Nos. 10-30080 & 10-30146

In the
United States Court of Appeals
For the Fifth Circuit

Anh "Joseph" Cao and the **Republican National Committee,**

Plaintiffs-Appellants

v.

The Federal Election Commission,

Defendant-Appellee.

On Certification and Appeal from the United States District Court for the Eastern District of Louisiana

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Reply Brief of Plaintiffs-Appellants

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Argument

FEC believes expenditures for communications containing parties' own speech and coordinated only as to timing (like the *Cao Ad*) are functional contributions, which is disproved in I-A. FEC believes parties may be treated like PACs, which is refuted in I-B. FEC believes that, when Congress says its corruption interest is satisfied at one contribution level, lesser limits in the same or similar situations remain justified. This is rejected in I-C and II-B. FEC rejects the Supreme Court's line defining First Amendment activity sufficiently election-related to be regulated and offers no other line, though it has acknowledged lines using language that the Supreme Court construed with the unambiguously-campaign-related line. *See* II-A. And if the additional spending authority of the Party Expenditure Provision is removed, the remaining limits are simply inadequate. *See* II-C.

I. Certified Questions Should Be Decided for Plaintiffs.

A. The Party Expenditure Provision Limits Are Unconstitutional As Applied to Parties' Own Speech (Issue 2).

Plaintiffs-Appellants ("Plaintiffs") established in their opening brief that parties' own-speech expenditures may not be regulated as contributions, RNC's proposed activities (e.g., *Cao Ad*) are its own speech, there is no anti-corruption interest to limit parties' own speech, the anti-circumvention interest fails here, and

the current party-independent-expenditure regime inadequately protects parties' right to engage in their own speech. (Pls. Br. 11-25.)

In response, FEC commits five fatal flaws. First, it asserts lower scrutiny by assuming direct-speech expenditures may be treated as indirect-speech contributions. (FEC Br. 14.) Second, it claims this as-applied challenge directed to a question left open in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"), is really a facial challenge. (FEC Br. 15-25.) Third, it misstates Plaintiffs' own-speech test and ignores *Buckley v. Valeo*, 424 U.S. 1 (1976)—which treats direct speech as expenditures—thereby ignoring the constitutional distinction between expenditures and contributions that protects RNC's own speech. (FEC Br. 15-25.) Fourth, it relies on an anti-circumvention interest that is dead in general application. (FEC Br. 20-24.) Fifth, it insists that an inadequate own-speech option satisfies the right to make one's own speech. (FEC Br. 23-24.) In all respects, FEC's arguments fail.

1. Scrutiny Is Strict Because Parties' Own Direct Speech Is Restricted.

FEC argues that the lesser scrutiny for *contribution* limits applies. (FEC Br. 14.) But that begs the question here, which is whether the expenditures at issue may be treated as contributions. FEC assumes the answer in asserting lower scrutiny. But *Colorado-II* explicitly said the standard could rise in a challenge to

"expenditures that involve more of the party's own speech." 533 U.S. at 456 n.17 (emphasis added). This is that challenge. Since it is unconstitutional to treat expenditures for one's own speech as contributions—because they are direct, not indirect speech under *Buckley*, 424 U.S. 1, *see infra*—the coordinated expenditures must be treated as *expenditures*. Consequently, strict scrutiny applies. But under either strict or lesser scrutiny, the Party Expenditure Provision limits are unconstitutional as applied because no interest justifies limiting a party's own direct speech. *See infra*.

2. An As-Applied Challenge Addressing an As-Applied Issue Left Undecided in a Facial Challenge Cannot Be a Facial Challenge.

FEC argues that this as-applied challenge is "[f]oreclose[d]" by *Colorado-II* because treating coordinated own-speech communications as expenditures would "effectively overturn" *Colorado-II* (FEC Br. 15) and because there is no particular activity to which the as-applied challenge is directed (FEC Br. 16-19). This argument fails for three reasons.

First, *Colorado-II*'s facial holding neither eliminates the possibility of a successful as-applied challenge encompassing substantial activity nor lowers FEC's burden to justify the limitation on Plaintiffs' right to engage in coordinated own-speech communication. FEC's portrayal of this challenge as facial and

precluded by *Colorado-II* is like FEC's assertion that *McConnell v. FEC*, 540 U.S. 93 (2003), foreclosed as-applied challenges to the electioneering-communication prohibition, which the Supreme Court unanimously and summarily rejected in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"). Despite *WRTL-I*'s rebuff, FEC argued again in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"), that the as-applied challenge as to three particular WRTL ads must fail as "fundamentally inconsistent with *McConnell v. FEC*." FEC Reply Br. at 4, *WRTL-II*, 551 U.S. 449 (Nos. 06-969, 06-970) (FEC's briefs are available at http://www.justice.gov/osg/briefs/2006/3mer/2mer/toc3index.html). FEC there argued that "[b]ecause the constitutional exemption that appellee advocates would encompass a *substantial percentage*—probably the vast majority going forward—of ads falling within BCRA's definition of 'electioneering communication' . . . , it cannot be reconciled with . . . *McConnell*['s] . . . rejection of plaintiffs' facial challenge . . . ." *Id.* at 7-8 (emphasis in original). FEC relied on *McConnell*'s statement that the "'vast majority' of . . . 'electioneering communications' had an 'electioneering purpose.'" *Id.* at 5 (*quoting McConnell*, 540 U.S. at 206). And it argued that the activities WRTL proposed were of a kind with those considered in the facial challenge. *Id.* at 8. Moreover, FEC asserted that "[i]n claiming a constitutional entitlement to an exemption from [the prohibition], *appellee* assumed the

burden of demonstrating (at least) that the generalization reflected in [the] definition of 'electioneering communication' does *not* hold true here." FEC Br. at 34, *WRTL-II*, 551 U.S. 449 (Nos. 06-969, 06-970) (emphasis in original).

The Supreme Court rejected these arguments. It neither lowered the scrutiny nor shifted the burden. *WRTL-II*, 551 U.S. at 455 (Roberts, C.J., joined by Alito, J.).[1] It allowed no *McConnell* generalization to eliminate the need for the government to prove the prohibition narrowly tailored to a compelling interest as applied or to preclude a holding protecting a substantial number of ads.[2] *WRTL-II*'s test permitted so many ads that the dissent complained that *McConnell* had been "effectively . . . overruled," *id.* at 504 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting). But what the majority did controls here.[3]

In light of *WRTL-II*, FEC's notion that this is really an unsustainable facial challenge fails. As in *WRTL-II*, the only question before this Court is what the Constitution requires, i.e., whether FEC can prove that the challenged limits are

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[1] This opinion ("controlling opinion") states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

[2] The controlling opinion dismissed the argument from *McConnell*'s "vast majority" statement, argument (*supra*) in a footnote, indicating that "Courts do not resolve unspecified as-applied challenges in the course of resolving a facial attack, so *McConnell* could not have settled the issue we address today." *Id.* at 476 n.8

[3] *WRTL-II* also rejected the notion that corporations had no First Amendment burden because they could "speak" through a political committee ("PAC"). *Id.* at 477 n.9 (an analysis relevant here, *see infra*).

adequately tailored to an adequate interest (under either strict or intermediate scrutiny) as applied to the *Cao Ad* and other proposed coordinated own-speech activities. How much activity that might encompass does not control the constitutional analysis.

Second, just as in *WRTL-II*, *Colorado-II*'s facial holding expressly left open this as-applied challenge. *WRTL-II* noted that "*McConnell* . . . was willing to 'assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.'" 551 U.S. at 480 (*quoting McConnell*, 540 U.S. at 206, n.88). *Colorado-II* likewise has left open the as-applied issue here, *see supra*, so FEC's arguments that this is really a facial challenge that must be rejected must be set aside just as the same arguments were in *WRTL-II*. In light of the express reservation of the as-applied own-speech question in the very context of *Colorado-II*'s facial decision, FEC's arguments about this being a facial challenge are untenable.

Third, there is particular activity to which the as-applied challenge is directed, e.g., the *Cao Ad* and other proposed activities, so this is properly an as-applied challenge. As noted below, FEC never really attempts to meet its burden as to the *Cao Ad*, preferring instead to make generalized arguments.

Following its effort to make this case about overturning *Colorado-II*, FEC

argues why *Colorado-II* should not be overturned (but since this not a facial attack, the premise is flawed). FEC argues that the "anti-corruption interests identified in *Colorado II* are [not] lessened." (FEC Br. 19.) By "anti-corruption" here FEC must mean "anti-circumvention" because it acknowledges that *Colorado-II* relied on the anti-circumvention interest. (FEC Br. 7.) The anti-circumvention rationale provides no justification for limits on the own-speech activity at issue here, *see infra*. And FEC diminishes RNC's problems in making independent expenditures that are truly its own speech (Pls. Br.19-25), arguing that RNC can't have "coordinated expenditures [simply] because they might be more useful than independent expenditures." (FEC Br. 24.) FEC is clearly asserting that the flawed independent-expenditure vehicle satisfies RNC's First Amendment interest in making its own speech. This is the argument rejected in *WRTL-II*, *supra* note 3, namely that an "onerous" speech option (in that case the PAC-option) eliminated the First Amendment burden on a preferable option. 551 U.S. at 477 n.9. The "onerous" PAC-option was also rejected as satisfying the right of corporations to speak in *Citizens United v. FEC*, 130 S.Ct. 876, 897 (2010).

This is not a facial challenge. FEC bears the full burden of proving that the challenged limits are constitutional as applied to the *Cao Ad* and the other proposed own-speech activities.

3. FEC Misstates the "Own Speech" Test, and *Buckley*'s Contribution-Expenditure Distinction Protects RNC's Own Speech.

FEC misstates Plaintiffs' own-speech test: "RNC alleges that *every time a political party pays for a communication and discloses publicly that it has done so*, it is, *ipso facto*, the party's 'own speech' and therefore any restrictions on that speech are unconstitutional." (FEC Br. 15 (emphasis in original).) But Plaintiffs said that "[a] political party's 'own speech' is speech that is *attributable* to it, even if input on the speech—as to details such as content, media, and timing—was received from others . . . ." (Pls. Br. 15 (emphasis in original).) FEC couldn't have missed this emphasized point because Plaintiff-Appellants repeated it: "In order to be one's 'own speech,' it must be *attributable* to the speaker. Attribution belongs to the entity that pays for *and adopts the speech*." (Pls. Br. 16 (emphasis added).)

This careful focus on *attribution* is vital because under FEC's misstated test FEC would consider a *candidate*'s ad to be RNC's speech if RNC paid the media bill (which would require RNC to be disclosed in the disclaimer as payor), even though the ad would be attributable to the candidate and would be the candidate's own speech. But in the words of Justice Breyer, joined by Justices O'Connor and Souter, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 624 (1996) ("*Colorado-I*"), such a case would be merely "a donation of

money with direct payment of a candidate's media bills," and not, as Justice Breyer put it, the sort of "party coordinated expenditures . . . [that] share some of the constitutionally relevant features of independent expenditures." (*See* Pls. Br. 14.)[4]

Plaintiffs carefully articulated a test for how to determine "own speech" based on how the law and regulations determine attribution of an ad. (Pls. Br. 15-17.) FEC failed to address this real test for attribution, instead creating a strawman caricature and attacking that. FEC's effort fails. The real test is consistent with the distinction between types of coordinated expenditures articulated and reserved in *Colorado-I* and *Colorado-II* and implements that distinction in a practical way based on statutory and regulatory requirements.

That distinction has its roots in *Buckley*'s foundational analysis of why contributions could be restricted while expenditures could not be and how to distinguish the two. Plaintiffs addressed this plainly, concluding that the keys were "(a) whether a disbursement is just a 'general expression of support' (contribution), i.e., a 'symbolic expression of support,' or whether it 'communicate[s] the underlying basis for support' (expenditure) and (b) . . . [whether] the disbursement

[4] This refutes FEC's claim that "*every* party coordinated communication" would be RNC's speech because it would be on the disclaimer as paying for it. (FEC Br. 17-18 (emphasis in original).)

fund[s] speech to the voters that is attributable to the payor (the payor's own speech)[] or . . . fund[s] speech to voters attributable to another person[.]" (Pls. Br. 14.) FEC fails to address, let alone refute, this most fundamental part of the binding constitutional analysis.

Applying this controlling constitutional principle to the *Cao Ad*, there is no question that this speech is RNC's. (Pls. Br. 17-18.) It is attributable to RNC, and RNC will appear as payor in the disclaimer. The only coordination at issue has to do with the timing of the ad, which is exactly the scenario envisioned in *Colorado-II*, 533 U.S. at 468 (dissent), as being different from coordinated party expenditures just paying a candidate's media and other bills.[5] Under *Buckley*'s distinction between direct-speech expenditures and indirect-speech contributions, this direct speech must be treated as an expenditure and not limited as a contribution. FEC takes passing note of the *Cao Ad* (FEC Br. 18 n.2), but fails to establish that this

[5] FEC argues that "[u]nder RNC's theory, . . . the degree of collaboration is [ir]relevant . . . ." (FEC Br. 17.) If degree matters, FEC must concede that as applied to the *Cao Ad* coordination is de minimis and non-cognizable. If degree matters, FEC must regulate under a graduated-interest system as *Roe v. Wade*, 410 U.S. 113 (1973), did with abortion. But FEC doesn't really think degree matters, insisting that even a minimal timing consult yields coordination, which makes expenditures valuable to a candidate and regulable per se. (FEC. Br. 18 & n.2, 22). The open question in *Colorado-II* asks both (a) whether *some* own-speech communications may not be regulated because coordination is de minimis (e.g., just timing) and (b) whether *all* such communications are too much like independent expenditures to be limited regardless of coordination degree. Under the former, degree matters and expenditures for the *Cao Ad* may not be treated as contributions. Under the latter, degree does not matter and none of RNC's proposed own-speech activities may be so treated.

as-applied proposed speech is *not* RNC's speech or *is* functionally a contribution under *Buckley*. Instead of addressing this central, foundational analysis, essential to answering Plaintiffs' argument and the issue left open in *Colorado-I* and *Colorado-II*, FEC argues other things. But it has not joined issue on the core question and so has failed to refute the constitutional necessity of not limiting coordinated expenditures for own-speech party communications.

Nor has FEC met its duty of showing any *anti-corruption* interest that justifies treating an RNC expenditure for the *Cao Ad* as a contribution if RNC merely asked Cao when would be a good time to run it. FEC could show none, for there is none, just as there is no *anti-circumvention* interest, *see infra*.

4. FEC's Circumvention Argument Is Fundamentally Flawed.

FEC acknowledges that *Colorado-II*'s facial upholding was based on an anti-circumvention rationale, the Court not reaching quid pro quo corruption (FEC Br. 7, 31 n.11). *See Colorado-II*, 533 U.S. at 456 n.18 ("no need to reach"). But FEC's effort to apply circumvention to justify the Party Expenditure Provision limits as applied to a party's own speech relies on a theory that is fundamentally flawed and misapplied because (a) the alleged circumvention activities to which FEC points as dangerous are *legal*, *currently* permissible, and *congressionally approved*; (b) the situation will not change if Plaintiffs-Appellees prevail on their own-speech

claim because Plaintiffs did not challenge the *contribution limits* to parties; and (c) circumvention is dead or dying as a justification for limiting the sort of activity at issue here.

FEC devotes Part III to the "coordinated expenditure limits' role in diminishing corruption." (FEC Br. 8-9 (altered capitalization).) Absent limits applied to coordinated own-speech party expenditures, FEC argues, candidates may tell maxed-out donors to contribute to their party, which may use the money for coordinated expenditures with the candidate. This amounts to circumvention, says FEC, justifying limits on coordinated party expenditures. A fundamental flaw in FEC's argument is that parties, donors, and candidates may do that right now. It is legal. Contributors may give $30,400 per year (current, indexed) to a political party, which may make $43,500 (current, indexed) in coordinated expenditures with a House nominee (in states with more than one Representative). Since $30,400 is less than $43,500, a contributor may *currently* tell a candidate that she contributed her maximum amount and claim that the party used all of her money to promote the candidate. If this constitutes circumvention, then it is congressionally sanctioned circumvention and so not cognizable as an interest that the government has asserted. FEC cannot assert interests that Congress has not.

This alleged circumvention will not change if Plaintiffs prevail because

Plaintiffs did not challenge the *contribution limits* to parties. There is nothing about how much a party may coordinate with a candidate that affects how much a contributor may give. Congress designed the contribution limits to eliminate quid pro quo corruption. Congress has made the judgment that there is no corruption if a contributor maxes out her contribution to the candidate, maxes out her contribution to the party at the candidate's recommendation, and then announces to the candidate and the world that she did so to help the candidate. These contribution *limits* are as far as Congress has asserted a corruption interest in this situation. FEC can go no further. And it matters not whether a contributor's $30,400 is measured against $43,500 or an unlimited amount of coordinated party expenditures because any quid pro quo corruption is meant to be taken care of by the $30,400 contribution limit to the party, not by how much the party spends in coordination with a candidate. The donor can do no more that would be of direct benefit to a candidate to thereby curry favor with the candidate.

Of course, the 5-4 *Colorado-II* Court found some anti-circumvention effect in the Party Expenditure limits as a general, facial matter, despite the weakness of the corruption interest just shown. But the Court recognized that it was *not* deciding an as-applied case where the "expenditures . . . involve more of the party's own speech," in which case strict scrutiny might well apply. 533 U.S. at 456 n.17. This

is that as-applied case, and strict scrutiny must apply. *See supra*. And under stricter scrutiny, the weak justification sustaining the closely-divided facial decision cannot endure.[6] *Colorado-I* had found evidence of circumvention "at best, attenuated," 518 U.S. at 616, and the *Colorado-II* dissent noted the "dearth of evidence" of corruption, 533 U.S. at 476, and how the majority relied instead on the "tally system," *id.* at 478, which is no longer an issue because RNC does not tally (Pls. Br.19). Moreover, *Colorado-II* focused on "two basic arguments" that are not the issue here: (1) "the *relationship* of a party to a candidate" and (2) "the *nature of a party*." *Id.* at 449 (emphasis added). Here we examine the *nature of the expenditure* as *speech*, the issue left open in *Colorado-II*, so little, if any, of what was said in *Colorado-II* as to facial justification controls here. Thus, when *Colorado-II* says that "*[t]here is no significant functional difference between a party's coordinated expenditures and a direct party contribution to the candidate*," *id.* at 464 (emphasis added), it was doing so at only a general, facial level since it had already excluded from its analysis expenditures "involv[ing] more of the party's own speech," 533 U.S. at 456 n.17. The premise of "no significant

[6] Regardless of the level of scrutiny, this case turns on the fundamental question of whether direct-speech expenditures may be treated as indirect-speech contributions, especially where all that is coordinated is the timing, as with the *Cao Ad*. *See supra*. Moreover, any generally applicable anti-circumvention interest died in *WRTL-II* and *Citizens*. *See infra*.

functional difference" being absent here, any circumvention interest crumbles for lack of foundation.

Moreover, anti-circumvention has long passed its high point as an assertable interest in this context, though it may have some limited application to true (not presumed) contributions in situations where persons multiply political committees to bypass restrictions (*see* FEC Br. 22). Circumvention as a generally applicable interest was pronounced dead in *WRTL-II* by Chief Justice Roberts in these now-famous words: "Enough is enough." 551 U.S. at 478 (controlling opinion). FEC "argue[d] that an expansive definition of 'functional equivalent' [wa]s needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions," as *WRTL-II* put it. *Id.* at 479. "[S]uch a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny." *Id.*

And in *Citizens United v. FEC*, 130 S.Ct. at 909-910, the Court pronounced dead the notion that access and favoritism constitute corruption: "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. . . . The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . ." FEC relies precisely

on the notions of access and favoritism to undergird its asserted anti-circumvention interest. (*See* FEC Br. 8-9, 23.) FEC tries to distinguish *Citizens* (FEC Br. 20-22) by arguing that *Citizens* did not "discuss[] whether anti-circumvention is a viable rationale" (FEC Br. 20), but there is no *substance* to FEC's circumvention with access and favoritism now held to be non-corrupting. And *Citizens* did discuss circumvention, but not in a way that helps FEC: "[I]nformative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights." 130 S.Ct. at 912. Political parties' voices are as "informative" as those of corporations set free to speak effectively in *Citizens*.

Citizens also rejected reliance on theories that have no limiting principle: "Reliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.'" *Id.* at 910 (citation omitted). Circumvention is just such a theory. When government limits the people's political speech in one way, the people do what remains legal. Then speech regulators cry "Circumvention!" and pass new laws. People move on to what is legal and again "Circumvention!" is heard. The circumvention rationale is auto-expanding, creating evermore limits on core political speech until a Court declares "Enough is enough!"and turns back the tide of "prophylaxis-upon-prophylaxis," as the Court has already done. *See supra*.

After *WRTL-II* and *Citizens*, the anti-circumvention interest as a generally applicable interest in situations such as this is dead. If this Court believes it is not, Plaintiffs preserve the issue to set before the Supreme Court to finish killing what it surely thought dead.

FEC prays for deference, but *Citizens* answers that: "When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy." 130 S.Ct. at 911. Here no problem exists needing a remedy, and since FEC cannot meet its constitutional burden to justify serious speech restrictions on parties, no plea of "facial challenge," "circumvention," or "deference" may prevail.

5. Independent Expenditures Inadequately Protect Speech Rights.

Plaintiffs established that independent expenditures are insufficient protection for a party's right to make its own speech. (Pls. Br. 19-24.) FEC disparages this serious problem as being about "certain challenges" (FEC Br. 23), and claims that *Buckley* already "recognized that independent expenditures would be less useful to *candidates*" (FEC Br. 24) (emphasis added). FEC evades the point, which is that independent expenditures do not adequately protect a *party*'s right to make its *own speech*. FEC's argument that *Colorado-II* rejected the notion that party spending is *necessarily* coordinated (FEC Br. 24) again evades the issue. FEC's argument that

political parties make independent expenditures in no way disproves the fact that independent expenditures are a last resort due to their failure to adequately vindicate a party's right to make its own speech. (FEC Br. 24.) And FEC's mere description of how committees set up "internal firewalls" (FEC Br. 25 n.5) does not answer Plaintiffs' detailed explanation (Pls. Br. 19-24) of how such technically possible means of creating "independence" are not practical in real life for a political party and are inadequate to protect its First Amendment rights.

In *WRTL-II*, *supra* n. 3, and *Citizens*, 130 S.Ct. at 897-98, the Supreme Court rejected the approach FEC takes here by holding the PAC-option inadequate to protect corporations' right to speak. In those cases, FEC argued that speaking through a PAC was good enough, but the Court pronounced PAC burdens onerous and said that the ability to speak through some lesser entity than the corporation itself did not protect the corporation's right to speak. *See supra*. This same principle controls here, where the independent-expenditure regime is onerous and doesn't allow parties to make their own speech, so political parties' right to make their own speech through coordinated party expenditures must be vindicated.

B. The $5,000 Contribution Limit Unconstitutionally Imposes the Same Limits on Political Parties as on PACs (Issue 3).

Plaintiffs established that the $5,000 contribution limit, standing alone, unconstitutionally imposes the same limits on political parties as on PACs. (Pls. Br. 25-30.) FEC responds that parties are "actually treated far more favorably" and there is no constitutional requirement that they be treated better, relying on *Colorado-II*'s refusal to raise scrutiny because of parties' unique position. (FEC Br. 25.) But what level of scrutiny *Colorado-II* selected does not remove the later, on-point holding that requiring political parties to abide by the same contribution limits as others "threatens harm to a particularly important political right, the right to associate in a political party." *Randall v. Sorrell*, 548 U.S. 230, 256 (2006) (plurality). And these problems "are especially profound if severability issues cause the entire Party Expenditure Provision to be struck down" (Pls. Br. 27), which would eliminate much of the favorable treatment of political parties to which FEC points.

FEC argues that *Randall*'s clear statement does not control because "*Randall* involved very low limits . . . and other exacerbating factors." (FEC Br. 30.) But the $5,000 limit, if standing alone, fulfills three of the factors: (1) it is low, (2) it is identical to PACs', and (3) it would reduce a party's voice to a whisper. And there

is a fourth: (4) the limit is not indexed for inflation. With four of *Randall*'s factors in play, FEC may not dismiss Randall's statement, which in any event stands alone, that parties may not be treated the same as PACs. And *Randall* rejected the argument that because Vermont was a small state it could impose low limits, 548 U.S. at 250, which dooms FEC's argument that Congress gets "discretion" to "take into account the relative size and population of a jurisdiction." (FEC Br. 13.)

FEC argues that parties are not disadvantaged now that corporations and unions can make independent expenditures because parties can make independent expenditures. (FEC Br. 32.) The difficulties of party independent expenditures have been explained at length already, and corporations suffer no such difficulties in making their own speech, so FEC's attempted parity fails. FEC's argument that the Court is simply being asked "to make a policy choice" (FEC Br. 32) is erroneous. Plaintiffs ask the Court to make the constitutionally-mandated holding, which would also correct the disparity created by *Citizens* that has not yet been corrected though the principle of *Randall* compels its repair.

C. The $5,000 Contribution Limit Is Unconstitutional Because It Is Not Adjusted for Inflation (Issue 4).

Plaintiffs established a fundamental principle regarding the anti-corruption justification for contribution limits, namely, that *multiple* levels in the same

situation vitiate any corruption interest in all but the highest level. (Pls. Br. 30-31.) The principle was clearly stated in *California Prolife Council PAC v. Skully*, 989 F. Supp. 1282, 1296 (E.D. Cal. 1998), *affirmed*, 164 F.3d 1189 (9th Cir. 1999) ("*CPLC-PAC*"), and is applicable in this case wherever there are variable rates. *Davis v. FEC*, 128 S.Ct. 2759, 2771 (2008), stated that the Court "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other," which principle would apply to candidates for the same office but not directly competing for the reasons given in *CPLC-PAC*. As applied to the failure to index for inflation, Congress's assertion of a corruption interest at the $5,000 contribution level means that it does *not* assert any corruption interest at lower levels. But with each passing year, the lack of indexing means inflation strips the $5,000 limit of value and effectively limits contributions at levels at which Congress never saw or asserted a corruption interest.

FEC fails to address this fundamental constitutional analysis. *CPLC-PAC*, which provides authority for the analysis, is relegated to a footnote far from the analysis on this issue, where its core principle is ignored. (FEC Br. 51 n.18.) Instead of dealing with the lack of a corruption interest for non-indexed limits, FEC argues that *Randall* only mentioned lack of indexing as "one factor" (there

are four here, *supra*) and that there is other spending authority for parties that is indexed (which fails to address the problem as to *this* limit and fails if this limit ends up standing *alone*). There was no constitutional justification for Congress to choose not to index any contribution limit because the limit must be justified by a corruption interest or fail. FEC's failure to address this constitutional problem dooms its response.

II. Non-Certified Questions Should be Heard and Decided for Plaintiffs.[7]

Plaintiffs established the constitutional principles that (A) campaign finance restrictions may not be vague or overbroad, but may regulate only activity that is unambiguously campaign related (Pls. Br. 34-51), (B) variable contribution limits for the same or similar offices vitiate any corruption interest in all but the highest limit, (Pls. Br. 51-57), and (C) contribution limits must be high enough to permit political parties to fulfill their historic roles (Pls. Br. 57-58), it then applied these principles to the challenged provisions showing their unconstitutionality.

FEC makes three fatally flawed responses. First, while attacking the unambiguously-campaign-related line it fails to establish another constitutional line governing what activity may be regulated as coordinated, though it has

[7] The district court was required to certify all questions that raise "colorable constitutional issues." *Khachaturian v. FEC*, 980 F.2d 330, 332 (5th Cir. 1992). (*See also* Pls. Br. 33.) The non-certified questions raise colorable issues and should be considered on the merits.

acknowledged a line is required. Second, it fails to rebut *CPLC-PAC*, which held that a corruption interest asserted at a high level eliminates the interest at lower levels for the same or similar offices. *See supra*. And third, it continues to argue that the $5,000 contribution limits, challenged as too low if standing alone, is constitutional because it does not (contrary to the proposed situation) stand alone. FEC is wrong on all accounts.

A. FEC Fails to Provide a Constitutionally Compelled Line for Permissible Regulation to Counter the Unambiguously-Campaign-Related Line (Issues 5 & 6).

Issues 5 and 6 (Proposed Questions 2 and 5) challenge provisions as unconstitutionally vague[8] and overbroad as applied to all but certain activities that are unambiguously campaign related. (Pls. Br. 2-3.) These challenges are premised on the mandate that campaign-finance laws "avoid problems of vagueness and overbreadth," *McConnell*, 540 U.S. at 192. (Pls. Br. 33-57.) This constitutional first principle applies to all campaign-finance law and is the principle on which Plaintiffs rely—the principle *behind* the express-advocacy test and other Court-created tests, constructions, and descriptions.

[8] *Buckley* treated overbreadth as a part of the unconstitutional *vagueness*, 424 U.S. at 42 ("construction . . . refocuses the vagueness question"), inherent in the *overbreadth* dissolving-distinction problem, *id.* ("distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application"), that it cured with the express-advocacy construction, *id.* at 44 & n.52. *Vagueness* and *overbreadth* converge in *Buckley*-overbreadth.

To distinguish this principle from *Broadrick*-overbreadth, Plaintiffs call it "*Buckley*-overbreadth," (Pls. Br. 36.) While Plaintiffs coined "*Buckley*-over-breadth" it is no new concept, as FEC suggests, nor is it surprising that courts have not employed a term freshly minted. (FEC Br. 36.) FEC's opposition focuses on the terminology used, ignoring the principle's substance. (FEC Br. 36-38.) As explained in the opening brief, the need for a bright constitutional line satisfying *Buckley*-overbreadth is present not only in *Buckley*, 424 U.S. at 12-14, 23 n.24, 24 n.25, 39, 42-44, 46 n.53, 78, 80, and *McConnell*, 540 U.S. at 190-92, 207, but also in *WRTL-II*, 551 U.S. at 469-70, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*"), and various lower court decisions.[9]

FEC argues that cases applying *Buckley*-overbreadth involved independent expenditures, and expenditures here are coordinated (FEC Brief at 37.) This is superficial. Of course expenditures here are coordinated, but the issue is whether they must be *treated* like independent expenditures because, as Justice Breyer put it, they "share some of the constitutionally relevant features of independent expenditures." *Colorado-I*, 518 U.S. at 624. So FEC again begs the question,

[9] *See, e.g., North Carolina Right to Life v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008). FEC claims *Leake* does not apply because *Leake* dealt with a state statute in a different circuit. (FEC Br. 42.) This confuses whether authority is binding with whether it is persuasive. *Leake*'s well-reasoned analysis that all campaign-finance law must be cabined and so is subject to the unambiguously-campaign-related principle, 525 F.3d at 281, 283, is strongly persuasive authority.

assuming that a constitutional principle governing independent expenditures does not govern coordinated party expenditures. But if they are alike, FEC's concession that the principle governs independent expenditures also concedes its application to coordinated party expenditures that are the functional equivalent of independent expenditures. Moreover, *Buckley*'s overbreadth analysis explicitly explaining its unambiguously-campaign-related principle was focused on unconstitutional overbreadth in the "expenditure" definition and did not rely in its analysis of the problem and solution on whether the expenditure was independent. 424 U.S. at 80.

FEC argues that applying the *Buckley*-overbreadth concept to the Party Expenditure Provision limits "would exempt virtually all coordinated expenditures from regulation." (FEC Br. 36) Numerous activities would remain regulated, but the question is not how many would, but what the Constitution requires, i.e., whether FEC may regulate certain activities.

FEC criticizes *Buckley*-overbreadth as "creat[ing] a roadmap for circumventing the coordinated expenditure limits and thus severely undermin[ing] the Act's contribution limits." (FEC Brief at 44.) As explained above, *see* I-A-4, FEC's anti-circumvention argument is flawed. And in any event, constitutional mandate is not circumvention.

As to the merits, there must be a line beyond which the government may not

go in treating coordinated expenditures as contributions. FEC does not provide the line. The statute provides a line by limiting party expenditures "*in connection with* the general election campaign of a candidate." 2 U.S.C. § 441a(d)(2)-(3) (emphasis added). But it was precisely such "in connection with" language that violated *Buckley*-overbreadth and required the express-advocacy construction in *MCFL*, 479 U.S. at, 248-49.

FEC acknowledges elsewhere that there must be a line. In a 2006 explanation and justification ("E&J") on "Coordinated Communications," 71 Fed. Reg. 33190, it said that the "content prong" of its coordination regulations was "to 'ensure that the coordination regulations do not inadvertently encompass communications that are not made *for the purpose of influencing* a Federal election,' and therefore are not 'expenditures' subject to regulation under the Act." *Id.* at 33191 (citation omitted) (emphasis added). Of course, this very expenditure-definition language was construed in *Buckley* with the express-advocacy gloss to assure that regulation would not reach beyond "spending that is *unambiguously related to the campaign of a particular federal candidate*." 424 U.S. at 80 (emphasis added).[10] And FEC

[10] FEC asserts that *Buckley*-overbreadth discussions all involve "independent expenditures" (FEC Br. 37) but *Buckley* here used the unambiguously-campaign-related principle to construe an *expenditure* definition, because of its vague and overbroad language, without regard to whether it was independent. It was the language that was the problem—the same language used here. Before a party "expenditure" may be deemed a "contribution" by coordination, it must first actually be an "expenditure" under *Buckley*'s construction.

acknowledged the unconstitutional chill on protected activity that would occur if it tried to regulate coordinated communications that are "unlikely to be for the purpose of influencing Federal elections." 71 Fed. Reg. at 33197. It stated that "where First Amendment rights are affected, '[p]recision of regulation must be the touchstone.'" *Id.* (citation omitted).

Plaintiffs agree that precision is required, that "for the purpose of influencing Federal elections" governs regulable expenditures, and that the Party Expenditure Provision limits may only reach activity "in connection with the general election campaign of a candidate.'" They simply go the next logical step, asserting that both of those phrases have been construed with the unambiguously-campaign-related principle and the same must control here.[11] This precise, constitutional line drawing was what FEC was required to provide here, but it chose evasion instead—a fatally flawed approach.

[11] Some courts have held that express-advocacy is the only expressive activity that may considered coordinated. *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986); *FEC v. Colorado Republican*, 839 F. Supp. 1448, 1455 (D. Colo. 1993); *Clifton v. FEC*, 927 F. Supp. 493, 500 (D. Me. 1996). The court in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), declined to limit regulable content for coordination to express advocacy, *id.* at 88, but still did not go far beyond express advocacy, theorizing that campaign-related "gauzy candidate profiles for use at a national political convention" might be "as beneficial to the candidate as a cash contribution," *id*.

B. FEC Cannot Justify the Variability of the Party Expenditure Provision Limits (Issue 7).

In Issue 7 (Proposed Question 4), Plaintiffs challenged the Party Expenditure Provision limits at 2 U.S.C. § 441a(d)(3) as unconstitutional primarily because variable limits for the same office vitiate the anti-corruption interest for rates below the highest and the unconstitutional provisions are non-severable[12] (and if a rate possibly survived, it is too low). (*See* Pls. Br. 3, 51-57.)

FEC argues that *Colorado-II* upheld the limits despite the variability and so says this is a call to reconsider *Colorado-II*. (FEC. Br. 48.) FEC fails to show where the variability was challenged in *Colorado-II*, so both assertions fail. FEC then argues for deference to Congress's need to balance anti-corruption with allowing candidates to amass adequate funds. (FEC Br. 49.) This argument is flawed for two reasons.

First, FEC again fails to deal with the holding in *CPLC-PAC* that where there are variable limits for the same or similar offices, lower ones are unsupported by any anti-corruption interest. *See infra* at I-C. This failure dooms its response. Absent a corruption interest, Congress gets no deference.

Second, Congress may limit contributions based on an anti-corruption interest,

[12] FEC urges severability (FEC Br. 52 n.19), which if possible would change part of the analysis. But FEC provides no real analysis of congressional intent, only citing a severability clause.

as FEC acknowledges (FEC Br. 49), but that is the *only* justification for a limit. So the constitutional analysis must deal with limits only in terms of their anti-corruption justification. Absent an anti-corruption justification there may be no limit. Congress may not use a variable rate for the same office, thereby eliminating the *anti-corruption* interest as to lower rates, *supra*, and then say, "Though we've no corruption here, we may have non-corrupting limits based on our perceived need for funding." FEC loses sight of the *only* justification for a contribution limit, which is fatal to its argument. Moreover, FEC's argument that contribution limits may vary because of geographic or population variation was rejected in *Randall*, 548 U.S. at 250.

FEC argues that Plaintiffs did not provide evidence of candidates unable to amass the resources necessary for effective advocacy. (FEC Br. 52-57.) But that argument fails under FEC's flawed notion that limits may be set absent corruption provided Congress wants to enable amassing resources. *See supra*. To the extent it applies to the residual issue of whether a surviving contribution limit (if there is non-severability) is inadequate, that situation would only occur in a vastly different landscape with which there has yet been no experience (and so no evidence would be available).

FEC cites *Randall*'s acknowledgment that the "the contribution limits at issue

in *Colorado II* were far less problematic" than Vermont's to justify the Party Expenditure Provision's variable limits. (FEC Brief at 56). This argument fails because *Randall* was not discussing the variability of the limits, but simply their amount, and because the Court did not say that the Party Expenditure Provision limits were constitutional, simply *less* problematic. FEC has failed to carry its burden of justifying the challenged provisions.

C. The $5,000 Contribution Limit, Standing Alone, Forecloses Political Parties Ability to Fulfill Their Historic Role (Issue 8).

In Issue 8 (Proposed Question 8), *see supra* at 3, Plaintiffs challenged the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) as unconstitutional. One basis (regarding lack of inflation indexing) was certified, *see supra* at I-C. The issue here is premised on preserving the historic role of political parties if the Party Expenditure Provisions limits are struck down as unconstitutional and parties are limited to $5,000 contributions only.

FEC primarily relies on the notion that Plaintiffs' challenge to this provision standing alone must fail because "it does not stand alone." (FEC. Br. 58.) But that argument is fatally flawed for ignoring the very as-applied situation to which this challenge is made.

The $5,000 contribution limit, standing alone, is simply too low to allow

political parties to fulfill their historic and important role in our democratic republic. *See Randall*, 548 U.S. at 257 (plurality opinion) (low limits "severely limit the ability of a party to assist its candidate's campaigns by engaging in coordinated spending" and hinder "the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates"). So this low contribution limit is facially unconstitutional for violating political parties' and their candidates' rights to free expression and association under the First Amendment.

Conclusion

For the reasons stated, Plaintiffs request the Court to provide the relief requested in the Conclusion to their opening brief. (Pls. Br. 58.)

Dated April 19, 2010

Respectfully Submitted,

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I hereby certify that the foregoing Reply Brief of Plaintiffs has been filed in the office of the Clerk for the United States Court of Appeals for the Fifth Circuit, and a true and correct copy of the same has been provided to counsel listed below in the manner indicated on this 19th day of April, 2010. I also certify that this filing complies with 5th Cir. R. 25.2.13 and 5th Cir. R. 25.2.1, and that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Dated: April 19, 2010