EN BANC ARGUMENT SCHEDULED FOR MAY 24, 2010

Nos. 10-30080 and 10-30146
(Consolidated for Briefing and Argument)

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ANH "JOSEPH" CAO and the REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,
v.
FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Certified Constitutional Questions and Appeal from
the United States District Court for the Eastern District of Louisiana

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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April 12, 2010

CERTIFICATE OF INTERESTED PARTIES

Anh "Joseph" Cao and RNC v. FEC, Nos. 10-30080 & 10-30146

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Anh "Joseph" Cao, Plaintiff-Appellant, U.S. Representative for the Second Congressional District of Louisiana;

2. The Republican National Committee, Plaintiff-Appellant;

3. The Louisiana Republican Party, a Plaintiff below;

4. The Federal Election Commission, Defendant-Appellee.

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STATEMENT REGARDING ORAL ARGUMENT

This case has been scheduled for oral argument on May 24, 2010. *See Cao v. FEC*, No. 10-30080, Scheduling Order [Doc. # 00511024407] (5th Cir. Mar. 1, 2010). The FEC agrees that oral argument would assist the Court in its disposition of the complex issues raised by this case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Miscellaneous

JURISDICTIONAL STATEMENT

This case consists of two different proceedings that have been consolidated for the purposes of briefing and oral argument. Each proceeding has a different jurisdictional basis.

Cao v. FEC, No. 10-30080, involves questions certified by the district court on January 27, 2010 to this Court en banc pursuant to 2 U.S.C. § 437h. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 as this case is a constitutional challenge to the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 ("FECA" or "Act").

Cao v. FEC, No. 10-30146, is an appeal of the district court's Order and Reasons denying certification of certain questions and granting summary judgment to the Federal Election Commission as to "all remaining claims [other than those that had been certified]." *Cao v. FEC*, No. 08-4887, Order and Reasons (Berrigan, J.) [Doc. #89], slip op. at 97, 2010 WL 386733, at *50 (E.D. La. Jan. 27, 2010) (R. 3248) ("Order"). A panel of this Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATUTES

An addendum contains relevant statutory provisions.

COUNTERSTATEMENT OF THE CASE

Plaintiffs attempt to relitigate *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"), by describing this case as an "as-applied" challenge to campaign finance laws that the Supreme Court has facially upheld: limits on the amounts that political parties can contribute to and coordinate with their candidates. Under 2 U.S.C. § 437h, the district court made findings of fact and certified four constitutional questions to this Court sitting en banc, which is to decide the merits of these issues in the first instance. The district court also granted summary judgment to the FEC on plaintiffs' remaining claims. Plaintiffs appealed that judgment, and this Court has consolidated that appeal with its consideration of the certified questions.

COUNTERSTATEMENT OF FACTS

I. PARTIES

The complaint in this case was filed by Anh "Joseph" Cao, the Republican National Committee ("RNC"), and the Republican Party of Louisiana ("LA-GOP") (unless otherwise indicated, collectively "RNC"). Cao is the United States Representative for the Second Congressional District of Louisiana. Order, Findings of Fact ("Facts") ¶ 3 (R. 3163). The RNC is the national political party committee of the Republican Party. *Id.* ¶ 6 (R. 3164). LA-GOP is the State Committee of the Republican Party for Louisiana. *Id.* ¶ 9 (R. 3165). The Federal

Election Commission ("Commission" or "FEC") is the independent agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA and other campaign finance statutes. *Id.* ¶ 11 (R. 3165-66).

II. STATUTORY AND REGULATORY BACKGROUND

A. Political Parties Under FECA

FECA limits the amounts that individuals, political parties, and other political committees (commonly known as "PACs") can contribute to a candidate. 2 U.S.C. § 441a(a)(1). These contribution limits apply both to direct contributions of money and in-kind contributions of goods or services. 2 U.S.C. § 431(8)(A). If an individual or entity coordinates with a candidate or her campaign to make an expenditure, that expenditure is considered an in-kind contribution because it benefits the campaign just as if the individual or entity had donated the good or service directly to the campaign. 2 U.S.C. § 441a(a)(7)(B). But political parties, unlike all other entities, are permitted under FECA to coordinate spending with candidates well above their contribution limits. 2 U.S.C. §§ 441a(d)(2)-(3) ("Party Expenditure Provision"); Facts ¶¶ 36-39 (R. 3174-76). The Act currently allows a national and state committee of a political party each to coordinate spending with a candidate up to $43,500 or $87,000 in races for the House of Representatives (depending on whether the state has only one or multiple districts), and up to a

range of $87,000 to $2,395,400 in races for the Senate (depending on the state's voting age population); the Act also permitted the national parties to coordinate spending up to $19,151,200 in the most recent Presidential race. 2 U.S.C. §§ 441a(d)(2)-(3); 75 Fed. Reg. 8353-55 (Feb. 24, 2010); 73 Fed. Reg. 8696, 8698 (Feb. 14, 2008).

FECA also provides political parties special fundraising advantages in connection with federal elections. Facts ¶¶ 14-28 (R. 3167-72). Committees established by state and national parties can receive far more in "hard money" (money raised in accord with the restrictions of the Act) than other political committees or candidates. 2 U.S.C. § 441a(a)(1); Facts ¶ 23 (R. 3170). Party committees can also generally receive and transfer more money from more sources than other entities can. 2 U.S.C. §§ 441a(a)(1), 441a(a)(2), 441a(a)(5), 441i(b); 11 C.F.R. §§ 300.30; Facts ¶¶ 24-26 (R. 3171-72). National party committees receive millions of dollars in funding from the federal government for their presidential nominating conventions. 26 U.S.C. § 9008(b); Facts ¶ 28 (R. 3172). They also receive special non-monetary benefits, such as getting their names next to those of their candidates on ballots in most states and automatic inclusion on the general election ballot for major party nominees. Facts ¶¶ 16-17 (R. 3167-68).

The Democratic and Republican parties together raised more than a billion dollars in each of the last three two-year election cycles. Facts ¶ 58 (R. 3185). In

the 2008 election cycle, Republican party committees (including national, state, and local committees) supported their federal candidates with over $30 million in coordinated expenditures, as did the Democratic party committees. Facts ¶ 65 (R. 3187). During the last three election cycles, both major parties' national committees have averaged well over $100 million in independent campaign expenditures. Facts ¶ 70 (R. 3188-89). During those same cycles, both major parties' state and local committees also spent millions of dollars on independent expenditures. *Id.*

B. The Supreme Court Has Upheld the Party Expenditure Provision

The provisions RNC challenges were upheld on their face in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Colorado II*. In *Buckley's* two primary holdings relevant to this case, the Supreme Court held that limitations on political campaign contributions were generally constitutional, but that limitations on independent expenditures generally violated the First Amendment. *Buckley*, 424 U.S. at 58-59. *Buckley* recognized, however, that paying for an expenditure made in cooperation with a campaign was the equivalent of making a contribution to that campaign. *Id.* at 46-47 & n.53. The Court therefore understood "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee … but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the

candidate." *Id*. at 78. "So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." *Id.* Among the contribution limits that *Buckley* upheld was the limit applicable to multicandidate political committees, including political parties, of $5,000 per election in contributions to each federal candidate. 2 U.S.C. §§ 441a(a)(2)(A).

Since *Buckley*, the Supreme Court has repeatedly explained the "fundamental constitutional difference" between contributions and independent expenditures. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). "We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("*MCFL*"); *see also McConnell v. FEC*, 540 U.S. 93, 134-40 (2003).

Prior to 1996, the Commission also presumed that, due to the close connection between parties and candidates, "all party expenditures should be treated as if they had been coordinated *as a matter of law*." *Colo. Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 619 (1996) ("*Colorado I*"). The Commission thus presumed that all expenditure limits imposed on political parties were effectively contribution limits. *Id.* But in *Colorado I*, the Supreme Court held that parties were capable of making independent expenditures, and when they

did so, that spending could not constitutionally be limited. *Id.* at 617 ("[T]he constitutionally significant fact … is the lack of coordination between the candidate and the source of the expenditure") (citation omitted). Although the petitioner asked the Court to strike down the Party Expenditure Provision on its face, the Court for prudential reasons remanded the case for consideration of whether limits on expenditures that were actually coordinated between parties and campaigns were constitutional. *Colorado I*, 518 U.S. at 623-24.

After remand, the issue returned to the Supreme Court in *Colorado II*. In that case, the Court applied the "same scrutiny" it had previously "applied to limits on . . . cash contributions," *i.e.*, whether the limit was "closely drawn to match a sufficiently important interest." 533 U.S. at 446 (citations and quotation marks omitted); *see id.* at 456. The Court reaffirmed that the longstanding constitutional distinction between coordinated and independent expenditures applied to spending by political parties. *Id.* at 464. The Court then upheld the limits in 2 U.S.C. § 441a(d) on their face, explaining that "[t]here is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate." 533 U.S. at 464. The Court based its decision largely on an anti-circumvention rationale: Because persons can make much larger contributions to political parties than to candidates, the latter limits could be more easily circumvented if the parties' ability to make coordinated expenditures were

unlimited. As the Court explained, "[c]oordinated expenditures of money donated to a party are tailor-made to undermine contribution limits," which serve to deter corruption. *Colorado II*, 533 U.S. at 464.

III. COORDINATED EXPENDITURE LIMITS' ROLE IN DIMINISHING CORRUPTION

Because money is fungible, coordinated expenditures made on behalf of a campaign "free[] other campaign funds to be spent in other ways." Declaration of Martin Meehan ("Meehan Decl.") ¶ 17 (R. 1064). Former Congressman Meehan explained that coordinated expenditures made on his behalf "functioned as contributions to [his] campaign." *Id.* In the absence of limits on coordinated expenditures, an affluent donor wishing to contribute more than the statutory limit to a candidate can "use a party committee to 'launder' the money" by contributing to the party, which would then use that money to engage in coordinated expenditures with the donor's favored candidate. Jonathan Krasno, Political Party Committees and Coordinated Expenditures in *Cao v. FEC* ("Krasno Rept.") at 4 (R. 1031).

"[W]hether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452. As Congressman Meehan explained, "[p]arty fundraising serves as a mechanism for major donors to get special access to lawmakers." Facts ¶ 88 (R. 3196). Indeed, "[n]ational parties' 'fundraising events often [] feature

members of Congress as draws, and they explicitly offer donors the opportunity to meet and get to know various officials.'" Facts ¶ 89 (R. 3196) (quoting Krasno). To facilitate its donors' access to federal candidates and officeholders, the RNC organizes "fulfillment" events and invites individuals who have made large contributions to the RNC, and officeholders such as the President or other prominent Republicans also attend. Facts ¶ 97 (R. 3198-99). There are numerous other ways in which federal candidates and officeholders can, and do, learn the identity of individuals who have made large donations to their party. Facts ¶¶ 101-05 (R. 3201-02). Unless a federal officeholder is actively avoiding the information, she will learn the identity of large donors to her political party. Facts ¶¶ 104-05 (R. 3201-02).

The RNC encourages its candidates to tell their "maxed out" donors to contribute to the RNC. Facts ¶ 110 (R. 3203-04). Congressman Cao has personally suggested to donors who had given the maximum amount to his campaign that they could also contribute to the party. *Id.* Without limits on coordinated expenditures, circumvention of the contribution limits would become even simpler because candidates "could draw a relatively straight line from their own 'maxed-out' donors' contributions to a party and, then, to the benefit of their campaign." Krasno Rept. at 4 (R. 1031).

IV. PROCEDURAL HISTORY

This case was brought under 2 U.S.C. § 437h, a unique provision which instructs the district court to "certify all questions of constitutionality of this Act to the United States Court of Appeals for the circuit involved, which shall hear the matter sitting en banc." The district court's role in a section 437h proceeding is to make findings of fact and certify any questions that it deems to be "neither insubstantial nor settled." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). The district court made findings of fact and certified four of RNC's eight proposed questions, stating that it was only deciding "whether [each] constitutional challenge is 'frivolous.'" Order at 1, 96-97 (R. 3152, 3247-48).[1] The district court also held the non-certified questions "frivolous" and granted summary judgment to the FEC as to "all remaining claims." Order at 97 (R. 3248).

Plaintiffs appealed the district court order denying certification of the remaining questions and granting summary judgment of those claims to the Commission. This Court has consolidated that appeal with the certified questions for purposes of briefing and oral argument. *See Cao v. FEC*, No. 10-30080, Scheduling Order [Doc. # 00511024407] (5th Cir. Mar. 1, 2010).

[1] The district court certified questions only for Cao and the RNC. Order at 97 (R. 3248). LA-GOP is not a party to any part of this proceeding.

SUMMARY OF ARGUMENT

Despite RNC's description of this case as an "as-applied" challenge, it attempts to overturn *Colorado II*. The categories of unlimited expenditures that RNC claims it should be able to make in coordination with its candidates are so broad that they would swallow up the party expenditure limits previously upheld by the Supreme Court. These limits help foreclose corruption and its appearance.

Colorado II was based on an anti-circumvention rationale: Because persons can make much larger contributions to political parties than to candidates, the individual contribution limits could be more easily circumvented if the parties' ability to make coordinated expenditures were unlimited. "Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." *Colorado II,* 533 U.S. at 464. RNC argues that any time a party adopts speech as its "own" and pays for it — even if written by the very candidate it supports —such coordinated expenditures must be treated as if they had been made independently, and thus subject to no limits. This argument ignores the benefit candidates gain from collaboration with a spender, making the resulting expenditure equivalent to a direct contribution to the candidate.

Similarly, RNC argues that all restrictions on party coordinated communications are unconstitutional except for a small sliver of activity that RNC identifies as "unambiguously campaign related." This invented standard has no

basis in law and would improperly import the "express advocacy" interpretation — established in *Buckley* concerning *independent* expenditures made by groups *other than political committees* — to the context of coordinated expenditures by political parties. RNC also argues that it should be able to coordinate unlimited amounts of what it calls "non-targeted" federal election activity, but in RNC's view, almost all voter registration, get-out-the-vote activity, and other federal election activity is "non-targeted"; accepting RNC's novel concept would thus provide a roadmap for unlawful circumvention.

Colorado II's facial upholding of the Party Expenditure Provision has not been undermined. The Court's recent decision in *Citizens United v. FEC* dealt with independent expenditures by corporations, not coordinated expenditures by political parties. And nothing in that decision calls into question the Court's repeated upholding of anti-circumvention provisions in FECA. Factually, the evidence shows that party coordinated expenditures continue to pose a danger of circumvention of candidate contribution limits.

The $5,000 limit on contributions that political parties can give to candidates is constitutional. *Buckley* upheld this limit for political committees generally, and there is no constitutional requirement that party committees be treated more favorably than other committees. Indeed, *Colorado II* explained that "parties' capacity to concentrate power to elect is the very capacity that apparently opens

them to exploitation as channels for circumventing contribution" limits. 533 U.S. at 455. In any event, overall, FECA affords parties numerous advantages over other committees, including the unique ability to make large coordinated expenditures.

The Supreme Court has never invalidated a contribution limit solely because it was not indexed for inflation, and the $5,000 limit at issue here is far higher, and part of a far less restrictive financing regime, than any very low contribution limit the Court has found problematic. Nor does the $5,000 limit prevent parties from fulfilling their historic role: Political parties have raised more than $1 billion in each of the last three two-year election cycles, and they enjoy ample opportunities to participate in the electoral process. More fundamentally, the Court evaluates contribution limits by assessing whether the recipient candidates can amass the resources necessary to wage effective campaigns, and RNC has presented no evidence to support such a claim.

Finally, the coordinated expenditure limits are constitutional even though they vary depending upon, in part, the voting age population of states. The Supreme Court has deferred to Congress's discretion to set specific contribution limits, and legislatures may take into account the relative size and population of a jurisdiction. No court has ever found variability in contribution limits for different races to be a constitutional defect.

ARGUMENT

I. THE CERTIFIED QUESTIONS SHOULD BE DECIDED IN THE COMMISSION'S FAVOR

The district court certified four constitutional questions. The Commission has not contested Certified Question 1: Congressman Cao and the RNC have alleged sufficient injury to create a "case or controversy" under Article III. The remaining three questions should be decided in favor of the FEC.

A. Standard of Review

This Court will answer the certified questions in the first instance because the district court decided only that those questions were not frivolous.

The Party Expenditure Provision at issue receives the same scrutiny as a law limiting a party's contributions. *Colorado II*, 533 U.S. at 456. Contribution limits are reviewed under a less rigorous standard than expenditure limits. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 134-36 (2003); *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). A contribution limit is valid if it satisfies the "lesser demand" of being "closely drawn" to match a "sufficiently important interest." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 387-88 (2000).

B. Limits on Coordinated Expenditures Are Constitutional When Applied to Communications RNC Describes as a Party's "Own Speech"

Certified Question 2 asks whether the Party Expenditure Provision and the party contribution limits are unconstitutional as applied to "coordinated

communications that convey the basis for the expressed support." Order at 97 (R. 3248). Plaintiffs have interpreted (Br. at 11-12) this question to apply to all coordinated communications that plaintiffs define as the speaker's "own speech." A political party's "own speech," according to plaintiffs' theory, is all "speech that is attributable to [the party], even if input on the speech — as to details such as content, media, and timing — was received from others, such as … officials … and candidates." Br. at 15-16. In other words, 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. This theory would effectively eviscerate the Party Expenditure Provision and the explicit holding of *Colorado II* (*see supra* pp. 7-8). This Court should therefore reject RNC's challenge.

1. *Colorado II* Forecloses RNC's Extraordinarily Broad "Own Speech" Claim

Plaintiffs attempt to characterize their "own speech" claim as an issue left unresolved in *Colorado II*, but their expansive theory would effectively overturn that decision. RNC relies on a footnote in the *Colorado II* dissent, where Justice Thomas wrote "[t]o the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility that there are such expenditures that would not be functionally identical to direct contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures

remains unresolved." *Colorado II*, 533 U.S. at 468 n.2. The majority responded to the dissent's footnote with a footnote of its own stating that it "need not reach [the question of specific types of expenditures] in this facial challenge," and it rejected an overbreadth argument that the Party Expenditure Provision was unconstitutional because it limited "expenditures that involve more of the party's own speech." *Colorado II*, 533 U.S. at 456 n.17.

These footnotes merely acknowledge the general legal principle that the facial upholding of a law does not prevent future as-applied challenges. But such challenges can succeed only if they raise a factual circumstance or principle of law that the earlier decision did not rely upon in upholding the law on its face. Recently, a three-judge district court in the D.C. Circuit rejected a similar attempt by the RNC to disguise a facial attack as an as-applied challenge:

> *McConnell* upheld § 323(a) against a facial challenge based on the same applications of the statute that the RNC now raises in its as-applied challenge. In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent.

RNC v. FEC, 08-1953, 2010 WL 1140721, at *5 (D.D.C. Mar. 26, 2010); *see also, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 354 (1989) (Scalia, J., dissenting) ("While rejection of a facial challenge to a statute does not preclude all as-applied attacks,

surely it precludes one resting upon the same asserted principle of law."); *McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004) (rejecting as-applied challenge presenting "the same type of fact situation that was envisioned . . . when the facial challenge was denied in *McGuire I*.").

An as-applied challenge attacks the constitutionality of a statute "in discrete and well-defined instances," *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007), but RNC's claim encompasses virtually every type of electoral communication, including those that expressly advocate the election or defeat of a federal candidate. *See Buckley*, 424 U.S. at 44. Under RNC's theory, neither the electoral content of the message nor the degree of collaboration is relevant; all that matters is whether the party pays for the ultimate communication. For example, RNC asserts that a communication is a party's "own speech" even if a candidate chooses which communication to broadcast out of a group of proposals by the party and even if the communication states that it was approved by the candidate. Facts ¶¶ 142, 144 (R. 3214-15). RNC even takes this argument to its logical extreme and asserts that a communication can be a party's "own speech" if the *candidate* actually writes and produces the communication, as long as the party accepts it and pays for it to be run. Facts ¶ 143 (R. 3214-15). Because *every* party coordinated communication is, by definition, "paid for by a political party committee or its agent," 11 C.F.R. § 109.37(a)(1), it is hard to imagine any such expenditure that

RNC would *not* consider a party's "own speech." Even so, RNC claims that the very fact that such communications have been paid for by the party places them beyond permissible regulation, as long as the party acknowledges that it has paid for the communication, as it is required to do. *See* 11 C.F.R. § 110.11(b)(2).[2]

"If a candidate or her staff drafts or collaborates on the script of an ad that the party pays for, it benefits the candidate's campaign, regardless of whether the resulting ad reflects the party's own views." Meehan Decl. ¶ 20 (R. 1064). Indeed, if a party financed a $1 million ad campaign of that kind, it would be the equivalent of a $1 million contribution to the candidate." *Id.* If a party runs an ad at the suggestion of a candidate or campaign, or in a time or place suggested by the candidate or campaign, that similarly benefits the candidate. *Id.* ¶¶ 21-23 (R. 1064-65). Because media expenses represent such a large portion of campaign expenditures, any "exception [to coordinated expenditure limits] that allowed

[2] RNC devotes one paragraph (Br. at 17-18) to a narrower challenge based on an advertisement allegedly written without Cao's involvement, but for which the RNC would have liked to consult with him "as to [the] timing" of the ad's broadcast. Under Commission regulations, coordination as to the timing of an advertisement is sufficient to meet the "conduct" portion of the definition of a coordinated communication. *See* 11 C.F.R. §§ 109.21(d)(2)(v), 109.37(a)(3). But RNC has not challenged these regulations, and this Court does not have jurisdiction in this proceeding to consider challenges to regulations. 2 U.S.C. § 437h ("The district court immediately shall certify all questions of constitutionality *of this Act* … ") (emphasis added).

parties and candidates to coordinate on media" would "effectively destroy any remaining limits on coordinated expenditures." Krasno Rept. at 11 (R. 1038).

RNC's "own speech" claim cannot be reconciled with *Colorado II*. The Party Expenditure Provision's facial validity necessarily means that, even if it were unconstitutional in certain applications, those exceptions could not be so broad as to deregulate a substantial number of coordinated expenditures. *Colorado II*'s facial upholding of the provision necessarily means that its unconstitutional applications are not "substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)). Because RNC's "own speech" exemption would swallow up the facially valid provision, it must be rejected.

Plaintiffs have offered no support for their suggestion that the anti-corruption interests identified in *Colorado II* are lessened when a party adopts a candidate's communication as its "own speech." The fact that the RNC may stand by certain coordinated speech as its "own" does not decrease the amount of coordination that preceded it. Party coordinated communications can be limited not because of the attribution of the speech to a particular speaker, but because the very act of coordination makes the communications the functional equivalent of contributions; thus, these coordinated communications can be used as vehicles to

circumvent the Act's contribution limits and present an opportunity for, or appearance of, corruption.[3]

2. *Colorado II* Has Not Been Legally or Factually Undermined

Colorado II rested primarily on an anti-circumvention rationale. 533 U.S. at 465 ("a party's coordinated expenditures … may be restricted to minimize circumvention of contribution limits."). Relying on *Citizens United v. FEC*, 130 S. Ct. 876 (2010), RNC attempts (Br. at 18-19) to undermine *Colorado II* by arguing that preventing circumvention is not a sufficient anti-corruption rationale.

Nothing in *Citizens United* discusses whether anti-circumvention is a viable rationale or suggests that the Court's repeated reliance on such a rationale in other cases was silently called into question. Yet RNC now suggests that *Citizens United* should be interpreted as having swept away the holdings of numerous opinions upholding several different provisions of FECA. *See, e.g.*, *Buckley*, 424 U.S. at 38 (upholding yearly aggregate contribution limit because it "serves to prevent evasion of the $1,000 contribution limitation by a person who might

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[3] RNC's "own speech" challenge proves so much that, if successful, it would threaten to unravel not only *Colorado II*, but much of the Act's core limits on contributions. Although RNC has challenged only the provisions of the Act that apply to political parties, part of *Colorado II's* reasoning is that a party "is in the same position as some individuals and PACs" as to whom coordinated spending limits had already been held valid. 533 U.S. at 455. If a party's "own speech" cannot be constitutionally limited, then it is not clear why other entities or persons would not also be able to avoid limits on coordinated communications merely by adopting candidates' messages and paying for them.

otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party"); *Cal. Med. Ass'n*, 453 U.S. at 198 (upholding limits on contributions to multicandidate committees because "an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee."); *McConnell*, 540 U.S. at 170 (upholding requirement that state and local employees must generally be paid with hard money due to "Congress' interest in preventing circumvention of § 323(b)'s other restrictions"); *id.* at 172 (upholding restrictions on state and local party fundraising because any such burdens are "far outweighed by the need to prevent circumvention of the entire scheme"); *id.* at 174 (upholding ban on solicitations to tax-exempt organizations engaged in political activity because "preventing circumvention of Title I's limits on contributions of soft money to national, state, and local party committees … is entirely reasonable"); *Beaumont*, 539 U.S. at 155 (upholding prohibition on contributions by certain non-profit corporations to prevent their use as conduits); *Colorado II*, 533 U.S. at 456 ("all Members of the Court agree that circumvention is a valid theory of corruption").

If the government has a legitimate interest in preventing *quid pro quo* corruption, as RNC admits it does, then the government must also have a

legitimate interest in assuring that the interest is not undermined through circumvention. In determining whether anti-circumvention is a viable rationale for a statute, a court must assess the underlying interest that the anti-circumvention measure protects. In the case of coordinated party expenditures, limits on them are justified to prevent circumvention of the limits on direct contributions to candidates, *i.e.*, to prevent the "danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Colorado II*, 533 U.S. at 464 (quoting *Buckley*, 424 U.S. at 47).

In any event, *Citizens United* addressed limits on independent corporate spending, not party coordinated expenditures. The Supreme Court specifically noted that the independent expenditures at issue in that case could not be constitutionally limited because "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate." *Citizens United*, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47).

Factually, nothing has changed in the nine years since *Colorado II* was decided that undermines the Court's finding that "substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated

spending wide open." *Colorado II*, 533 U.S. at 457 (footnote omitted). Indeed, the district court's findings of fact in this case echo the Supreme Court's earlier conclusions. Party committees continue to facilitate their largest donors' access to candidates and officeholders. *See* Facts ¶¶ 88-90, 97-99, 103-05, 106 (R. 3196-3202). Donors wishing to make excessive contributions can still attempt to circumvent that limit by donating additional funds to the party "with the tacit understanding that the favored candidate will benefit." *Id.* at ¶¶ 111-13 (R. 3204-05). Federal candidates, including the lead plaintiff in this case, continue to ask their "maxed out" contributors to give additional funds to the parties. *Id.* at ¶ 110 (R. 3204). And as Congressman Meehan and Professor Krasno confirmed, party coordinated expenditures continue to pose a real danger of circumvention of candidate contribution limits. Meehan Decl. at ¶ 19 (R. 1064); Krasno Rept. at 17-18 (R. 1044-45). RNC does not present evidence to the contrary.[4]

Finally, plaintiffs argue (Br. at 19-25) that parties face certain challenges when they make independent expenditures, but they raise nothing significant that

[4] Plaintiffs assert (Br. at 19) that they "do not engage in the 'tallying' identified as problematic in *Colorado II,*" 533 U.S. at 459. But the Court neither suggested that tallying (short of earmarking) was contrary to the statute, nor that it would have reached a different result in the absence of such a practice. Indeed, the tallying discussed by the Court was practiced by the Democratic Party, not the Colorado Republican party that challenged the Party Expenditure Provision.

has not already been addressed by the Supreme Court. *Buckley* itself recognized that independent expenditures would be less useful to candidates than coordinated expenditures: "Unlike contributions, ... independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." 424 U.S. at 47. *See also Colorado II*, 533 U.S. at 441 (quoting same language from *Buckley*). And as the district court noted, the Supreme Court has "summarily rejected" RNC's claim that party spending *must* be coordinated. Order at 83-84 ("[t]he assertion that the party is so joined at the hip to candidates that most of its spending must necessarily be coordinated spending is a statement at odds with the history of nearly 30 years under the act … " (quoting *Colorado II*, 533 U.S. at 449-50)). Thus, the Supreme Court has foreclosed RNC's contention that parties have a constitutional right to make coordinated expenditures because they may be more useful than independent expenditures.

RNC's argument is also belied by the evidence. Despite RNC's assertion (Br. at 22) that "independent expenditures are employed only when there is 'no other way' to have an impact on a race," political parties made $280,873,688 in independent expenditures in the 2008 election cycle alone. *See* Order at 84

(R. 3235); Facts ¶ 69 (R. 3188). Parties would not spend such vast sums of money on independent expenditures if they did not believe they were valuable.[5]

C. The $5,000 Limit on Political Parties' Contributions Is Constitutional

RNC claims that the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) is unconstitutional because it imposes the "same limitations" on parties as on PACs. Br. at 25. However, parties are actually treated far more favorably than other political committees under the overall regulatory structure, and in any case, they are not constitutionally required to be treated more favorably precisely because of their distinct role in the political system. *See supra* pp. 3-5; *infra* pp. 25-32.

1. Political Parties Are Not Constitutionally Entitled to More Favorable Treatment Than Other Political Committees

Parties' favorable treatment under the Act is not constitutionally required. In *Colorado II*, the Court rejected the argument that a political party is in "a different position from other political speakers, giving it a claim to demand a

[5] RNC argues (Br. at 24) that setting up internal firewalls to conduct independent expenditures is "not practically possible," but committees have successfully implemented firewalls through practices where "specific employees are placed on separate teams (or 'silos') within the organization, so that information does not pass between the employees who work on independent expenditures and the employees who work with candidates and their agents." Coordinated Communications, 71 Fed. Reg. 33,190, 33,206 (June 8, 2006); *see also Shays v. FEC*, 528 F.3d 914, 929-30 (D.C. Cir. 2008) (upholding firewall safe harbor regulation at 11 C.F.R. § 109.21(h)). To the extent RNC's challenge is really directed at FEC regulations, this Court does not have jurisdiction over such claims under § 437h.

generally higher standard of scrutiny before its coordinated spending can be limited"; the Court subjected the Party Expenditure Provision to the same scrutiny as the contribution limits applicable to individuals and other political committees. 533 U.S. at 445, 456. The Court "reject[ed] the Party's claim to suffer a burden unique in any way that should make a categorical difference under the First Amendment," *id*. at 447, 464. Thus, there is no reason to conclude that the $5,000 limit on contributions by political committees, which the Court upheld in *Buckley*, raises a unique or substantial constitutional issue as applied to political parties.

RNC argues (Br. at 27-28) that parties should be free of the challenged financial restraint because they have a unique historical role in the democratic process, but that very role demonstrates that the party contribution limits serve vital interests. In the Constitution, the Framers created a system of checks and balances partly as a way to limit the influence of political parties. *See* Defendant Federal Election Commission's Proposed Findings Of Fact And Statement Of Material Facts As To Which There Is No Genuine Dispute, *Cao v. FEC*, No. 08-4887 [Doc. #66] (E.D. La. Aug. 31, 2009) ("FEC Facts") ¶¶ 21-25 (R. 963-64).[6] Nevertheless, parties have prospered. The major parties have never been

[6] In particular, the Framers were concerned that a party "was very likely to become the instrument with which some small and narrow special interest could impose its will upon the whole of society, and hence to become the agent of tyranny." FEC Facts ¶ 25 (R. 964) (quoting Richard Hofstadter, The Idea of a Party System (1970), at 12).

financially stronger since their founding in the 1800s than they are now. *Id.* at ¶¶ 28-36 (R. 965-67). Echoing the concerns of the Framers, the Court in *Colorado II* found that the "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players." 533 U.S. at 455.[7] Thus, parties' distinctive and important role is precisely why the contribution limits Congress established serve as an essential bulwark against potential corruption.

2. FECA Treats Parties More Favorably Than Other Political Committees

First, the $5,000 contribution limit as applied to parties is far more generous than for other political committees. The statute does not group together all committees of a political party as if they were a single contributor, so the major parties' three national committees, as well as state and local committees (including state committees outside a candidate's state), may each contribute $5,000 to every

[7] *See also Colorado II*, 533 U.S at 454 ("why would the Constitution forbid regulation aimed at a party whose very efficiency in channeling benefits to candidates threatens to undermine the contribution (and hence coordinated spending) limits[?]"); *id.* at 460 ("If suddenly every dollar of spending could be coordinated with the candidate … a candidate enjoying the patronage of affluent contributors would have a strong incentive … to promote circumvention … ."); *id.* at 460 n.23 ("The same enhanced value of coordinated spending that could be expected to promote greater circumvention of contribution limits for the benefit of the candidate-fundraiser would probably enhance the power of the fundraiser to use circumvention as a tactic to increase personal power and a claim to party leadership.").

federal candidate in each election ($5,000 in the primary and $5,000 in the general election).[8] For example, in the 2008 election cycle, one House candidate received $98,051 in party contributions from a variety of national and state party committees, each permitted to contribute $5,000 per election under § 441a(a)(2)(A). Facts ¶ 21 (R. 3169).[9] Moreover, a national party committee, such as the RNC, may receive unlimited transfers from other national party committees, such as the National Republican Senatorial Committee or National Republican Congressional Committee. 2 U.S.C. § 441a(a)(4); Facts ¶ 26 (R. 3171-72).[10] In fact, unlimited transfers of hard money may be made among national, state, district, and local party committees of the same political party, further enhancing the ability of parties to provide contributions to their candidates. *Id.* This ability to transfer money is available only to party committees and committees affiliated with the same corporation, union or other entity. *Id.*

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[8] In contrast, all separate segregated funds established, maintained or controlled by all subsidiaries, branches, divisions, departments or local units of corporations and labor organizations "shall be treated as a single separate segregated fund" for contribution limit purposes. 2 U.S.C. § 441a(a)(5)(C).

[9] Other 2008 House candidates reported receiving $57,250, $38,979, and $24,640 in party contributions. Some 2008 Senate candidates reported receiving $51,563, $46,897, $46,802, and $42,900 in party contributions. Facts ¶ 21 (R. 3169-70).

[10] In addition, national parties and their senatorial campaign committees may together contribute up to $42,600 to each Senate candidate. 2 U.S.C. § 441a(h); Facts ¶ 20 (R. 3169).

Second, as the Supreme Court observed in *Colorado II*, "a party is better off [than individuals and other political committees], for a party has the special privilege the others do not enjoy, of making coordinated expenditures up to the limit of the Party Expenditure Provision." 533 U.S. at 455 (footnote omitted). In the 2008 election cycle, Cao received $83,971 in coordinated expenditures from the RNC on behalf of itself and the LA-GOP. Facts ¶ 155 (R. 3219). Non-parties can make coordinated expenditures only up to the level of their applicable contribution limits.

Third, the Act permits political parties to raise money in much larger amounts than candidate committees and other political committees. Facts ¶ 15 (R. 3167). During the 2010 election cycle, the national committees of a party may receive up to a combined total of $30,400 per year from each individual donor; state, district, and local party committees may receive up to a combined total of $10,000 per year, per individual. Facts ¶ 23 (R. 3170). Other multicandidate political committees may receive only $5,000 per year, per individual. *Id.* In addition, a national party committee may receive up to $15,000 per year from another multicandidate committee, but other multicandidate committees are limited to receiving $5,000 per year and candidates are limited to receiving $10,000 per year in contributions from multicandidate committees. Facts ¶ 24 (R. 3171).

Finally, the Act provides special exemptions to the definitions of contributions and expenditures for parties. These special exemptions exclude certain legal and accounting services, the use of real property for events, including incidental costs of food and beverage, and certain candidate and staff travel expenses, subject to certain limits. Facts ¶ 47 (R. 3179). Moreover, state and local parties may pay for some communications, such as slate cards, with non-federal funds even if the communications are coordinated with a federal candidate. *Id.*

RNC's reliance on *Randall v. Sorrell*, 548 U.S. 230 (2006), is misplaced. RNC argues (Br. at 26-27) that *Randall*, in striking down Vermont's contribution limits, relied in part on the challenged statute's application of the same contribution limits to political parties and everyone else. But *Randall* involved very low contribution limits of $200-$400 and other exacerbating factors: Each limit applied to all national, state, and local affiliates of a party combined, applied to both the primary and general elections combined, and included expenses incurred by volunteers. 548 U.S. at 257, 249, 259. The state statute provided no generous additional limit for coordinated party expenditures. *Id.* at 257. The Court found that reducing the amount a political party could contribute to a candidate from $3,000 to $400 for both the primary and general election "would reduce the voice of political parties in Vermont to a whisper." *Id.* at 259 (internal quotation marks omitted). But here, RNC challenges a $5,000 per election

contribution limit (for each political party affiliate) that the Supreme Court has upheld, and that is only one part of a menu of options the Act provides parties.

RNC's claim is analogous to the unsuccessful equal protection challenge to the Act's $5,000 limit on contributions by unincorporated associations to multicandidate political committees that relied on the fact that the ability of corporations and unions to support their separate segregated funds is not so limited. *See Cal. Med. Ass'n*, 453 U.S. at 200. The Supreme Court rejected that claim because "the statute as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions." *Id*. Similarly, parties receive far more favorable overall treatment under the Act than other political committees do. As the Court explained, Congress may choose to treat different organizations differently under FECA, but that "reflect[s] a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Id*. at 201.[11]

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[11] RNC claims (Br. at 29) that parties must enjoy a higher direct contribution limit than other political committees because "political parties cannot corrupt their own candidates," but this is a red herring. *Colorado II* upheld the Party Expenditure Provision primarily as an anti-circumvention measure, without deciding whether it might also be justified "by a concern with *quid pro quo* arrangements . . . between candidates and parties themselves." 533 U.S. at 456 n.18.

Finally, RNC claims (Br. at 27-29) that parties are disadvantaged compared to corporations and labor organizations, which may now make unlimited *independent* expenditures. *Citizens United*, 130 S. Ct. at 899. However, unlike parties, corporations are still prohibited from making any contributions or coordinated expenditures, except through their separate segregated funds. 2 U.S.C. § 441b. And ever since *Colorado I*, parties themselves have been able to make unlimited independent expenditures. Facts ¶ 56 (R. 3184). As discussed *supra* pp. 24-25, in the 2008 election cycle, parties made $280,873,688 in independent expenditures. Facts ¶ 69 (R. 3188).

In the end, plaintiffs candidly admit that they are asking this Court to make a policy choice when they state (Br. at 29) that "[t]his case presents a constitutionally-sound opportunity to enhance the power of political parties." But that is not the role of the courts, and plaintiffs' claims, to the extent they have any merit, are grievances best addressed to Congress. *See, e.g.*, *Randall*, 548 U.S. at 248 (noting that "the legislature is better equipped" to determine campaign finance laws); *cf. EMILY's List v. FEC*, 581 F.3d 1, 19 (D.C. Cir. 2009) (noting that corporations face fewer fundraising restrictions than parties and that "[i]f eliminating this perceived asymmetry is deemed necessary, the constitutionally permitted *legislative* solution . . . is 'to raise or eliminate' limits on contributions to parties or candidates") (emphasis added); *RNC*, 2010 WL 1140721, at *8 n.5 ("As

a lower court, it is not our place to reassess the constitutionality of limits on contributions to political parties that the Supreme Court has upheld. And it is not our role to question Congress's policy choice to limit contributions to political parties.").

D. The $5,000 Contribution Limit Is Constitutional Even Though It Is Not Indexed for Inflation

The Supreme Court has upheld against a facial challenge the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) and other limits that were not indexed for inflation. *Buckley*, 424 U.S. at 35-36. The Court has never struck down a federal contribution limit based solely on a lack of indexing, and there is no basis to do so here.

As the Supreme Court explained in *Randall*, indexing is only one factor in a court's determination of whether a contribution limit may be so low as to "prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" 548 U.S. at 248 (quoting *Buckley*, 424 U.S. at 21). As explained *supra* p. 30, the $200-$400 limits in *Randall* were "suspiciously low." *Id.* at 261. By contrast, the $5,000 limit on multicandidate political committee contributions to federal candidates that plaintiffs challenge here is more than 10 times higher. But even the "suspiciously low" limits in *Randall* were not found unconstitutional without further consideration of a five-factor test, of which indexing was only one factor. *Id.* at 261; *see also* Order at 94 (R. 3245). RNC is thus wrong to argue (Br.

at 30-33) that failure to index alone causes a contribution limit to be unconstitutional. Indeed, under RNC's reasoning, every contribution limit that is not indexed for inflation is unlawful. *See Ognibene v. Parkes*, 599 F. Supp. 2d 434, 449-50 (S.D.N.Y. 2009) (explaining that under *Randall*, the absence of indexing alone is not determinative).[12]

Moreover, the $5,000 contribution limit does not operate in isolation. As explained *supra* pp. 27-28, each political party at the national, state, and local level can contribute $10,000 per election cycle. *See* Facts ¶ 20-21 (R. 3169-70). And parties can make significantly higher coordinated expenditures that are indexed for inflation and functionally equivalent to contributions.

Congress made a deliberate choice to index some limits and not others. "Courts . . . must respect and give effect to these sorts of compromises." *Ragsdale v. Wolverine World Wide, Inc*., 535 U.S. 81, 94 (2002) (citation omitted); *see also Rodriguez v. U.S.*, 480 U.S. 522, 525-526 (1987). RNC argues (Br. at 32) that

[12] Indeed, courts have struck down campaign finance restrictions in reliance upon *Randall* only when the regulation amounted to a complete ban on contributions in certain instances. *See Free Mkt. Found. v. Reisman*, 573 F. Supp. 2d 952, 954 (W.D. Tex. 2008) (finding unconstitutional a statute prohibiting all organizations from making coordinated expenditures for a House Speaker election); *Kermani v. New York State Bd. Of Elections*, 487 F. Supp. 2d 101, 111-12 (N.D.N.Y. 2006) (staying the statute and calling upon the legislature to change a prohibition on party contributions or coordinated spending at the primary stage).

"Congress should be required to reenact a proper limit indexed for inflation." But like RNC's related argument concerning Congress's decision to regulate parties differently from other entities, this complaint is best addressed to Congress, not the judiciary, which is not the appropriate venue to pursue legislative solutions to perceived statutorily-created imperfections. *See supra* pp. 32-33.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO THE FEC AS TO ALL NON-CERTIFIED ISSUES

The district court denied certification of all remaining issues and granted summary judgment on those claims to the FEC. When deciding the issues on appeal, this Court should determine that the district court correctly found that the issues should not be certified. Questions should only be certified under the statute if they are "neither insubstantial nor settled." *Cal. Med. Ass'n*, 453 U.S. at 192.

A. Standard of Review

The district court's order denying certification of certain questions and granting summary judgment to the FEC on those claims is reviewed de novo. *See Goland v. United States*, 903 F.2d 1247, 1252 (9th Cir. 1990) (dismissal of § 437h action is reviewed de novo); *Broussard v. Procter & Gamble Co.*, 517 F.3d 767, 769 (5th Cir. 2008) (grant of summary judgment is reviewed de novo).

B. The District Court Correctly Found RNC's Claims of Vagueness and Overbreadth to Be Frivolous

RNC argues (Br. at 34-35) that the Party Expenditure Provision and the party-to-candidate contribution limits are unconstitutionally vague and overbroad except as applied to four narrow categories, a theory that would exempt virtually all coordinated expenditures from regulation. RNC's claims are contrary to Supreme Court precedent, and the district court correctly found them to be "frivolous." Order at 78-79 (R. 3229-30). This Court should do the same.

1. Neither *Buckley* Nor Any Subsequent Case Created an "Unambiguously Campaign Related" Constitutional Test For All Campaign Finance Laws

RNC argues that the Supreme Court has developed a general test to judge the constitutionality of all campaign finance laws, including coordinated expenditure restrictions like the ones at issue in this case. In the district court, RNC primarily referred to this proffered standard as the "unambiguously campaign related" principle. In this Court, RNC has identified (Br. at 43) a new term, "*Buckley*-overbreadth," which is purportedly a general premise underlying the "unambiguously-campaign-related principle." RNC claims that these principles mean that the Constitution limits regulation of party coordinated expenditures to a tiny subset of coordinated activity. This argument lacks merit.

Although *Buckley* was decided 34 years ago, no Supreme Court opinion or lower court opinion has ever used the term "*Buckley*-overbreadth." The term did

not even appear in any of plaintiffs' briefs in the court below. It is true that campaign finance statutes, like all laws, must "avoid problems of vagueness and overbreadth." Br. at 35 (*quoting McConnell*, 540 U.S. at 192). But there is no support for the notion that *Buckley* created a special constitutional doctrine involving a "primarily legal analysis of how closely a campaign-finance law adheres to [its] constitutional parameters … ." Br. at 36. Plaintiffs suggest that the doctrine of "*Buckley*-overbreadth" is revealed in a comparison of *McConnell*, which facially upheld electioneering-communication restrictions against an overbreadth challenge, 540 U.S. at 207, with *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL"*), which struck down some applications of the same restrictions as overbroad, 551 U.S. 449, 469-70 (2007). But the discussions of overbreadth in *McConnell* and *WRTL* all involved independent expenditures and have no application to the coordinated expenditure limits at issue in this case, which the Court has always analyzed as contribution limits. *See* Order at 75 (R. 3226) ("Since *Buckley*, the Supreme Court has never applied a limiting 'line' to coordinated campaign expenditures. The portion of the *Buckley* decision that introduced the phrase 'unambiguously campaign related' was explicitly discussing expenditure limits as distinct from contribution limits.").[13]

[13] RNC claims that the Supreme Court decision in *Citizens United* also involved "*Buckley*-overbreadth." *See* Br. at 37 n.8. But that case similarly involved independent expenditures; despite the Court's extensive examination of

Nor has any Supreme Court decision ever suggested that *Buckley* created a general constitutional test with the words "unambiguously campaign related." Although *Buckley* used the phrase "unambiguously campaign related," 424 U.S. at 81, it was merely part of the Court's explanation of its statutory construction of the term "expenditure" in connection with some of the Act's disclosure provisions as applied to *independent* expenditures. *Buckley* made no reference to "unambiguously campaign related" when analyzing the constitutionality of the Act's *contribution* limits. *See id.* at 23-38; *see also id. at* 44-45; *MCFL*, 479 U.S. at 249. Instead, the Court construed the term "contribution" quite broadly, encompassing indirect contributions, *all* coordinated expenditures, and money given to organizations other than political committees or non-candidate individuals but "earmarked for political purposes":

> We construed that term to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, *but also all expenditures placed in cooperation with or with the consent of a candidate*, his agents, or an authorized committee of the candidate. . . . So defined, "contributions" have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.

Buckley, 424 U.S. at 78 (emphasis added).

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campaign finance law, it made no suggestion that *Buckley* established a general overarching constitutional principle to test all campaign finance laws.

Thus, *Buckley*'s interpretation (424 U.S. at 79-80) of the term independent "expenditure" — when made by individuals or groups *other than political committees* — to mean spending that "expressly advocate[s] the election or defeat of a clearly identified candidate" has no bearing on the coordinated expenditure limits at issue in this case.[14] Likewise, the Court's observation that express advocacy communications are "unambiguously campaign related" has no relevance to judicial review of coordinated expenditures or other kinds of contributions. *See Orloski v. FEC*, 795 F.2d 156, 166-67 (D.C. Cir. 1986) (explaining that the "express advocacy" standard is limited "to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions."); *cf. RNC*, 2010 WL 1140721, at *5 (rejecting RNC's "proposed 'unambiguously campaign related' standard" in challenge to ban on "soft-money" donations to national political parties).

Moreover, *Colorado II* nowhere suggests that coordinated expenditure limits can be applied only to communications containing express advocacy or conduct

[14] Moreover, to the extent that *Buckley* caused any confusion about whether its express advocacy construction created a constitutional limit on Congress's authority, the Court put that question to rest in *McConnell*, which noted that *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-92 (footnote omitted).

that is "unambiguously campaign related," despite the fact that *Colorado II* was decided 25 years after *Buckley*. Such a requirement would be completely inconsistent with the anti-circumvention rationale on which the Court based its holding, because it would allow parties to engage in a wide range of coordinated activities with candidates without any limit. Such spending would both help candidates and raise the opportunity for real or apparent corruption — regardless of whether the spending is "unambiguously campaign related." As *Buckley* itself emphasized, the presence of "prearrangement and coordination" is what increases the value of the expenditure to the candidate and creates the "danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 424 U.S. at 47.

Other decisions have confirmed that express advocacy is not required in the context of coordinated expenditures. In *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), the court rejected the

> argument that the "express advocacy" limitation must apply to expressive coordinated expenditures on both quasi-statutory and constitutional grounds. The quasi-statutory argument is that under Supreme Court precedent, the term "expenditure" has been limited throughout the Act to express advocacy. This position is untenable. Indeed, in direct contrast to the Coalition's position in this case, *Orloski* held that the "express advocacy" standard was not constitutionally required for statutory provisions limiting contributions.

Id. at 86-87 (citations and footnotes omitted). *See also id.* at 87 n.50 ("The Coalition advances a fanciful interpretation of *Buckley*. In the context of discussing FECA's disclosure obligations, the *Buckley* Court reaffirmed that the term 'contribution' includes 'all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.' *Buckley*, 424 U.S. at 78.").

More recently, in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays I")*, and *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III"*), the D.C. Circuit invalidated Commission regulations that define "coordinated communication" because they failed to regulate enough activity by relying too heavily upon the "express advocacy" standard.[15] In particular, the definition did not treat communications as regulable coordinated expenditures under the Act if they were disseminated more than 120 days before an election unless they redistributed a candidate's campaign materials or contained express advocacy. In *Shays I*, the court explained that

> the Commission took the further step of deeming these two categories adequate by themselves to capture the universe of electorally oriented communication outside the 120-day window. That action requires some cogent explanation, not

[15] Although the regulation directly at issue in the *Shays* cases, 11 C.F.R. § 109.21, did not define party coordinated communications, which are defined in 11 C.F.R. § 109.37, the applicable "content" standards in the two regulations rely on the express advocacy standard in the same way.

> least because by employing a "functionally meaningless" standard outside that period, the FEC has in effect allowed a coordinated communication free-for-all for much of each election cycle.

414 F.3d at 100 (quoting *McConnell*, 540 U.S. at 193). After the Commission modified the pre-election time windows and provided additional explanation for its reliance in part on the express advocacy standard, the D.C. Circuit again invalidated the regulation, noting that "expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.'" *Shays III*, 528 F.3d at 925 (quoting *McConnell* and *Colorado II*).

RNC also argues (Br. at 43-44) that the "unambiguously campaign related" test was later applied in *MCFL* and *WRTL*, but neither case based its holding on such a requirement, and neither case involved limits on parties' coordinated expenditures. Similarly, RNC's references to the Fourth Circuit's decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), have no application to this case. *See* Br. at 38 n.9 & 47. The mention of "unambiguously campaign related" in *Leake* was merely dicta in a case about the definition of "express advocacy" in a state statute. *See* 525 F.3d at 281, 283. The *Leake* court had no reason even to address *Colorado II*. Of course, this Circuit is not bound by

opinions of other circuits. *Peters v. Ashcroft*, 383 F.3d 302, 305 n.2 (5th Cir. 2004).[16]

2. RNC's Claim of Vagueness and Overbreadth Would Exempt So Many Party Activities from Regulation That It Would Virtually Eliminate the Limits of the Party Expenditure Provision

RNC claims that the Party Expenditure Provision is unconstitutionally vague and overbroad "as applied to coordinated expenditures other than (a) communications containing express advocacy, (b) targeted federal election activity, (c) disbursements equivalent to paying a candidate's bills, and (d) distributing a candidate's campaign literature." Br. at 34-35. But very few coordinated expenditures would fall into the categories of activities that RNC concedes are regulable; accepting this claim would create a roadmap for

[16] RNC also relies on (Br. at 47-48) a brief filed in *McConnell* by six Senators and Representatives. But that brief takes a position directly contrary to the arguments RNC makes here, stating that "*Buckley* adopted a practical, limiting construction of particular statutory language that was impermissibly vague — not a constitutional standard that would foreclose Congress from redrawing the statutory lines." *McConnell* Intervenors' Brief at 60-62 (http://supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf). In any case, there is no reason for this Court to judge the merits of RNC's arguments based upon a brief written by a different party in a different case about a different part of the Act.

circumventing the coordinated expenditure limits and thus severely undermine the Act's contribution limits. *See* Facts ¶¶ 124-25, 134-35 (R. 3208-09, 3211-12).[17]

a. *Few Communications Intended to Influence Federal Elections Employ "Express Advocacy"*

"[T]he most effective campaign ads … avoid the use of the magic words" to expressly advocate for or against federal candidates. *McConnell*, 540 U.S. at 127. Prior to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), so-called "issue advocacy" communications that did not contain express advocacy were routinely "used to advocate the election or defeat of clearly identified candidates." *McConnell*, 540 U.S. at 127.

Indeed, plaintiffs freely acknowledge that their desire to coordinate with candidates on "issue ads" or "grassroots lobbying" is for campaign purposes. As the district court found, "LA-GOP acknowledges that the reason it would like to coordinate its grassroots lobbying with candidates is that 'it brings the candidate into the message and gives us a greater chance of electing a candidate.'" Facts ¶ 135 (R. 3212) (quoting Rule 30(b)(6) representative of LA-GOP). Among the "issue ads" that plaintiffs have indicated they would have liked to run just before

[17] RNC repeatedly asserts that the statute is "vague and overbroad," yet it appears that this claim deals solely with overbreadth; RNC does not explain what in the statute is purportedly "vague." The Commission has promulgated detailed regulations explaining the conduct and content required for a coordinated communication to fall within the reach of the statute. *See* 11 C.F.R. §§ 109.21, 109.37. RNC largely ignores these regulations.

the 2008 general election in Louisiana was one addressing former Congressman William Jefferson's "pending trial and alleged corruption." Facts ¶ 134 (R. 3211-12). There can be no doubt about the electoral nature of a party ad made in coordination with that party's candidate that runs shortly before that candidate's election and discusses his opponent's pending criminal trial. The district court correctly found that "Plaintiffs' claim, if successful, would enable parties to run unlimited amounts of 'issue ads' designed to influence federal elections, in coordination with candidates." *Id.*

Plaintiffs claim that the coordinated expenditure limits prevent parties from engaging in speech that is unrelated to elections, but the evidence shows that parties do not frequently use the many avenues currently available to them without restriction. Parties can already do "grassroots lobbying" independently of candidates at any time of the year, but the RNC has not been engaged in any activities that do not reference federal candidates "in a long time." Facts ¶ 119 (R. 3207). Furthermore, pursuant to Commission regulations, parties have been able to coordinate communications with candidates prior to the 90 or 120 days before an election, as long as such communications do not contain express advocacy or disseminate candidate campaign materials. 11 C.F.R. §§ 109.37(a)(2)(i)-(ii). But the plaintiffs in this case have given no indication that

they actually engage in such communications prior to the pre-election windows. *See* FEC Facts ¶ 148 (R. 1006); RNC 30(b)(6) Dep. at 139-45 (R. 1304-10).

It is unsurprising that political parties generally spend money only on election-related activity because a "primary goal of all the major political parties is to win elections." Facts ¶ 116 (R. 3206). Even the party plaintiffs admit that their basic role is to elect Republican candidates to office. Facts ¶¶ 116-18 (R. 3206-07).

b. *Plaintiffs' Definition of "Targeted Federal Election Activity" Is a Roadmap for Circumvention*

Although plaintiffs concede that "targeted" federal election activity can be constitutionally regulated, their definition of "targeted" (a term not found in relevant campaign finance statutes or cases) is so narrow that it, too, is a roadmap for circumvention of contribution limits. The district court found that under RNC's definition, "virtually all voter registration, voter identification, get-out-the-vote activity and generic campaign activity is 'non-targeted.'" Facts ¶ 123 (R. 3208). *See* 2 U.S.C. § 431(20) (definition of "federal election activity"). Although plaintiffs do not define "targeted" in their brief, in the district court plaintiffs explained that if such activity takes place in more than one congressional district, or in only a part of a congressional district, or statewide, it is "non-targeted." Facts ¶¶ 127-28 (R. 3210). If voter registration references *multiple* candidates, plaintiffs claim it is "non-targeted." Facts ¶ 129 (R. 3210). To

meet plaintiffs' definition, "targeted" federal election activity must be coterminous with the candidate's congressional district *and* refer only to that one candidate. In fact, what plaintiffs consider "targeted" voter registration "rarely happens." Facts ¶ 130 (R. 3210-11).

Federal election activity such as voter registration and get-out-the-vote activities are conducted by parties for the purpose of getting their candidates elected. Facts ¶¶ 124-25 (R. 3209). Under plaintiffs' theory, parties can easily accomplish the same goals and circumvent the Act's limits on coordinated expenditures by engaging in "non-targeted" activity — a dispositive point admitted by the RNC's own witness, who explained that the RNC would like to coordinate "non-targeted" activities with candidates "in an effort to help candidates win elections … ." Facts ¶ 126 (R. 3210). Thus, for example, under plaintiffs' extremely narrow conception of "targeting," if a party wished to coordinate voter registration activity with a candidate, it could avoid any limits by simply conducting the activity in a geographic area that was slightly larger or smaller than the candidate's district, which would still benefit the campaign of a candidate in that district. Facts ¶¶ 124-25 (R. 3208-09). Indeed, the 30(b)(6) deponent for the RNC conceded that most voter registration is conducted statewide, which plaintiffs view as "non-targeted." Facts ¶ 130 (R. 3210-11).

In sum, plaintiffs' overbreadth argument is unsupported in law and fact, and inconsistent with *Colorado II*'s anti-circumvention rationale.

C. RNC's Claims Based on the Variability of the Party Coordinated Expenditure Limits Are Frivolous

RNC claims that the variability in the party coordinated expenditure limits for different races means that: (i) the lower limits cannot be justified by an anti-corruption rationale, (ii) even the highest limits are too low, and (iii) because the limits are not severable, all the limits must fall. The district court correctly found that these claims are frivolous. Order at 85-90 (R. 3236-3241). *Colorado II* upheld these limits, despite their variability, and in no case has the Court ever suggested that variation in limits between different elections for different offices poses a constitutional problem. To the contrary, in *Buckley* the Court explained that the then-$1,000 limit on individual contributions to House and Senate candidates "might well have been structured to take account of the graduated expenditure limitations for House, Senate and Presidential campaigns." 424 U.S. at 30 (footnote omitted).

1. The Supreme Court Has Deferred to Legislative Decisions About the Precise Level of Contribution Limits for Different Races

RNC argues (Br. 51-56) that this Court should reconsider *Colorado II* because the limits' variability undermines the link between the limits and the interest in preventing corruption. But, as the district court correctly noted, "absent

unconstitutionally low limits, [the § 441a(d)(3) coordinated expenditure limits are] consistent with the anti-corruption rationale to allow Congress the discretion to set different coordinated expenditure limits in different races in different states." Order at 88 (R. 3239); s*ee also* Facts ¶¶ 109-115 (R. 3203-05).

"[T]he judiciary has 'no scalpel to probe' each possible contribution level"; "such complex line drawing — which is 'necessarily a judgmental decision' — is best left to congressional discretion." Order at 87-88 (R. 3238-39) (quoting *Buckley*, 424 U.S. at 30, 83); *accord Shrink Missouri*, 528 U.S. at 397. The Supreme Court has typically deferred to the legislative branch's determination of such matters since "[i]n practice, the legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office." *Randall*, 548 U.S. at 248 (citation omitted); *see also Buckley*, 424 U.S. at 83 ("The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion."). Indeed, "[w]hen contribution limits are challenged as too restrictive, [the Court has] extended a measure of deference to the judgment of the legislative body that enacted the law." *Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008).

The variations between different races in the party coordinated expenditure limits reflect Congress's judgment as to the best way to balance the competing interests of preventing corruption and the candidates' need to "amass[] the

resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Such accommodation of competing interests is the norm in legislation, and "[c]ourts . . . must respect and give effect to these sorts of compromises." *Ragsdale*, 535 U.S. at 94 (citation omitted). As the Supreme Court has explained:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez, 480 U.S. at 525-26. Here, Congress made a legislative judgment based upon the difference between state-wide elections and elections in a congressional district occupying less than an entire state. Congress was doubtless aware that running campaigns targeting more voters or voters across a larger geographic area would be more costly.

The Supreme Court has recognized that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same," and "[t]he initial discretion to determine what is different and what is the same resides in the legislatures … ." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (emphasis and citations omitted). "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Buckley*, 424 U.S. at 97-98.

Contribution limits that vary by office or by the size of the constituency have been before the Court not only in *Colorado II*, but also in *Shrink Missouri* and *Randall*, and in no case has the Court suggested that such variability presents any constitutional problem. *See Colorado II*, 533 U.S. at 438-39; *Shrink Missouri*, 528 U.S. at 382-83 (upholding state contribution limits that varied based on whether office was statewide and on the size of the population represented); *cf. Randall*, 548 U.S. at 236-38 (striking down on other grounds state contribution limits that varied based on whether office was statewide, for state senator, or for state representative).[18] The district court noted that in *Shrink Missouri*, "the Court did not address, much less criticize, the notion that different limits could apply in different races and geographic regions." Order at 87 (R. 3238).

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[18] In *Davis*, the Supreme Court evaluated a provision of BCRA that could trigger relaxed contribution limits for a candidate's opponent if the candidate spent significant amounts of his own money on his candidacy. 128 S. Ct. at 2770. The Court noted that it had "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other," *id.* at 2771, but if the limits applied equally to candidates vying for the same seat, "Davis would not have any basis for challenging those limits." *Id. See also* Order at 87 (R. 3238). Similarly, in *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998), the challenged state law allowed a candidate who chose to abide by specified expenditure limits to take advantage of increased contribution limits. Thus, as in *Davis*, the statute created variable limits for candidates competing against one another. *See* Order at 86 (R. 3237) (distinguishing that statute from § 441a(d)). The *California Prolife* court specifically noted that the size of the district and the cost of various campaign expenses is relevant to whether a contribution limit has an adverse effect on campaigns. 989 F. Supp. at 1298. Here, the § 441a(d) limits apply equally to competing candidates, and thus present no constitutional defect.

In *Randall*, the Court noted its reluctance to second-guess the legislature, but found that where certain "danger signs" exist that a contribution limit may harm the electoral process, "it is the courts' duty to review the proportionality of the restrictions." Order at 89 (R. 3240) (explaining *Randall*, 548 U.S. at 249). In its analysis of whether "danger signs" existed, the Court considered evidence regarding the population size of the various districts at issue (*i.e.*, comparing the 2004 population of Vermont with the average House district in 1976 and with Missouri). The Court's consideration of such evidence demonstrates that it found population size (and, therefore, some variance) relevant to determining the appropriate level for contribution limits. RNC is thus wrong to argue (Br. at 51) that because Congress set limits relying in part on the size of the voting population, the lower limits in other races are "unsupported by an anti-corruption interest."[19]

2. Plaintiffs Presented No Evidence That Cao or Any Other Candidate Is Prevented from Amassing the Resources Necessary for Effective Advocacy

The Supreme Court evaluates contribution limits by determining whether the "contribution limits prevent candidates from 'amassing the resources necessary for

[19] Even if the Court were to find that any of the Party Expenditure Provision's limits are unconstitutionally low, the Court should reject the RNC's nonseverability argument. FECA contains a strong severability clause, providing that if any portion of the Act is found invalid, the remaining provisions shall not be affected. 2 U.S.C. § 454. *See INS v. Chadha*, 462 U.S. 919, 932 (1983) (interpreting identical severability provision as "unambiguous"); *Califano v. Westcott*, 443 U.S. 76, 90 (1979) (characterizing same provision as "strong").

effective [campaign] advocacy.'" *Randall*, 548 U.S. at 248 (quoting *Buckley*, 424 U.S. at 21); Order at 89 (R. 3240) ("Although the Cao plaintiffs argue otherwise . . . , it is the candidate's speech that is affected by the magnitude of the contribution limits, and it is the ability of the candidate to speak effectively that the Court must safeguard."). In *Khachaturian v. FEC*, this Court emphasized that a Senate candidate challenging the constitutionality of the Act's $1,000 individual contribution limit as applied to him would have to show a "serious adverse effect" on his campaign in light of *Buckley*'s facial upholding of that provision. 980 F.2d 330, 331 (5th Cir. 1992).

As the district court correctly found, "the Cao plaintiffs have not presented any evidence that would lead the Court to question the current expenditure limits." Order at 89. In the absence of any evidence presented by plaintiffs, this Court cannot find in their favor. In *Buckley*, the Court found "no indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations," citing statistical findings that only 5.1% of the contributions raised by all candidates for Congress in 1974 were obtained in amounts in excess of $1,000 and that two major-party senatorial candidates operated "large-scale campaigns" under a self-imposed $100 contribution limit. 424 U.S. at 21 n.23. Of course, "[e]ven assuming that the contribution limits affected [a candidate]'s ability to wage a

competitive campaign, a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*." *Shrink Missouri*, 528 U.S. at 380.

In *Randall*, the only case in which the Supreme Court has invalidated contribution limits for being too low, it relied on a considerable factual record demonstrating that the limits harmed candidates' ability to wage effective campaigns. For example, the Court relied on expansive expert testimony demonstrating that the contribution limits would harm the ability of a candidate to mount an effective campaign. 548 U.S. at 253-56 (finding, for example, that Vermont's new contribution limits would "cut the party contributions by between 85% (for the legislature on average) and 99% (for governor).").

Here, plaintiffs have not even tried to assemble such a record, and the facts demonstrate that the candidate-plaintiff, Representative Cao, did amass the resources necessary for effective campaign advocacy. During the 2008 cycle, Cao's congressional campaign reported receipts of $242,531, including $5,000 in contributions from the RNC, $500 from the South Carolina Republican Party, and $83,971 in coordinated expenditures from the RNC (this amount included the LA-GOP's authority to make coordinated expenditures under § 441a(d)). Facts ¶ 155 (R. 3219). Approximately six months into the current election cycle, Cao had already received more receipts for the 2010 election than he had received

during the entire 2008 cycle. *Id.* More generally, in the 2008 election cycle alone, congressional candidates spent almost $1.4 billion, with House candidates spending $949.7 million, and Senate candidates spending $444.7 million. FEC Facts ¶ 43 (R. 969).

Party fundraising and spending has also been prodigious in recent election cycles, confirming that "[d]espite decades of limitation on coordinated spending, parties have not been rendered useless." *Colorado II*, 533 U.S. at 455. Data shows that the two major political parties together raised more than $1.4 billion in the 2004 election cycle, more than $1 billion in the 2006 cycle, and more than $1.5 billion in the 2008 cycle. Facts ¶ 58 (R. 3185). Because the parties have been able to raise record amounts, they have provided significant financial support to their federal candidates. In the 2008 cycle alone, the Republican party committees (including national, state, and local committees) supported their federal candidates with more than $31 million in coordinated expenditures, and the Democratic party committees supported their federal candidates with more than $37 million in coordinated expenditures. *Id.* ¶ 65 (R. 3187).

The data also makes clear that the parties approach the maximum coordinated expenditures permitted under the Act only in a small fraction of races — generally the most competitive ones. *See* Facts ¶¶ 79-87 (R. 3191-96). Although there are at least 468 federal elections in each two-year cycle, in the 2008

cycle Republican party committees made coordinated expenditures at 95% or more of the maximum amount permitted on behalf of only 61 candidates, and Democratic party committees did so on behalf of only 30 candidates; by contrast, in the 364 elections deemed to be uncompetitive by the well-respected Cook Report, the two parties each reached the 95% threshold in only 2% of these elections. *Id.* ¶¶ 82, 84-86 (R. 3192-95). This data suggests that, although plaintiffs argue that the coordinated expenditure limits are too low for parties to fulfill their historical role, the limits do not create a constitutionally significant burden.

Finally, contrary to plaintiffs' assertions, *Randall* supports the Commission's position, not theirs. *Randall* pointedly contrasted the $200-$400 Vermont limits with the Party Expenditure Provision upheld in *Colorado II*: "the contribution limits at issue in *Colorado II* were far less problematic, for they were significantly higher than [Vermont]'s limits." 548 U.S. at 258. Moreover, the Court noted that the § 441a(d)(3) limits are:

> much higher than the federal limits on contributions from individuals to candidates, thereby reflecting an effort by Congress to balance (1) the need to allow individuals to participate in the political process by contribution to political parties that help elect candidates with (2) the need to prevent the use of political parties "to circumvent contribution limits that apply to individuals."

Id. at 258-59 (quoting *Colorado II*, 533 U.S. at 453). In sum, there is no constitutional infirmity with the Party Expenditure Provision's variable limits.

D. The District Court Correctly Found Plaintiffs' Remaining Challenges to the $5,000 Contribution Limit to Be Frivolous

1. Allowing National Party Committees to Contribute More to Senatorial Candidates Does Not Render the $5,000 Limit on Contributions to House Candidates Unconstitutional

Plaintiffs alleged that 2 U.S.C. § 441a(h), which permits national party committees such as the RNC to contribute higher amounts to Senate candidates, renders the $5,000 limit on contributions to House candidates unconstitutional. The district court correctly found this question to be frivolous. Order at 95 (R. 3246). Because plaintiffs have failed to include an argument regarding this question in their brief before this Court, they have waived this claim. *Justiss Oil Co., Inc. v. Kerr-McGee Refining Corp.*,75 F.3d 1057, 1067 (5th Cir. 1996) ("When an appellant fails to advance arguments in the body of its brief in support of an issue it has raised on appeal, we consider such issues abandoned."); *L&A Contracting Co. v. Southern Concrete Services, Inc.*, 17 F.3d 106, 113 (5th Cir. 1994) (where appellant submitted a one-page argument in support of a particular claim, but cited no authority, the Court found "the challenge abandoned for being inadequately briefed.").

2. The District Court Correctly Found That Plaintiffs' Claim That Parties Cannot Fulfill Their Historic Role and Abide by the $5,000 Contribution Limit Is Frivolous

The district court found plaintiffs' claim that the $5,000 limit in § 441a(a)(2)(A) is "simply too low to allow political parties to fulfill their historic and important role in our democratic republic" is also insubstantial. Order at 95. The district court correctly noted that the appropriate test for this claim is whether the limit hampers "the *candidate's* ability to engage in political speech," and found that "plaintiffs make this suggestion without providing evidence to support the claim." *Id.* (emphasis in original).

In *Buckley*, the Supreme Court upheld the $5,000 limit on contributions to candidates by political committees. 424 U.S. at 35-36. RNC alleges (Br. 57-58) that the $5,000 contribution limit is simply too low when "standing alone." However, as explained *supra* pp. 27-30, it does not stand alone. Again, because political parties can make much higher coordinated expenditures and can, among other things, each make $5,000 contributions to candidates, any alleged harm created by the $5,000 contribution limit cannot be viewed in isolation.

The $5,000 contribution limit has not prevented the parties from supporting their candidates. RNC does not explain what the parties' "historic and important role" is "in our democratic republic" (Br. at 57) or specifically how that role has been adversely affected by the contribution limit, but the record shows that a

"primary goal of all the major political parties is to win elections." Facts ¶ 116 (R. 3206); *see also* Facts ¶117-119 (R. 3206-07). FECA has not inhibited the parties' ability to pursue that goal. On the contrary, the Democratic and Republican parties raised more than $1 billion dollars in each of the last three election cycles. Facts ¶ 58 (R. 3185). In the 2008 election cycle, the Republican national party committees alone raised $640,308,267 in hard money. Facts ¶ 61 (R. 3185-86). In the 2008 election cycle, the Republican national party committees supported their candidates with $1,286,809 in contributions and $29,807,792 in coordinated expenditures. Facts ¶ 66-67 (R. 3187-88). In addition, the Republican party committees spent $124,682,649 in independent expenditures. Facts ¶ 69 (R. 3188).[20] The district court thus correctly found this question to be frivolous.

CONCLUSION

For the reasons stated above, all certified questions should be decided in favor of the Commission and the district court's grant of summary judgment should be affirmed.

Respectfully submitted,

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[20] RNC does not suggest that the Republican party committees are somehow comparatively disadvantaged by the $5,000 limit in their competition with other political parties, which must live by the same rules.

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CERTIFICATE OF SERVICE

I hereby certify that I will cause the Brief for the Federal Election Commission and the Federal Election Commission Record Excerpts to be filed electronically using the Court's CM/ECF system, which will then send a notification of such filing to counsel below, on the 12th day of April 2010. Paper copies will also be mailed to:

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14 point font.

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STATUTORY ADDENDUM
TABLE OF CONTENTS

Page

TITLE 2. THE CONGRESS
Chapter 14—Federal Election Campaigns
Subchapter 1—Disclosure of Federal Campaign Funds

§ 431. Definitions

When used in this Act:

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(20) *Federal election activity*.

(A) *In general*. The term 'Federal election activity' means—

(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);

(iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or

(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

(B) *Excluded activity*. The term 'Federal election activity' does not include an amount expended or disbursed by a State, district, or local committee of a political party for—

(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);
(iii) the costs of a State, district, or local political convention; and
(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

§ 437h. Judicial review

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

§ 441a. Limitations, contributions, and expenditures [Sections (a) – (h)]

(a) *Dollar limits on contributions*.

(1) Except as provided in subsection (i) and section 315A (2 U.S.C. § 441a-1), no person shall make contributions—
(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;
(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $25,000;
(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000; or
(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

(2) No multicandidate political committee shall make contributions—
(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;
(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or
(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—
(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;
(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that

(A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fundraising efforts;

(B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and

(C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if

(i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices;

(ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and

(iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26.

In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)

(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert, with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

(iii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) if—

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 304(f)(3)) (2 U.S.C. § 434(f)(3)); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and

(D) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) 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 contributions which are in any way earmarked or otherwise directed 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.

(b) *Dollar limits on expenditures by candidates for office of President of the United States*.

(1) No candidate for the office of President of the United States who is eligible under section 9003 of title 26 (relating to condition for eligibility for payments) or under section 9033 of title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

(A) $10,000,000 in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) *Increases on limits based on increases in price index.*

(1)

(A) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period.

(B) Except as provided in subparagraph (C), in any calendar year after 2002—

(i) a limitation established by subsections (a)(1)(A), (a)(1)(B), (a)(3), (b), (d), or (h) shall be increased by the percent difference determined under subparagraph (A);

(ii) each amount so increased shall remain in effect for the calendar year; and

(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.

(C) In the case of limitations under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), increases shall only be made in odd-numbered years and such increases shall remain in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the amount is increased and ending on the date of the next general election.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means—

(i) for purposes of subsections (b) and (d), calendar year 1974; and

(ii) for purposes of subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), calendar year 2001.

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office*.

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2), (3) and (4) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(4) *Independent versus coordinated expenditures by party*.

(A) *In general*. On or after the date on which a political party nominates a candidate, no committee of the political party may make—

(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in section 301(17)) (2 U.S.C. § 431(17)) with respect to the candidate during the election cycle; or

(ii) any independent expenditure (as defined in section 301(17)) (2 U.S.C. § 431(17)) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle.

(B) *Application*. For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

(C) *Transfers*. A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate.

(e) *Certification and publication of estimated voting age population.*

During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) *Prohibited contributions and expenditures.*

No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) *Attribution of multi-State expenditures to candidate's expenditure limitation in each State.*

The Commission shall prescribe rules under which any expenditure by a candidate for presidential nominations for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) *Senatorial candidates.*

Notwithstanding any other provision of this Act, amounts totaling not more than $35,000 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.