NO. 24-621

In the
Supreme Court of the United States

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, et al.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* REPUBLICAN GOVERNORS ASSOCIATION IN SUPPORT OF PETITIONERS

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January 6, 2025

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STATEMENT OF INTEREST[1]

The Republican Governors Association (RGA) is a Washington, D.C.-based 527 organization founded in 1961. Members of the RGA include U.S. state and territorial Republican governors. For the past six decades, the RGA has helped elect Republican governors and provided them the resources to govern effectively.

The RGA has both an acute interest in and first-hand knowledge of the impact that the Federal Election Campaign Act's limitations on coordinated party expenditures can have on campaigns for national office. RGA members frequently go on to run for national office and therefore are subject to FECA's limitations. The RGA and its members likewise have first-hand experience with all the different ways in which the States regulate coordinated party expenditures for State and local offices. The RGA is therefore uniquely situated to explain how the States have approached coordinated party expenditures, and whether such restrictions are necessary to prevent *quid pro quo* corruption or its appearance.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus curiae* confirms that counsel of record for all parties received timely notice of the intent to file this brief.

SUMMARY OF THE ARGUMENT

The Federal Election Campaign Act (FECA) severely restricts how much political parties can spend on their own campaign advertising if done in cooperation with the candidates they support. That is a blatant restriction on core political speech. In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), a 5-4 majority upheld that restriction on core political speech on the theory that it is necessary to prevent would-be bribers from circumventing FECA's limits on individual-to-candidate contributions by laundering their contributions through political parties, who would then coordinate their expenditures with the candidate. But as Chief Judge Sutton acknowledged in the decision below, the majority's reasoning in *Colorado II* is in significant tension with modern campaign-finance doctrine. Pet.App.10a-11a.

While that is reason enough to revisit *Colorado II*, it is not the only one. It is not just the law that has left *Colorado II* behind. The facts have too. Indeed, decades of experience have now shown that *Colorado II*'s concern about corruption by circumvention is far more hypothetical than real. More than half the States in the country give parties free rein to coordinate expenditures with the candidates that they support. So do most of the States that impose limits on how much individuals can contribute directly to candidates. Yet "[d]espite having decades to look for" examples of corruption by circumvention in those States, and despite the discovery that it sought and received in this case, the government has mustered virtually no evidence that would-be bribers are

skirting individual contribution limits by funneling bribes through political parties in exchange for benefits. Pet.App.30a-31a. That is hardly surprising. States that give free rein to parties to coordinate expenditures have numerous other ways to deter would-be bribers—including by imposing limits on how much donors can contribute to political parties, and restricting donors from earmarking those contributions for specific uses or candidates. That the government has identified next to no evidence of corruption by circumvention in those States strongly suggests that those prophylactic measures work as intended. And it strongly supports the conclusion that the same prophylactic measures imposed by FECA are more than sufficient to prevent the sort of corruption that concerned the majority in *Colorado II*.

ARGUMENT

I. State Experience Confirms That *Colorado II*'s Corruption-By-Circumvention Concern Is More Hypothetical Than Real.

1. This Court has repeatedly explained in recent years that there is "only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *FEC v. Cruz*, 596 U.S 289, 305 (2022). The government has never provided any tenable theory for why limiting coordinated party expenditures prevents *quid pro quo* corruption or its appearance. Pet.16. After all, it makes little sense to think that parties are bribing their own candidates with campaign contributions, and the government did not even attempt to argue otherwise below. Pet.16. Instead, the government principally defends the limits on the theory that they

are necessary to prevent would-be bribers from circumventing FECA's limits on individual contributions to candidates by laundering their bribes through political parties.

There are strong reasons to "greet the assertion of an anticorruption interest here with a measure of skepticism." *Cruz*, 596 U.S. at 306. As this Court has repeatedly explained, "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) (plurality op.). And that risk is even more improbable given the "quintuple prophylactic statutory scheme" that already addresses those concerns, including limits on contributions to political parties and restrictions on earmarking. Pet.18. But whatever the merits of the government's concerns in theory, experience in the States demonstrates that the government's concerns are unfounded in practice.

This Court has explained in a variety of First Amendment contexts that, when it comes to restrictions on speech, the government must "do more than 'simply posit the existence of the disease sought to be cured.'" *Cruz*, 596 U.S. at 307. "It must instead point to 'record evidence or legislative findings' demonstrating the need to address a special problem." *Id.*; *see also Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (explaining that the government "must specifically identify an 'actual problem' in need of solving"). In the campaign finance context in particular, this Court has repeatedly looked to the experience of the States to determine whether

restrictions on core political speech are necessary to prevent *quid pro quo* corruption or its appearance. *Cruz*, 596 U.S. at 307 (citing *Citizens United v. FEC*, 558 U.S. 310, 357 (2010); *McCutcheon*, 572 U.S. at 209 n.7). After all, when "States do not impose" a particular campaign-finance restriction, the "absence" of evidence that the specific "*quid pro quo* corruption" at issue is real is a telltale sign that the government's concern is too speculative to support restrictions on core political speech. *Id.*

Here, experience in the States contradicts the government's contention that limits on coordinated party expenditures are necessary to prevent donors from circumventing donor-to-candidate contribution limits. *See Colorado II*, 533 U.S. at 457. More than half the States in the country "give parties free rein to make coordinated expenditures on behalf of their state-level nominees." Pet.App.14a. Seventeen States place few if any limits on how parties coordinate with their candidates while capping what individuals can contribute to candidates. Twelve of those States largely give parties free rein on how much they can contribute to candidates while limiting the amount that individuals can contribute to candidates. *See* Cal. Gov't Code §85301; 10 Ill. Comp. Stat. 5/9-8.5(b); Kan. Stat. Ann. §25-4153(a); Ky. Rev. Stat. §§121.150(6), 121.015(3); La. Stat. §18:1505.2(H)(1)(a), (b); N.J. Stat. Ann. §19:44A-29; N.J. Admin. Code §19:25-11.2; N.Y. Elec. Law §14-114(1), (3); N.C. Gen. Stat. §163-278.13(a), (h); S.D. Codified Laws §§12-27-7 & 12-27-8; Vt. Stat. tit. 17, §2941(a)(1)-(3); Wis. Stat. §§11.1101(1), 11.1104(5); Wyo. Stat. §22-25-102(a), (c). Two of those States expressly allow parties to engage in unlimited coordinated expenditures with

candidates while capping what individuals and parties can contribute to those candidates. *See* Ariz. Rev. Stat. §§16-911(B)(4)(b), 16-912(A), 16-915(A); W. Va. Code §§3-8-5c; 3-8-9b(a). Three others allow parties to coordinate with candidates through in-kind contributions while placing limits on how much individuals can contribute to those candidates. *See* 970 Mass. Code Regs. 1.04(12) & n.11; N.M. Stat. §1-19-34.7(A)-(B), (J); Ohio Rev. Code Ann. §3517.102(B)(1)(a)(i)-(iii), (6).

If limits on coordinated party expenditures were truly necessary to prevent would-be bribers from laundering contributions through political parties, then one would expect evidence of such bribes in the 17 States that allow coordinated party expenditures while capping how much individuals can contribute to candidates.[2] Those State regimes are precisely the kind that the government warned about in *Colorado II*. There, the government argued (and a majority of the Court agreed) that "[a] party's right to make unlimited expenditures coordinated with a candidate would induce individual and other nonparty contributors to give to the party in order to finance coordinated spending for a favored candidate beyond the contribution limits binding on them." 533 U.S. at 446. But the fear that donors will launder bribes through political parties in the absence of limitations on coordinated party expenditures has not borne out in practice.

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[2] States with no limits on individual-to-candidate contributions are less likely to experience corruption-by-circumvention because a would-be briber would have no need to use the political party to funnel its bribe. It could simply bribe the candidate directly.

Take New York, for example. New York limits individual contributions to gubernatorial candidates to $18,000 per election cycle (i.e., primary and general).[3] N.Y. Elec. Law §14-114(1)(c). But it places no limits on how much parties can give the same candidates. *Id.* §14-114(3). Under that regime, donors could theoretically circumvent the limits on individual contributions to a candidate by laundering their contributions through political parties that coordinate their spending with the candidate. But the government's own expert in this case admitted that he is "not aware" of any examples "of quid pro quo routing through a party" in New York. Dist.Ct.Dkt.41-4 at 166.

The same is true even in States with much lower individual contribution limits (and therefore even greater incentives to circumvent those limits). Massachusetts, Kansas, Kentucky, Vermont, New Jersey, and West Virginia have some of the lowest donor-to-candidate limits in the country for gubernatorial candidates. *See* Mass. Gen. Laws Ch. 55, §7A(a)(1) ($1,000 per calendar year); Kan. Stat. Ann. §25-4153(a)(1) ($4,000 per cycle); Ky. Rev. Stat. §121.150(6) ($4,000 per cycle indexed for inflation every odd-numbered year); Vt. Stat. tit. 17 §2941(a)(3)(A)(i) ($4,000 per cycle); N.J. Stat. Ann. §19:44A-29(a) ($4,900 per cycle); W. Va. Code §3-8-5c(a)(1) ($5,600 per cycle). Yet Kansas, Kentucky, Vermont, and New Jersey do not limit how much state political parties can contribute to those candidates. *See* Kan. Stat. Ann. §25-4153(a); Ky. Rev. Stat.

[3] Contribution limit amounts referenced throughout this brief represent the respective limits as of the date of drafting.

§§121.150(6), 121.015(3); Vt. Stat. tit. 17, §2941(a)(3)(B); N.J. Stat. Ann. §19:44A-29. Massachusetts allows parties to coordinate with those candidates through in-kind contributions. *See* 970 Mass. Code Regs. 1.04(12) & n.11. And West Virginia expressly exempts political parties from its coordinated expenditure rules when it comes to general election campaigns for governor. *See* W. Va. Code §3-8-9b(a). In those States, too, would-be bribers could theoretically skirt individual contribution limits by laundering their bribes through political parties in exchange for official action. Yet the government has not identified a single instance of that sort of corruption in any of those States.

2. That is not for lack of trying. In the district court, the parties engaged in three months of discovery so that the government could look for examples of corruption by circumvention. Pet.App.5a. Yet despite all that discovery, and "[d]espite having decades to look for" evidence, the government pointed to next to no examples of corruption by circumvention. Pet.App.30a-31a. Indeed, the government's own expert conceded that "coordinated expenditures d[id] not feature prominently" in any of the examples that the government cited to the courts below. DCt.Dkt.36-1 at 13.

Many of the government's examples were "simply instances of 'influence' or 'access' that fall short of quid-pro-quo corruption," Pet.App.31a n.2—i.e., the "direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192. For instance, the government pointed to "Samuel Bankman-Fried's alleged attempts to obtain a favorable regulatory

environment using donations made to the DNC, DSCC, and DCCC." CA6.Dkt.38 at 41. But that example reflects at most an attempt to garner "greater influence with or access to" a political party, which is "not the type of *quid pro quo* corruption the Government may target." *Cruz*, 596 U.S. at 307-08. The government also pointed to donations by "Roger Tamraz" to "Democratic Party committees," which were allegedly made to influence "decisions of the National Security Council concerning energy policies." CA6.Dkt.38 at 40-41. But the FEC's own proposed findings concluded that the contributions were "not ultimately successful," as the National Security Council "opposed" Tamraz's efforts. Dist.Ct.Dkt.43 at 31-32.

Other examples involved "only campaign-finance law violations, not quid-pro-quo corruption." Pet.App.31a n.2. For instance, the government pointed to an article in the *Hartford Courant* detailing a Connecticut grand jury investigation into whether Governor Dannel Malloy's 2014 campaign "illegally used contributions from state contractors made into the party's account to make … expenditures on behalf of the campaign." CA6.Dkt.38 at 42. It also pointed to a *New York Daily News* article detailing how Mayor Bill de Blasio allegedly "worked with donors and candidates for the state Senate to circumvent campaign donation limits by having excessive candidate contributions routed through county committees and the State Democratic Campaign Committee." *Id.* And it pointed to an article published by a "climate accountability" advocacy group in the *Louisiana Illuminator* accusing "Democratic Party leaders" of "funneling thousands of dollars from utility

companies to the campaign of a fossil fuel-friendly candidate who ran for reelection on the state's utility regulatory committee." *Id.* at 43; *see* Sara Sneath, *Louisiana Democratic Party 'Utility' Donations to Climate Candidate's Challenger*, La. Illuminator (Jan. 25, 2023), https://tinyurl.com/uukeay4c. While those articles detail potential violations of state campaign finance laws, none mentions anything that amounts to *quid-pro-quo* corruption. And in all events, none of those examples led to prosecution or enforcement actions, suggesting that the accused "were not guilty—a possibility that [the government] does not entertain." *McCutcheon*, 572 U.S. at 217.

Still other examples involved alleged corruption that would not be possible under other prophylactic measures that now exist to prevent corruption by circumvention. The government repeatedly pointed to President Nixon's reversal of the Department of Agriculture policy, which was allegedly prompted by the dairy industry's contributions to Nixon's re-election campaign via money funneled through the RNC. CA6.Dkt.38 at 40. But that example pre-dates FECA and would be foreclosed multiple times over today by FECA's base limits, earmarking limitation, and disclosure requirements. *See* 52 U.S.C. §§30101(8)(A)(i); 30104(b); 30116(a)(1)(B), (8). The government also pointed to an example in which an Ohio school-board member allegedly helped a construction company secure a government contract in exchange for a contribution to the county-level Democratic Party that was earmarked for the candidate's campaign ads. CA6.Dkt.38 at 42. But

again, that sort of corruption by circumvention would not be possible under rules restricting earmarking.[4]

In the courts below, the government tried to explain away its failure to muster evidence of "scandals specifically involving federal coordinated expenditures" by insisting that the absence of evidence just proves that "the current regulations are working as intended." CA6.Dkt.38 at 60. One of the concurrences below likewise tried to brush it aside on the theory "'that no data can be marshaled to capture perfectly the counterfactual world in which' the regulation does 'not exist.'" Pet.App.88a (quoting *McCutcheon*, 572 U.S. at 219). That reasoning might have more purchase if the premise were true. But there plainly *is* a "counterfactual world" in which no such regulation exists, as States have (for decades) permitted political parties to coordinate expenditures with political candidates for state and local office. And when there is little evidence to substantiate the government's concerns in the States that explicitly permit what FECA prohibits, that is a strong indication that the government's concerns are more hypothetical than real. *See Cruz*, 596 U.S. at 307.

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[4] Judge Stranch's concurrence in the judgment also pointed to plea agreements in Wisconsin and Ohio, Pet.App.92a, but those examples involve unavailable or disputed facts about the defendant's conduct. *See In re Disciplinary Proc. Against Chvala*, 730 N.W.2d 648, 649 (Wis. 2007); *United States v. Finley*, No. 2:15-cr-148 (S.D. Ohio 2015), Dkts.3. 22 (information and judgment). And even crediting those examples, two instances over the course of multiple decades does not present the kind of evidence that the government needs to restrict core political speech. *Cruz*, 596 U.S. at 307-08.

II. State Experience Confirms That FECA's Other Prophylactic Measures Are More Than Sufficient To Prevent Corruption By Circumvention.

1. It is no surprise that the FEC has not been able to find widespread corruption by circumvention at the federal or state level. As Petitioners correctly explain, FECA has a "quintuple prophylactic statutory scheme" that strongly discourages would-be corrupters. Pet.17-19. And States that give parties free rein to coordinate expenditures have enacted similar prophylaxes that likewise strongly discourage would-be corrupters. The absence of examples of corruption by circumvention in those States illustrates that those prophylaxes are working. And they are a powerful indication that FECA's own "quintuple prophylactic statutory scheme" is more than sufficient to prevent corruption by circumvention as well.

To start, like FECA, many States set limits on how much individuals can contribute directly to candidates. *See* Ariz. Rev. Stat. §16-912(A); Cal. Gov't Code §85301(a)-(d); 10 Ill. Comp. Stat. 5/9-8.5(b)(i); Kan. Stat. Ann. §25-4153(a); Ky. Rev. Stat. §121.150(6); La. Stat. §18:1505.2(H)(1)(a); N.J. Stat. Ann. §§19:44A-11.3(a), 19:44A-29; N.J. Admin. Code §19:25-11.2; N.Y. Elec. Law §14-114(1); N.C. Gen. Stat. §163-278.13(a); S.D. Codified Laws §§12-27-7(1), 12-27-8(1); Vt. Stat. tit. 17, §2941(a)(1)(A)(i), (2)(A)(i), (3)(A)(i); W. Va. Code §3-8-5c(a)(1); Wis. Stat. §11.1101(1); Wyo. Stat. §22-25-102(c). That is itself "a prophylactic measure … because few if any

contributions to candidates will involve *quid pro quo* arrangements." *McCutcheon*, 572 U.S. at 221.

To prevent donors from circumventing the donor-to-candidate contribution limits, many States (like FECA) also limit how much individuals can contribute to political parties. *See, e.g.*, Ky. Rev. Stat. §121.150(11); W. Va. Code §3-8-5c(b); S.D. Codified Laws §12-27-10(1). Some of the States set relatively low limits for how much individuals can contribute to political parties. *See, e.g.*, 10 Ill. Comp. Stat. 5/9-8.5(c)(i) ($10,000 per election cycle for individuals); Kan. Stat. Ann. §25-4153(d) (per calendar year limit of $15,000 individual-to-state party committee; $5,000 individual-to-other party committee); W. Va. Code §3-8-5c(b) ($10,000 per calendar year). Those limits accord with *Colorado I*'s observation that legislative bodies that "conclude that the potential for evasion of the individual contribution limits [is] a serious matter" can "change the … limitations on contributions to political parties." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617 (1996) (plurality op.).

To further prevent circumvention, many States that do not limit coordinated expenditures restrict (as FECA does) donors from earmarking contributions to political parties for specific purposes or candidates. Some States prohibit earmarking altogether. *See, e.g.*, Ariz. Rev. Stat. §16-918; W. Va. Code §3-8-5c(b). Others treat an earmarked transaction as a contribution to the candidate subject to the base contribution limits. *See, e.g.*, Cal. Gov't Code §§85303(b)-(c), 85704; Kan. Stat. Ann. §25-4153(a); Wyo. Stat. §22-25-102(c), (f). Regardless of the exact

way that earmarked contributions are handled, these earmarking restrictions prevent would-be-bribers from circumventing the base contribution limits and corrupting candidates through a political party. After all, if a donor cannot earmark donations to political parties for particular uses or particular candidates, the donor must "by law cede control over the funds," meaning that any subsequent routing to a specific candidate would occur at the party's "discretion—not the donor's." *McCutcheon*, 572 U.S. at 211. While the party *could* spend the contribution as the contributor wishes, it is far more likely (given the party's broader purpose) that the party will spend the money on "close races" regardless of the donor's preference. Pet.App.148a. And because close races tend to draw more money than other races, any party (or contributor) spending will be "significantly diluted" by other contributors, diminishing the potential for corruption. *McCutcheon*, 572 U.S. at 212.

In the highly unlikely event that (a) a donor wants to bribe a candidate, (b) the donor-to-party limits are large enough to facilitate bribe-sized contributions, and (c) the donor has evaded earmarking rules and somehow persuades the party to use the funds according to his wishes, most States set yet another safeguard: They (like FECA) require parties to publicly report their spending, as well as their donors' names and donation amounts. *See, e.g.*, Ariz. Rev. Stat. §§16-907(D), (G)-(H), 16-926; Cal. Gov't Code §§82013, 84211; 10 Ill. Comp. Stat. 5/9-10; Ky. Rev. Stat. §121.180(2); La. Stat. §§18:1483(17), 1484(3), 1491.6, 1491.7(B); N.J. Stat. Ann. §§19:44A-8, 19:44A-11.8; N.Y. Elec. Law §14-102; N.C. Gen. Stat. §§163-278.8, 163-278.11, 163-278.12; S.D. Codified Laws

§12-27-24; Vt. Stat. tit. 17, §§2963, 2964; W. Va. Code §§3-8-5, 3-8-5a; Wis. Stat. §11.0304; Wyo. Stat. §22-25-106. Such disclosure rules offer "a particularly effective means of arming the voting public with information" and offer "robust protections against corruption." *McCutcheon*, 572 U.S. at 224.

2. Many States that give parties free rein to coordinate expenditures include some (if not all) of these other prophylaxes. West Virginia is a great example. In fact, West Virginia is particularly instructive because it closely embodies the regime that would exist absent FECA's limitations on coordinated party expenditures. Like FECA, West Virginia places relatively strict limits on individual-to-candidate and party-to-candidate contributions. W. Va. Code §3-8-5c(a)(1) (limiting individuals and political parties to $2,800 in contributions per election). It also imposes a $10,000 per calendar year limit on individual-to-party contributions with an earmarking restriction that prevents individuals from designating a portion of their party contribution for a particular candidate. *Id.* §3-8-5c(b).

West Virginia also has a provision that specifies that "a coordinated expenditure is considered to be a contribution and is subject to all requirements for contributions contained in this article." *Id.* §3-8-9a(a); *accord* 52 U.S.C. §30116(a)(7)(B)(i)-(ii). But a separate provision provides that, "[n]otwithstanding the provisions of §3-8-9a" (the coordinated expenditures restriction), "the state committee of a political party … may make coordinated expenditures in any amount with the general election campaign of the candidate for each of the following offices:

Governor, Attorney General, … State Senate, and House of Delegates." W. Va. Code §3-8-9b(a).

In other words, even though West Virginia gives parties free rein to coordinate expenditures for certain state elections, it includes the same other prophylaxes that FECA includes to deter would-be bribers from funneling their bribes through political parties. The absence of any examples of *quid pro quo* by circumvention corruption in West Virginia strongly suggests that those prophylaxes are more than sufficient to prevent such corruption in that state. And it likewise strongly suggests that the same prophylaxes in FECA are more than sufficient to prevent that sort of corruption in federal elections too.

Arizona is also instructive. Arizona places few limits on coordinated party expenditures. But like FECA, Arizona imposes numerous other prophylaxes to prevent corruption by circumvention. Like FECA, Arizona places limits on individual-to-candidate and party-to-candidate contributions. Ariz. Rev. Stat. §16-912(A) ($6,250 individual limit per election cycle); *id.* §16-915(A) ($100,000 party limit for nominees to statewide office and $10,000 for other offices per election cycle). And like FECA, Arizona limits the ability of individuals to earmark donations to political parties for specific purposes or candidates, *id.* §16-918, and requires parties to keep records of all contributions and produce them to officials upon request. *Id.* §§16-907(D), (G)-(H), 16-926. The absence of any evidence of corruption by circumvention in Arizona strongly suggests that those prophylaxes are working. And it likewise strongly suggests that similar prophylaxes in FECA are more

than up to the task of preventing corruption by circumvention.

Kansas is another helpful example. Kansas also gives parties free rein to coordinate expenditures. But it imposes other prophylaxes to prevent corruption by circumvention. Like FECA, Kansas imposes low individual-to-candidate contribution limits. Kan. Stat. Ann. §25-4153(a)(1)-(3) ($4,000 for governor and lieutenant governor candidates per election cycle; $2,000 for state senator and state board of education candidates per election cycle; $1,000 for other candidates per election cycle). Like FECA, Kansas caps individual contributions to political parties. *Id.* §25-4153(d) ($15,000 to state party committees and $5,000 to other party committees per election cycle). And those limits account for attempted circumvention through earmarking. *See id.* §25-4153(a) ("The aggregate amount contributed to a candidate and such candidate's candidate committee and to all party committees … dedicated to such candidate's campaign, by any … person … shall not exceed" the limits.). Here, too, the government's failure to muster a single example of corruption by circumvention in Kansas strongly suggests that the other prophylaxes the State employs are more than sufficient to prevent corruption by circumvention in Kansas. And it strongly suggests that similar prophylaxes in FECA are sufficient to prevent corruption by circumvention in federal elections as well.

* * *

In short, 17 States that limit individual contributions to candidates give parties free rein to coordinate their expenditures with those candidates.

"Despite having decades to look" for examples of corrupting by circumvention in those States, Pet.App.30a-31a, the government has barely put forth evidence of any corruption at all, let alone of widespread corruption that undermines public faith in our electoral system. The prevalence of state campaign finance regimes that give parties free rein to make coordinated expenditures on behalf of their state-level nominees, coupled with the lack of evidence that the absence of limits on coordinated expenditures has fostered *quid pro quo* circumvention corruption, fatally undermines the government's claim that limits on coordinated expenditures are a closely drawn means of addressing circumvention concerns. In reality, FECA's coordinated expenditure limits are a superfluous prophylaxis-upon-prophylaxis that abridges far more First Amendment activity than the Constitution permits.

III. The Importance Of This Case Is Enhanced By The Fact That Some States Do Follow FECA's Approach Of Limiting Coordinated Party Expenditures.

This case cries out for review for all the reasons explained in the Petition. If FECA's limits on coordinated party expenditures violate the First Amendment, then the federal government has been curtailing core political speech for decades. But this case is important for yet another reason: If the federal government has been curtailing core political speech for decades, then so have the States that do limit coordinated party expenditures.

To be sure, States do not always limit coordinated party expenditures in the same exact way. Unlike

FECA, which has separate provisions addressing direct party-to-candidate contributions and coordinated party expenditures, *see* 52 U.S.C. §30116(a)(2)(A), (c), (h) (base limits); *id.* §30116(d) (party expenditures), many of the States that limit coordinated party expenditures treat them as a direct contribution from the party to the candidate and apply their party-to-candidate limits to those coordinated expenditures accordingly. Some States do so expressly. *See, e.g.*, Mont. Code Ann. §13-1-101(9)(a)(ii); Okla. Stat. Ann. tit. 21, §187(4); Tenn. Code Ann. §2-10-303(5). Others do so implicitly by indicating that coordinated expenditures will not be treated as independent expenditures. *See, e.g.*, Ark. Code Ann. §7-6-201(11); Fla. Stat. Ann. §106.011(12)(b); S.C. Code Ann. 8-13-1300(17). But whatever the precise mechanism, those restrictions burden core First Amendment activity for all the same reasons that FECA's limits on coordinated party expenditures burden core First Amendment activity. Holding that FECA's limits on coordinated party expenditures are unconstitutional thus would go a long way to fixing the longstanding and severe First Amendment violations in those States as well.

What is more, state limits on coordinated party expenditures impose numerous practical constraints on candidates for state office, much like how FECA places numerous practical constraints on candidates for federal office. As the *Colorado II* dissenters pointed out over two decades ago, "break[ing the] link between the party and its candidate … impose[s] 'additional costs and burdens to promote the party message.'" 533 U.S. at 470 (Thomas, J., dissenting). Limits on party-candidate collaboration also "create[s]

voter confusion" and may "undermine the candidate that the party sought to support." *Id.*[5] Even the FEC's experts in *Colorado II* acknowledged that independent expenditures are not an effective way for parties to spend money, as they "require[] the party committee to stay at a safe distance from the candidate and the candidate's campaign plan and strategies." *See* Dist.Ct.Dkt.36-2 at 45 (Expert Report of Frank J. Sorauf & Jonathan S. Krasno in *Colorado II*). Moreover, FECA's limits on parties likely serve as "an incumbent protection rule" because "parties are the most likely to give to challengers" due to a willingness to spend more money to help challengers "in pursuit of majorities." Pet.31. FECA's coordinated party expenditure limits, in short, have created numerous significant burdens and inefficiencies in federal elections from the start.

There is little reason to believe that the burdens and inefficiencies imposed by those restrictions are limited to federal candidates. State-level candidates face these same obstacles when operating in States that limit party-candidate coordination. In Georgia, for example, the state Republican party was able to

[5] One recent example of this confusion in a federal election occurred when Colorado Senator Cory Gardner objected to the content of television advertisement from the NRSC during the 2020 election. Senator Gardner publicly stated that he "would not have personally run the ad and called on the NRSC's independent expenditure unit to stop running it. Caitlyn Kim, *Sen. Cory Gardner Asks GOP Group to Remove Political Ad About Firestone Home Explosion*, CPR News (July 22, 2020), https://tinyurl.com/32kxss3p. At that point, the NRSC had no choice but to continue to run the ad, as acquiescence to Gardner's request could have constituted prohibited coordination.

contribute up to $10,000 to the 2022 gubernatorial campaign. Ga. Code Ann. §21-5-41(a) ($5,000 for both the primary and the general election). After that, the Governor and the party had to sever the "inextricabl[e]" link that bound their fates and try to wage a successful campaign despite the potential for all sorts of inefficiencies, confusion, and chilled speech.

If anything, the burden on state level candidates is even greater than that on federal candidates. Candidates for federal office may well have other ways to build name recognition and curry favor with voters, whether via Super PACs or other mechanisms. These avenues, though less efficient than collaboration between a candidate and her party, can also help offset some incumbency protection. Candidates for state office, however, may well be more reliant on coordination with political parties to run effective campaigns. Deciding whether FECA's limits on coordinated party expenditures are consistent with the First Amendment thus is critical not just for federal elections, but for state elections as well.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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January 6, 2025