley*, 424 U.S. at 23-24), campaign spending limits (*id.* at 22), or independent expenditure limits on individuals (*id.* at 50), committees (*FEC v. National Conservative PAC*, 470 U.S. 480 (1985)), or political parties (*Colorado I*). It should not defer here.

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Counsel Statement accompanying § 2911, Legislative History of FECA Amendments of 1976 at 142 (Feb. 18, 1976).

## III. The FEC Has Not Shown That The Party Expenditure Provision Limits Prevent Circumvention of Other Limits

### A. The FEC Offers No Evidence That Circumvention Is A Genuine Problem

*Buckley* rejected the argument that limits on independent campaign expenditures could be justified as a means of preventing circumvention of the contribution limits, saying (at 424 U.S. at 56):

> There is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussions of such violations will be insufficient to police the contribution provisions.

The FEC offers no evidence that circumvention actually occurs, much less that it is a sufficient problem to justify substantial and direct restraints on speech. The FEC Brief's seven-page circumvention argument is littered with the language of speculation, *e.g.*, a donor "*could* contribute additional amounts . . . and *could* in various ways communicate the expectation" that funds go to a candidate. FEC Brief at 25-26 (emphasis added). Despite years of discovery, there is no evidence that circumvention *does* occur, even though it could happen under present law.

In a lengthy footnote (at 31-32 n.14), the FEC Brief discusses the "tally system" by which the Democratic Senatorial Campaign Committee ("DSCC") kept track of the extent to which Senators generated financial contributions to the party. In a 1995 Conciliation Agreement in Matter Under Review ("MUR") 3620, however, the FEC approved the tally system on condition that earmarking be clearly disclaimed.

The tally system is discussed at length in the Declaration of Robert Hickmott (JA 244-53). That Declaration was obtained by the FEC following ex parte contacts and is drafted to give

maximum credence to the FEC's position. Nevertheless, Mr. Hickmott makes clear that:

- The DSCC carefully refrained from any "contract" as to how tally funds would be spent because "that would be earmarking, which is illegal" (JA 250).
- The DSCC carefully reviewed the fundraising letters of candidates to make sure they did not mislead contributors as to the operation of the tally process (JA 250).
- The DSCC allocated money raised through the tally process based upon "the financial strength of the campaign itself, including how much they had raised on their own behalf and how much there was on tally for the DSCC, and what their poll numbers looked like," as well as "who had the best chance of winning or who needed the money most" (JA 250-51).
- The "bottom line" of the tally system is that "some candidates get back more money than they raise, and others get less" (JA 250).[24]

Other of the FEC's declarants made the same points. Senator Simon explained that the tally system "made clear that this is not just automatic, so that no one could say if Tom Smith contributed $5,000 to the DSCC, that was a way of laundering it coming to Paul Simon" (FEC Brief at 32 n.14). Similarly, an aide to Senator Fowler explained that "we were not able to tell these contributors that the money could come back directly to help us," but that tallied contributions were "an indirect help to Mr. Fowler." *Id.*

[24] Also of interest is Mr. Hickmott's testimony that: "I am not aware of any instance in which a Senator who had to cast a particularly difficult vote was promised DSCC money in return for that vote" (JA 253).

In 1996, before this Court, the circumvention theory was first raised. The Colorado Party responded as follows:

> Amicus Common Cause argues (Br. 10-11) that party spending limits are necessary to prevent Senate candidates from becoming beholden to donors who, notwithstanding § 441a(a)(8), can contribute up to $120,000 ($20,000 per year) to a national party during a candidate's six-year term in addition to the $2,000 statutory maximum to the candidate. This argument is misleading on several levels. First individuals may not contribute $20,000 per year to a state political party like the Colorado Party. *See* § 441a(1)(C) (limiting annual contributions to $5,000). Second, individuals are limited to making $25,000 in total contributions to campaigns, PACS and party committees in any given year. § 441a(a)(3). Therefore, although an individual may contribute up to $20,000 per year in unearmarked funds to a national party, the individual would consequently be limited to contributing $5,000 to all other parties, PACS, and campaigns. Further, Common Cause ignores the impact of inflation on FECA's party-spending limits during the last two decades. In 1974 dollars, the Colorado Party's $5,000 contribution limit is worth only $1,618.12 today; the $20,000 limit to national parties is worth only $6,472.48. *See* FEC 22 Record 4 at 15 (Apr. 1996). Finally, *Common Cause did not cite a single example of such a contribution pattern in the 20 years of FECA.*

*Colorado I* Reply Brief at 5-6 n.5 (emphasis added). Another five years have passed and still neither the FEC, nor any *amici*, has identified a single example of such a contribution pattern during the 25 years of FECA.

The FEC's lack of evidence of circumvention is not surprising. FECA provides interlocking multilayered provisions designed to prevent circumvention. For example,

individuals are limited to giving $1,000 per year to a particular candidate or campaign committee. That limit is backed up with annual limits of $20,000 on contributions to a national party and $5,000 to a state party or a PAC. Those limits are further bolstered by an annual $25,000 limit on all hard money contributions by a contributor.[25] These limits are enforced by stringent reporting and disclosure requirements. On top of all of this, FECA restricts both donors that attempt and conduits that facilitate evasion of limits by "earmarking" contributions to particular candidates or campaigns. Knowing violation of any of these restrictions can lead to as much as a year in jail, not to mention the political consequences. Similar disclosure requirements and restrictions apply to PACs as well as individuals.

The FEC declarants who addressed the DSCC tally system were clear that the DSCC was careful to avoid violating FECA. Their testimony proves that FECA's restraints already are effective. Conduct to which the FEC objects, such as the tally system, occurs because it is lawful. If Congress wants to stop such conduct, it can simply forbid it, rather than relying on oblique disincentives that limit party speech.

The FEC Brief asserts (at 27-29) that Congress believed that circumvention might occur. As discussed above (at 38), the FEC proffered as evidence floor remarks made in 1973 concerning a bill that Congress never enacted. The remarks of these Senators focused on a provision allowing an individual to contribute $100,000 (equivalent to $300,000 today) directly to a party. The professed concern was that such a massive contribution might give rise to temptations that would not be resisted.

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[25] Thus, if a contributor gave $5,000 to a state committee of a party, and $20,000 to the national committee of that party, the contributor could make no additional hard money contributions to any candidate, committee, or PAC during the calendar year.

Under FECA, however, an individual at most can give $20,000 to a national party committee and $25,000 total in all hard money contributions in any calendar year. That is a very small fraction of the amounts that the individuals quoted by the FEC found to be of concern.

The FEC Brief argues (at 29) that *Buckley* (424 U.S. at 38) "upheld FECA's $25,000 annual aggregate limit on individual contributions" to restrict "the possibility of evasion," and *California Med. Ass'n v. FEC*, upheld a similar aggregate limit. 453 U.S. 182, 198 (1981). However, those aggregate limits directly targeted contribution amounts and obviously were adopted to reinforce more specific limits. Moreover, they raised little First Amendment concern since the much lower specific limits had been held to impose only a marginal burden on speech. 424 U.S. at 20. Individual aggregate limits are not analogous to the Party Spending Provision, which has no obvious relationship to contribution limits and was enacted to reduce the overall level of campaign speech. Moreover, the Party Expenditure Provision limits' direct and substantial burdens on party speech raise very different considerations.

### B. The FEC's Circumvention Theory Would Stand The First Amendment On Its Head

The FEC's circumvention argument attempts an end run around the First Amendment. As is shown above (at 25-26), contribution limits on individuals and PACs were sustained because they were found to impose only marginal and limited burdens on First Amendment rights. Now, to indirectly reduce the speculative possibility contribution limits might be circumvented (notwithstanding the anti-earmarking provision and other structural protections), the FEC proposes to sustain the direct and substantial burden on party speech imposed by the Party Expenditure Provision limit. That truly would stand the First Amendment on its head. The FEC cites no authority to sustain such a circumvention theory, and we know of none.

## IV. The FEC's Proposed Justifications Fall Short, Regardless Of The Applicable Standard Of Scrutiny

### A. The FEC's Theories Of Justification Are Novel And Implausible And Thus Require Substantial Support, Which Is Lacking

*Shrink Mo.* holds that "the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary . . . with the novelty and plausibility of the justification raised." 120 S. Ct. at 906. It held that Missouri had met its burden because (i) in light of *Buckley*, the government's claim that such limits prevented corruption was neither novel nor implausible, (ii) the state submitted evidence of a legislative finding that the contribution limits avoided a "real potential to buy votes," and (iii) the district court found as a fact that the 74% of Missouri's referendum voters who approved the limits reasonably believed that the limits would prevent corruption. 120 S. Ct. at 906-08. *Shrink Mo.* also noted the absence of substantial countervailing evidence. *Id*. at 908.

By contrast, the FEC's justifications are both novel and implausible. No ruling of this Court suggests that a party's expenditure of its hard money to support its own candidates is likely to be corrupting.[26] Certainly, no such judgment was made by Congress, which had a positive view of parties and adopted the Party Expenditure Provision primarily to reduce

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[26] To the contrary, this Court recently stated that:

> our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences."

*California Democratic Party v. Jones*, 120 S. Ct. 2402, 2408 (2000) (citing *Ev v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989)).

the overall level of campaign speech. *Colorado I*, Pet. App. 104a. No public referendum or similar information demonstrates that the public is concerned over the level of coordinated party speech funded by hard money, as opposed to large soft money contributions. Nor is it plausible that hard money contributions, received pursuant to FECA's limits, are a likely source of corruption. While parties are led by people, and people are not perfect, there is no reason to believe that FECA's regime of disclosure, limits, and sanctions, backed up by a vigilant press and the scrutiny of political opponents, is inadequate to encourage compliance with the law.

Equally novel and implausible is the FEC's claim that the Party Expenditure Provision is necessary to prevent circumvention of FECA's limits on individual and PAC contributions. As just discussed, that is not why Congress adopted the Party Expenditure Provision. No holding of this Court suggests that a circumvention problem exists that must be dealt with by limiting a party's hard money funded speech. To the contrary, the FEC Brief's discussion of the DSCC tally system shows that that committee scrupulously obeys the law. Nor is the Party Expenditure Provision a natural or direct way to prevent circumvention of limits on individual and PAC contributions.

The FEC had ample opportunity to develop the evidence. This is not a case in which a lower court has acted swiftly and with limited discovery to prevent an imminent First Amendment threat. Instead, this is a case in which, after four years of initial discovery, this Court remanded for further inquiry, giving the FEC yet another year and one-half to submit evidence. The fact that a lengthy intense, and focused inquiry found no evidence of a circumvention problem is compelling evidence that no such problem exists.

Moreover, the Colorado Party presented strong evidence that coordinated party spending is not corruptive but is desirable. The Colorado Party did not merely cite to

"academic studies" as occurred in *Shrink Mo.* 120 S. Ct. at 900. Rather, the Party's experts developed comprehensive reports that then were tested in the crucible of cross-examination. The FEC's inability to overcome this strong evidence further confirms that the Party Expenditure Provision cannot be justified.

In sum, the district court and the court of appeals correctly concluded that the FEC has failed to show that the Party Expenditure Provision limits serve sufficiently important interests to meet the standard mandated by *Shrink Mo.*, much less the compelling interest demanded by strict scrutiny.

### B. The Party Expenditure Provision Limits Are Not Closely Drawn To The FEC's Proffered Justification

If the FEC could establish that the Party Expenditure Provision limits serve sufficiently important interests, the *Shrink Mo.* standard then would require a demonstration that the limits are "closely drawn" to serve those interests. 120 S. Ct. at 899. The FEC Brief makes no apparent effort to meet this requirement. Nowhere does the Brief identify specific interests and then undertake to show that the Party Expenditure Provision is shaped to deal with that interest while avoiding unnecessary First Amendment burden. Nor could such a showing be made.

The FEC's theories of actual, potential, and perceived corruption overwhelmingly start with a concern over large contributions to a political party. If such concerns are substantial, a closely drawn response would be to reduce the allowable size of contributions. *Colorado I*, Pet. App. at 132a.[27] While over regulating hard money, Congress and the

[27] The *Amici* political scientist (at 3) advocate *increasing* hard money contribution limits. Moreover, the Shays-Meehan Bill passed by the last Congress would have increased individual contributions to state parties to

FEC to date have failed to limit soft money contributions. To address supposed corruption concerns by restricting a political party's use of hard money to fund coordinated speech is fairly described as irrational and perverse.

The FEC Brief argues (at 33) that, because political parties are run by people, and people are not perfect, party support must be feared. However, the people who run parties operate within a unique network of institutional and legal constraints that make manipulation of party speech a most unlikely route of corruption—as experience has shown. Moreover, the FEC's argument proves too much. By the FEC's rationale, candidates should not be allowed to have *any* important relationships with any person or institution controlled by people.

Tellingly, the FEC Brief relegates its one factual discussion—that concerning the DSCC tally system—to a footnote (at 31-32 n.14). If the tally system of one party committee (the DSCC) circumvents the ban on earmarking—a proposition the FEC has rejected—the closely drawn solution would be to make the anti-earmarking law clearer. The FEC's own declarants uniformly attested that those who operated the tally system were scrupulously careful to obey their understanding of the law as enunciated by the FEC in MUR 3620. To address the supposed circumvention problem by restricting every party's ability to use hard funds to engage in coordinated speech with its candidates is truly tangential and obscure. It is not a closely drawn response.

The truth is that the FEC Brief is hard pressed to show that the Party Expenditure Provision limit even affects the concerns that the FEC proffers as justifications. The FEC Brief does not and cannot show that the limits are closely

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$10,000 per year, doubling the size of the current limit. H.R. 417. McCain-Feingold would have done the same. S. 1593.

drawn to those interests, much less that the narrow tailoring required by strict scrutiny has been achieved.

## V. The Party Expenditure Provision Limits Are Void For Overbreadth

Where a provision substantially burdens speech in ways that the government has not justified, and there is "no core of easily identifiable and constitutionally proscribable conduct" to which a limiting construction can confine the provision, then the entire provision is invalid for overbreadth. *Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984); *see Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (First Amendment overbreadth must be substantial). Indeed, if a provision imposes impermissible First Amendment burdens only "at its margins," but cannot be narrowed to "easily identifiable and constitutionally proscribable" conduct, it must be invalidated. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *see New York v. Ferber*, 458 U.S. 747, 773 (1982) (stating rule but declining facial invalidity where the "arguably impermissible applications" amount to "no more than a tiny fraction" of the provision's legitimate scope).

The FEC Brief observes (at 20) that FECA's restrictions on coordinated party expenditures restrict a range of conduct. At one extreme, largely independent party speech is limited if the candidate has requested the speech or if the party has consulted or coordinated with the candidate. § 441a(a)(7)(B)(i). At the other extreme, speech that originates with the candidate but that the party agrees to support financially is coordinated and, therefore, limited. § 441a(a)(7)(B)(ii). In between is a vast middle ground where the candidate and party work together to develop, produce, and distribute position statements and ads reflecting the positions of both party and candidate. (JA 198, 207-16).

The FEC Brief does not contend that the Colorado Party's arguments, if accepted, invalidate only marginal or

insubstantial aspects of FECA's restrictions on coordinated speech. Nor do the coordination provisions have an easily identifiable core that would be proscribable even if the Party's position prevails. Thus, FECA's categorical restrictions on coordinated spending in connection with congressional elections fail in their entirety.

The proper course here is to invalidate subsection (3) of the Party Expenditure Provision, § 441a(d)(3).[28] That would leave in place subsection (1), § 441a(d)(1), which "exempt[s] political parties from the general contribution and expenditure limitations of the statute." *Colorado I*, Pet. App. 96a.[29] It also would leave in place subsection (2), § 441a(d)(2), which imposes limits on coordinated spending in presidential races.[30] The only effect of invalidating subsection (3) would be to eliminate restrictions on coordinated party spending in congressional elections.[31]

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[28] The district court's judgment referred to all of § 441a(d) as invalid. Pet. App. 91a. However, the text of the opinion is clear that the limits in subsection (3) are the target of the ruling. The court of appeals understood the judgment to invalidate subsection (3). Pet. App. 1a-2a.

[29] The relevant language of subsection (1) is as follows:

> Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions [political parties] may make expenditures in connection with the general election campaign of candidates for federal office . . .

[30] Because the element of public financing of presidential elections may affect the analysis, the Colorado Party in this action has not challenged the limits on coordinated spending in presidential campaigns established by § 441a(d)(2).

[31] The FEC's Brief in *Colorado I* argued (at 17) that, if subsection (3) is invalidated, the exception from other restrictions granted by subsection (1) also would evaporate, leaving parties subject to the same $5,000 limit on coordinated spending and contributions that applies to PACs. Such a result would be bizarre, however, since the rationale for striking subsection (3) would be that even higher limits are an unconstitutional burden on party speech and association. Given FECA's strong

## CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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severability provision, § 454, there is no reason that striking subpart (3) should impair subpart (1).

The FEC Brief suggests (at 5-6 n.3) that § 441a(a)(2) imposes a $5,000 limit on money contributions by a party to its candidate, notwithstanding § 441a(d)(1). The Colorado Party has not challenged that position in this action and takes no position concerning it, provided the limit is not construed to reach coordinated party expenditures.

The Colorado Party's Amended Complaint expressly asserts that all limits imposed by FECA on coordinated speech are invalid "(i) facially, (ii) as applied to political parties such as the State Party, and (iii) as interpreted by the FEC." (JA 23). If the Court declines to hold subsection (3) facially invalid, it should declare that FECA cannot constitutionally be applied to restrict coordinated party speech in connection with congressional elections.

# Party Activity on Behalf of Senators Filing Amicus Brief

| Senator | Party | State | Election | Winning Percentage | Party Contributions | Party Coordinated Expenditures | Receipts of Campaign* | Percentage of Receipts | Source |
|---|---|---|---|---|---|---|---|---|---|
| Max Cleland | D | Ga. | 1996 | 48% | $ 18,000 | $ 638,939 | $ 2,944,283 | 22.3% | (A) |
| Russell D. Feingold | D | Wis. | 1998 | 50% | $ 850 | $ 118,608 | $ 4,072,878 | 2.9% | (B) |
| Russell D. Feingold | D | Wis. | 1992 | 52% | $ 27,587 | $ 353,210 | $ 1,996,312 | 19.1% | (C) |
| Carl Levin | D | Mich. | 1996 | 58% | $ 21,424 | $ 332,000 | $ 6,021,723 | 5.9% | (A) |
| John McCain | R | Ariz. | 1998 | 68% | $ 1,000 | | $ 4,450,544 | 0.0% | (B) |
| John McCain | R | Ariz. | 1992 | 55% | $ 18,500 | $ 302,528 | $ 3,344,311 | 9.6% | (C) |
| John F. (Jack) Reed | D | R.I. | 1996 | 62% | $ 22,310 | $ 123,640 | $ 2,688,136 | 5.4% | (A) |
| Charles E. Schumer | D | N.Y. | 1998 | 54% | $ 500 | $ 2,575,200 † | $ 16,825,671 | 15.3% | (B) |

**Sources:**

**(A) Press Release, Federal Election Commission, FEC Reports Major Increase in Party Activity for 1995-96 (rel. Mar. 19, 1997) at pp. 12-13.**
**(B) Press Release, Federal Election Commission, FEC Reports on Political Party Activity for 1997-98 (rel. April 9, 1999) at pp. 13-15.**
**(C) Press Release, Federal Election Commission, Democrats Increase Spending by 89% in the '92 Cycle (rel. Jan. 1994) at pp. 7, 9.**

*** Election Cycle only.**
**† The Total Party Coordinated Expenditures for Senator Schumer include $560,000.05 from the Liberal Party of New York State and $439,700 from the Independence Party Federal Committee. See FEC Disclosure Report Search Results at http://www.fec.gov.**