No. 24-621

In the Supreme Court of the United States

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the federal statute that limits the amount of money that a political party may spend on an election campaign in coordination with a candidate, 52 U.S.C. 30116(d), violates the Free Speech Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-157a) is reported at 117 F.4th 389. The opinion and order of the district court (Pet. App. 158a-203a) is reported at 712 F. Supp. 3d 1017.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2024. The petition for a writ of certiorari was filed on December 4, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

Petitioners challenge a federal statute, 52 U.S.C. 30116(d), that limits the amount of money that a political party may spend in an election campaign in coordination with a candidate. The government agrees with petitioners that the challenged statute abridges the

freedom of speech under this Court's recent First Amendment and campaign-finance precedents. This Court should grant the petition for a writ of certiorari to address developments since the Court upheld the statute in *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*).

The core function of a political party is to promote its candidates to the electorate. A party performs that function most effectively in cooperation with the candidates themselves. By restricting that cooperation, the party-expenditure limit severely burdens the rights of parties and candidates alike. And the limit is not narrowly tailored to serve the only interest that this Court has held can justify a campaign-finance restriction: preventing the reality or appearance of *quid pro quo* corruption. See *FEC* v. *Ted Cruz for Senate*, 596 U.S. 289, 305 (2022); *McCutcheon* v. *FEC*, 572 U.S. 185, 192 (2014) (opinion of Roberts, C.J.).

The en banc Sixth Circuit acknowledged the serious constitutional concerns raised by the party-expenditure limit but determined that it was bound by this Court's decision upholding the limit in *Colorado II*. As the Sixth Circuit acknowledged, however, this Court's more recent precedents have superseded key portions of *Colorado II*'s analysis. For example, *Colorado II* rests on the premise that Congress may restrict political speech to combat not just *quid pro quo* corruption, but donor influence more generally—a rationale that this Court rejected in *McCutcheon* and *Cruz*. Moreover, Congress has amended the statute in a manner that undermines *Colorado II*'s rationale for upholding it, and thus that decision is no longer controlling even as to this very statute. Further, the modern dynamics of campaign-related expenditures have changed greatly in the 24

years since *Colorado II*, rendering its factual presuppositions obsolete. Multiple judges of the Sixth Circuit encouraged this Court to reconsider the statute's validity and the ongoing vitality of *Colorado II* in light of those developments. The Court should take up that invitation.

The Department of Justice has a longstanding policy of defending challenged federal statutes but has determined that this is the rare case that warrants an exception to that general approach. This case involves a campaign-finance restriction that violates core First Amendment rights—a type of restriction that has previously led the government to file a brief expressing skepticism of the constitutionality of a federal statute. See Att'y Gen. & United States Br., *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (No. 75-436). This case also involves a precedent of this Court that has been severely undermined, if not superseded, by intervening legal, factual, and statutory developments—but that only this Court can reassess. And this Court's more recent, controlling campaign-finance precedents raise a clear-cut case against the validity of this speech restriction, which raises First Amendment concerns of the utmost importance. See *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971) ("[T]he constitutional guarantee" of the Free Speech Clause "has its fullest and most urgent application precisely to the conduct of campaigns for political office."). This Court should grant the petition for a writ of certiorari, appoint an amicus curiae to defend the judgment below, and reverse the judgment.

STATEMENT

1. The Federal Election Campaign Act of 1971 (Act), 52 U.S.C. 30101 *et seq.*, regulates the financing of fed-

eral election campaigns. The Federal Election Commission (FEC) enforces the Act's provisions.

Four of the Act's provisions are relevant here. First, the Act imposes a "candidate base limit," an inflation-indexed cap on a person's contributions to a candidate. See 52 U.S.C. 30116(a)(1)(A) and (c)(1). At the time of the decision below, that limit was $3300 per election. See FEC, *Contribution limits for 2023-2024 federal elections*, https://perma.cc/UM3X-XKTQ (*2023-2024 Limits*). Second, the Act imposes a "party base limit," an inflation-indexed cap on a person's contributions to a national political party's general operating accounts. See 52 U.S.C. 30116(a)(1)(B) and (c)(1). At the time of the decision below, that limit was $41,300 per year. See *2023-2024 Limits*. Third, the Act imposes a $5000 per-election limit a party committee's contributions to a candidate. See 52 U.S.C. 30116(a)(2)(A); see also 52 U.S.C. 30116(h) (setting a higher limit for Senate campaigns).

This case concerns the Act's fourth limit, which caps political parties' expenditures. See 52 U.S.C. 30116(d). The limit for most House of Representatives seats is set at an inflation-indexed amount, but the limit for at-large House seats and Senate seats can vary with the State's voting-age population. See 52 U.S.C. 30116(d)(3). At the time of the decision below, the limit was set at $61,800 for most House seats and ranged from $123,600 to $3,772,100 for at-large House and Senate seats. See Pet. App. 118a-119a (Readler, J., dissenting).

In *Colorado Republican Federal Campaign Committee* v. *FEC*, 518 U.S. 604 (1996) (*Colorado I*), this Court held that the party-expenditure limit violated the First Amendment as applied to a party's *independent* expenditures—*i.e.*, expenditures that a party makes on its own, without a candidate's input. See *id.* at 608

(opinion of Breyer, J.). In *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), however, the Court upheld the limit with respect to *coordinated* expenditures—*i.e.*, expenditures made "with input from the party's candidate." Pet. App. 3a. The Court reasoned that the party-expenditure limit serves the interest in preventing "corruption," a term that it understood to include both "*quid pro quo* agreements" and "undue influence on an officeholder's judgment." *Colorado II*, 533 U.S. at 441.

Congress has amended the party-expenditure limit since *Colorado II*. In 2014, it adopted an exception to that limit for "segregated account[s]" that are used to "defray expenses incurred with respect to a presidential nominating convention," the "headquarters building of the party," or "the preparation for and the conduct of election recounts and contests and other legal proceedings." 52 U.S.C. 30116(a)(9) and (d)(5); see Pet. App. 12a.

2. Petitioners are the National Republican Senatorial Committee, the National Republican Congressional Committee, then-Senator (now Vice President) J.D. Vance, and then-Representative Steve Chabot. In 2022, they sued the FEC and its Commissioners (respondents here) in the United States District Court for the Southern District of Ohio. See Pet. App. 159a. They claimed that the party-expenditure limit violates the Free Speech Clause on its face or, at a minimum, as applied to "party coordinated communications" (a defined regulatory term that encompasses certain political advertising). See *id.* at 171a.[1]

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[1] The FEC's regulations define the term "party coordinated communication" based on a communication's content and associated conduct. 11 C.F.R. 109.37. The content prong is satisfied if the communication, among other things, "disseminates, distributes, or re-

The Act contains a special judicial-review provision that directs district courts to certify "all questions of constitutionality of this Act" to the court of appeals, "which shall hear the matter sitting en banc." 52 U.S.C. 30110. Consistent with that provision, the district court established a factual record and certified the following constitutional question to the Sixth Circuit: "Do the limits on coordinated party expenditures in [52 U.S.C. 30116] violate the First Amendment, either on their face or as applied to party spending in connection with 'party coordinated communications' as defined in 11 C.F.R. § 109.37." Pet. App. 202a; see *id.* at 158a-247a.

3. The en banc Sixth Circuit denied petitioners' facial and as-applied challenges. Pet. App. 1a-157a.

In an opinion for the court written by Chief Judge Sutton and joined by nine other judges, the en banc Sixth Circuit determined that *Colorado II* controlled its decision. Pet. App. 3a-18a. The court first concluded that *Colorado II* foreclosed petitioners' facial challenge. See *id.* at 6a-15a. The court acknowledged that "th[is] Court's recent decisions create tension with *Colorado*

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publishes, in whole or in part, campaign materials prepared by a candidate" or "expressly advocates the election or defeat of a clearly identified candidate." 11 C.F.R. 109.37(a)(2)(i) and (ii). The conduct prong is satisfied if, among other things, "[t]he communication is created, produced, or distributed at the request or suggestion of a candidate"; "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication * * * and the candidate"; or the person paying for the communication hires a candidate's vendor or former employee "to create, produce, or distribute" it and in doing so that vendor or employee uses "material" information about "campaign plans, projects, activities, or needs" or shares such information with the payor. 11 C.F.R. 109.21(d)(1)(i) and (3)-(5).

II's reasoning," that "the underlying facts" have changed since *Colorado II*, and that "Congress itself altered the campaign finance laws" after *Colorado II*. *Id.* at 10a, 12a, 14a. But the court explained that only this Court could overrule *Colorado II* or deem it no longer controlling. *Id.* at 15a.

The court of appeals also determined that *Colorado II* required it to reject petitioners' as-applied challenge. See Pet. App. 15a-18a. The court acknowledged that *Colorado II* had "left open the possibility" of certain as-applied challenges but found that reservation inapplicable given the "breadth" of petitioners' claim. *Id.* at 16a. Petitioners' claim, the court explained, covers all "'political advertising addressed in 11 C.F.R. § 109.37'" and is not limited to "specific settings" or to "a specific type of advertisement." *Id.* at 16a-17a. The court stated that, if it accepted petitioners' argument, it would be "difficult to see what would be left of *Colorado II*," given that their claim would encompass "roughly 97% of the committees' expenditures." *Id.* at 17a.

Judge Thapar concurred, joined by three other judges. Pet. App. 18a-36a. He agreed that *Colorado II* controlled the outcome but described that decision as "an outlier" in both "First Amendment jurisprudence generally" and "campaign-finance doctrine specifically." *Id.* at 18a. Judge Bush issued an opinion concurring dubitante. *Id.* at 37a-67a. He, too, agreed that *Colorado II* controlled the outcome but urged this Court to "consider revisiting" that decision. *Id.* at 38a.

Judge Stranch, joined by two judges in full and two judges in part, concurred in the judgment. Pet. App. 68a-114a. She agreed with the court of appeals that *Colorado II* resolved this case, but she disagreed with the court's endorsement of petitioners' "view that doctrinal,

statutory, and factual changes undermine" that decision. *Id.* at 85a. Judge Bloomekatz concurred in the judgment, stating that *Colorado II* "remains binding precedent" and that "[t]hat is all that is needed to resolve this case." *Id.* at 115a.

Judge Readler dissented. Pet. App. 116a-156a. He reasoned that *Colorado II* was not controlling, see *id.* at 120a-139a, and that the party-coordination limit violates the First Amendment, see *id.* at 139a-155a.

ARGUMENT

Petitioners renew (Pet. 12-34) their challenge to the constitutionality of the Act's party-expenditure limit. Although the government defended the limit in the court of appeals, it has re-evaluated that position since the change in Administration. The government now agrees with petitioners that the limit violates the First Amendment and this Court's modern campaign-finance precedents. While the Court upheld the limit in *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001), the Court's more recent decisions and other legal developments have eroded that precedent's foundations. Only this Court can definitively determine whether *Colorado II* retains its vitality in light of those developments, or whether the statute is invalid notwithstanding *Colorado II*. The Court should grant the petition for a writ of certiorari and should appoint an amicus curiae to defend the judgment below.

A. The Act Violates The First Amendment By Restricting Political Parties' Freedom To Engage In Political Speech In Coordination With Candidates

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I. That protection extends to the

right to engage in political speech, and to contribute or spend money for that purpose, as part of a political campaign. See *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam). The Amendment also protects the right to engage in such advocacy through associations such as political parties. See *id.* at 15. Those freedoms "are integral to the operation of the system of government established by our Constitution." *Id.* at 14. The Act's party-expenditure limit violates those basic rights, and *Colorado II* does not justify holding otherwise.

1. Under this Court's precedents, the standard of review applicable to a campaign-finance law depends on the nature of the restriction imposed. Restrictions on independent expenditures trigger strict scrutiny, while limits on contributions or coordinated expenditures generally are subject to "closely drawn" scrutiny. See *Buckley*, 424 U.S. at 25, 44. In recent cases, the Court has found it unnecessary to "parse the differences between the two standards." *McCutcheon* v. *FEC*, 572 U.S. 185, 199 (2014) (opinion of Roberts, C.J.); see *FEC* v. *Ted Cruz for Senate*, 596 U.S. 289, 305 (2022). No matter the standard, the Court has identified "only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *Cruz*, 596 U.S. at 305. Each standard also requires the government to show that the restriction is "narrowly tailored to achieve the desired objective." *McCutcheon*, 572 U.S. at 218 (opinion of Roberts, C.J.).

The Act's party-expenditure limit imposes a severe burden on political speech, warranting at least "closely drawn" scrutiny, if not strict scrutiny. The basic function of a political party is to nominate and promote candidates for public office. See *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214,

224 (1989). Candidates, in turn, serve as their party's "standard bearer[s]," advocating the party's policies to the electorate. *Ibid.* (citation omitted). To carry out those roles effectively, the party and its candidates must be free to cooperate with each other. "[I]t would be impractical and imprudent, to say the least, for a party to support its own candidates without some form of 'cooperation' or 'consultation.'" *Colorado Republican Federal Campaign Committee* v. *FEC*, 518 U.S. 604, 630 (1996) (Kennedy, J., concurring in the judgment and dissenting in part). By restricting a party's freedom to consult with its candidates before spending money on political speech, the party-expenditure limit stifles "the ability of the party to do what it exists to do," contrary to our Nation's "constitutional tradition" of "joint First Amendment activity." *Ibid.*

That restriction on core political speech is not narrowly tailored to serve the only interest that could justify a campaign-finance law, preventing the reality or appearance of *quid pro quo* corruption. To begin, the restriction does not seek to prevent political parties from engaging in corruption. In fact, "it doesn't make any sense to think of a party as 'corrupting' its candidates," given that "'the very aim of a political party is to influence its candidate's stance on issues.'" Pet. App. 26a (Thapar, J., concurring) (brackets and citation omitted). And "rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." *Colorado I*, 518 U.S. at 618 (opinion of Breyer, J.).

Nor can the restriction be justified as an effort to prevent contributors from circumventing the candidate

base limits and from funneling bribes to candidates through political parties. The Act already includes four layers of protection against such *quid pro quo* corruption. First, the Act imposes a candidate base limit, capping the amount of money that a donor may contribute to a candidate. See 52 U.S.C. 30116(a)(1)(A). Second, to prevent donors from circumventing the candidate base limit, the Act imposes a party base limit, capping the amount of money that a donor may contribute to a party. See 52 U.S.C. 30116(a)(1)(B). Third, the Act treats a payment as a contribution to a candidate, even if it is nominally made to the party, if it is "in any way earmarked" for the candidate. 52 U.S.C. 30116(a)(8). Fourth, the Act requires parties to report their own spending and their donors' names and contributions. See 52 U.S.C. 30104(b). The party-expenditure limit adds a fifth layer of prophylaxis by capping the amount of money that a party may spend in coordination with a candidate. But this Court has treated such a "prophylaxis-upon-prophylaxis approach" as a "significant indicator that the regulation may not be necessary for the interest it seeks to protect." *Cruz*, 596 U.S. at 306; see Pet. App. 28a-29a (Thapar, J., concurring).

In addition, the government may not limit political speech based on "'mere conjecture'"; rather, it must identify "'record evidence or legislative findings' demonstrating the need to address a special problem." *Cruz*, 596 U.S. at 307 (citations omitted). The record here contains no persuasive evidence that contributors have used donations to political parties to funnel bribes to specific candidates. "'[A]t least 28 states largely give parties free rein to make coordinated expenditures on behalf of their state-level nominees,'" and "no evidence

of corruption has materialized" in those jurisdictions. Pet. App. 14a (citation omitted).

Rather than meaningfully advancing "a permissible anticorruption goal," the party-expenditure limit serves "the impermissible objective of simply limiting the amount of money in politics." *Cruz*, 596 U.S. at 313; see *Colorado I*, 518 U.S. at 618 (opinion of Breyer, J.) ("[T]his Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending."). The Act does not impose a uniform party-expenditure limit for all congressional races, analogous to the uniform $3300 candidate base limit. The limit instead varies with the office sought and, for Senate seats and at-large House seats, the State's voting-age population. See 52 U.S.C. 30116(d). That approach would make little sense if Congress were trying to prevent *quid pro quo* arrangements; a coordinated expenditure's corrupting potential does not depend on state population.

The amendments that Congress enacted in 2014 reinforce that analysis. Under those amendments, the party-expenditure limit does not apply to certain types of coordinated expenditures, such as expenditures on "the conduct of election recounts and contests and other legal proceedings." 52 U.S.C. 30116(a)(9). Nothing in the record suggests, however, that "funneling money to a candidate's election-night recount really pose[s] less of a bribery risk than funneling money to his advertisements." Pet. App. 30a (Thapar, J., concurring).

2. The en banc Sixth Circuit recognized the serious First Amendment concerns that the party-expenditure

limit raises, but it concluded that *Colorado II* compelled it to uphold the law. Regardless of whether *Colorado II* bound the Sixth Circuit, however, it does not bind this Court here. Given significant doctrinal, statutory, and factual changes in the last 24 years, the constitutional questions at issue here meaningfully differ from those decided in *Colorado II*.

As the en banc Sixth Circuit recognized, this Court's campaign-finance doctrine has changed in important ways since *Colorado II*. See Pet. App. 10a. For example, *Colorado II* understood the government's interest in preventing corruption to extend not only to "*quid pro quo* agreements," but also to "undue influence on an officeholder's judgment, and the appearance of such influence." 533 U.S. at 441; see *McCutcheon*, 572 U.S. at 240 (Breyer, J., dissenting) ("[T]he Court upheld limits upon coordinated expenditures among parties and candidates because it found they thwarted * * * 'undue influence' by wealthy donors."). Since then, however, the Court has repeatedly determined that the government's anti-corruption interest extends only to *quid pro quo* corruption or its appearance, and that Congress may not restrict political speech to "limit the general influence a contributor may have over an elected official." *Cruz*, 596 U.S. at 305; see *McCutcheon*, 572 U.S. at 207-208 (opinion of Roberts, C.J.); *Citizens United* v. *FEC*, 558 U.S. 310, 359-361 (2010).

Colorado II also justified the party-expenditure limit by invoking the government's interest in preventing "circumvention" of the candidate base limits. 533 U.S. at 465; see *id.* at 461-465. This Court has since recognized, however, that the candidate base limits "are themselves prophylactic measures, given that 'few if any contributions to candidates will involve *quid pro*

quo arrangements.'" *Cruz*, 596 U.S. at 306 (citation omitted). It also has recognized that Congress and the FEC have established an "intricate regulatory scheme" that guards against "circumvention of the base limits," for instance treating payments as contributions if they have been earmarked for candidates. *McCutcheon*, 572 U.S. at 201 (opinion of Roberts, C.J.). Given those safeguards, the Court has cast doubt on the necessity of yet more layers of protection and has greeted the assertion of an anti-circumvention interest "with a measure of skepticism." *Cruz*, 596 U.S. at 306; see *McCutcheon*, 572 U.S. at 210-224 (opinion of Roberts, C.J.).

More broadly, *Colorado II* treated "'closely drawn'" scrutiny, the test that this Court has applied to limits on contributions and coordinated expenditures, as a highly "deferential" standard. Pet. App. 8a (citation omitted). For instance, the Court did not require the government to provide any specific evidence that the party-expenditure limit was necessary to prevent corruption. It instead noted the "difficulty of mustering evidence" to support the statute and then speculated that, if political parties could spend money in coordination with candidates, "the inducement to circumvent would almost certainly intensify." *Colorado II*, 533 U.S. at 457, 460. The Court also did not require narrow tailoring, concluding instead that "Congress [wa]s entitled to its choice" among available alternative approaches and stating that courts "do not throw out * * * contribution limits for unskillful tailoring." *Id.* at 463 n.26, 465.

Since *Colorado II*, this Court has "strengthened the 'closely drawn' test." Pet. App. 11a (citation omitted). It has explained that the government may not justify a campaign-finance law by "posit[ing] the existence of the disease sought to be cured" and that the government

bears the burden of offering "record evidence or legislative findings" to support the statute. *Cruz*, 596 U.S. at 307 (citations omitted); see *McCutcheon*, 572 U.S. at 210 (opinion of Roberts, C.J.). And it has clarified that "closely drawn" scrutiny is a "rigorous" test under which the government must show that the statute is "narrowly tailored" to its asserted interest. *McCutcheon*, 572 U.S. at 197, 199, 218 (citations omitted).

In addition, Congress has amended the Act since *Colorado II*, exempting various types of expenditures, including coordinated expenditures for post-election recounts and legal challenges, from the party-expenditure limit. See Pet. App. 12a-13a. Those amendments materially undermine *Colorado II*'s anti-corruption justification for upholding the statute, because that justification applies with equal force to significant conduct that the statute now exempts. The government may defend a statute under heightened scrutiny only by invoking the law's "'actual purposes,'" not by offering after-the-fact "rationalizations." *United States* v. *Virginia*, 518 U.S. 515, 535-536 (1996) (citation omitted). A statute's exemptions can illuminate its real purposes; "[u]nder-inclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown* v. *EMA*, 564 U.S. 786, 802 (2011). Here, the exemptions that Congress enacted in 2014 confirm that the party-expenditure limit seeks simply to limit the amount of money that parties spend on campaigns, not to prevent *quid pro quo* corruption.

On top of all that, the relevant facts have changed since *Colorado II* in a way that magnifies the burden on the restricted speakers. *Colorado II* found "little evidence" that the party-expenditure limit had "frustrated the ability of political parties" to engage in political

speech, and viewed parties as the "dominant players, second only to the candidates themselves, in federal elections." 533 U.S. at 449-450 (citation omitted). Those claims have "a quaint ring" today; since *Colorado II*, the power of parties has fallen and that of Super PACs (political action committees) has grown. Pet. App. 14a; see *id.* at 13a-14a; accord Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 Hous. L. Rev. 845, 862-870 (2017). As Super PACs become dominant players, the burden imposed by the restriction on political parties becomes comparatively greater.

In short, the statute, the doctrine, and the facts have all materially changed since *Colorado II*. Cf. *McCutcheon*, 572 U.S. at 200, 202 (opinion of Roberts, C.J.) (earlier constitutional ruling "does not control" given "statutory and regulatory changes in the campaign finance arena"); *Herrera* v. *Wyoming*, 587 U.S. 329, 342 (2019) (earlier decision "'must be regarded as retaining no vitality,'" even though it had not been "'expressly overruled,'" because it was "impossible to harmonize" with a later decision) (citation omitted); *McDonald* v. *City of Chicago*, 561 U.S. 742, 758-759 (2010) (opinion of Alito, J.) (earlier decisions were not controlling because they preceded the development of the applicable doctrinal framework).

3. To the extent *Colorado II* remains a controlling precedent, this Court should overrule that decision. *Stare decisis* is not "an inexorable command," and the doctrine is "at its weakest when [the Court] interpret[s] the Constitution." *Ramos* v. *Louisiana*, 590 U.S. 83, 105 (2020) (citations omitted). The factors that this Court considers when deciding whether to overrule a precedent weigh strongly in favor of doing so here.

First, *Colorado II* is "not just wrong, but grievously or egregiously wrong." *Ramos*, 590 U.S. at 121 (Kavanaugh J., concurring). That decision is "an outlier" in First Amendment jurisprudence. Pet. App. 18a (Thapar, J., concurring). As detailed above, it conflicts in "several ways" with this Court's other decisions concerning campaign-finance laws. *Id.* at 11a (majority opinion); see pp. 13-15, *supra*. It is thus "the kind of doctrinal dinosaur or legal last-man-standing for which [the Court] sometimes depart[s] from *stare decisis*." *Kimble* v. *Marvel Entertainment, LLC*, 576 U.S. 446, 458 (2015); see *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 419 (2024) (Gorsuch, J., concurring) (warning against elevating "aberrational rulings" above "the mainstream of past decisions").

Colorado II also has "caused significant negative * * * real-world consequences." *Ramos*, 590 U.S. at 122 (Kavanaugh, J., concurring). The right of a political party to engage in political speech during campaigns is central to the functioning of our Nation's system of representative democracy. "The formation of national political parties was almost concurrent with the formation of the Republic itself," and our political system would be "unimaginable" without them. *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). *Colorado II*, however, has impaired political parties' ability to carry out their core function: "promoting among the electorate candidates who espouse their political views." *Ibid.* "Entering to fill the void have been new entities" that "operate in ways obscure to the ordinary citizen." *Randall* v. *Sorrell*, 548 U.S. 230, 265 (2006) (Kennedy, J., concurring in the judgment). Those real-world harms to our political system provide a "'special justification,'" "over and above the belief 'that the precedent

was wrongly decided,'" for overruling *Colorado II*. *Kimble*, 576 U.S. at 456 (citation omitted).

On the other side of the ledger, no reliance interests justify retaining *Colorado II*. Cf. *Citizens United*, 558 U.S. at 365 (no reliance interests supported retaining precedent upholding bans on election expenditures by corporations). Overruling *Colorado II* would not cause "anything like the prospective economic, regulatory, or social disruption" that sometimes prompts this Court to retain wrongly decided precedents. *Ramos*, 590 U.S. at 107. At most, the government has relied on *Colorado II* when enforcing the party-expenditure limit. But that type of reliance interest "cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Id.* at 110-111.

B. This Court Should Grant The Petition For A Writ Of Certiorari

This case involves an exceptionally important legal question that calls for this Court's review. The party-expenditure limit restricts a right that lies at the core of the First Amendment: the right to engage in political speech in an election campaign. As discussed above, the limit also has significant practical consequences for the operation of our Nation's political system. See pp. 15-16, *supra*.

Although this Court previously addressed the party-expenditure limit in *Colorado II*, it should revisit that issue here. As discussed above, intervening changes have deprived *Colorado II* of its vitality as precedent. And eleven judges of the en banc Sixth Circuit, in both the majority opinion and separate writings, recognized that *Colorado II* warrants re-examination. See, *e.g.*, Pet. App. 11a ("[Petitioners] identify several ways in which tension has emerged between the reasoning of

Colorado II and the reasoning of later decisions of the Court."); *id.* at 24a (Thapar, J., concurring) ("*Colorado II*'s holding is questionable."); *id.* at 38a (Bush, J., concurring dubitante) ("The Supreme Court should consider revisiting *Colorado II*."); *id.* at 124a (Readler, J., dissenting) ("[A] wave of intervening precedent * * * leaves *Colorado II* essentially on no footing at all.").

Only this Court can determine whether *Colorado II* remains good law or whether the statutory restriction is invalid notwithstanding *Colorado II*. While the Court has sometimes concluded that intervening developments have deprived its precedents of controlling effect, see p. 16, *supra*, the en banc Sixth Circuit was understandably reluctant to take that step on its own. The court reasoned that, in our "hierarchical legal system," "any new assessment" of the party-expenditure limit remains "the Supreme Court's province." Pet. App. 15a; see *id.* at 36a (Thapar, J., concurring) ("[O]ur court is not the proper audience for these concerns."); *id.* at 67a (Bush, J., concurring dubitante) ("None of us is vested with Supreme Court authority. In this case, all we can do as lower court judges is essentially make suggestions for that Court to consider.").

This Court, to be sure, denied certiorari in *Cao* v. *FEC*, 562 U.S. 1286 (2011), another case involving a post-*Colorado II* challenge to the party-expenditure limit. That case, however, predated Congress's 2014 amendments to the Act and the Court's decisions in *McCutcheon* and *Cruz*. The petitioners there also raised only certain as-applied challenges to the statute; they did not challenge the statute across the board. See *In re Cao*, 619 F.3d 410, 421-431 (5th Cir. 2010) (en banc), cert. denied, 562 U.S. 1286 (2011). As the FEC pointed out, the petitioners there had failed to preserve one of

their as-applied challenges below, and "factual uncertainty * * * render[ed] th[e] case a poor vehicle" for addressing another of the challenges. Br. in Opp. at 20, *Cao*, *supra* (No. 10-776); see *id.* at 9. This case does not raise those concerns.

C. This Court Should Appoint An Amicus Curiae To Defend The Court Of Appeals' Judgment

The Department of Justice has traditionally adhered to a general policy of defending the constitutionality of federal statutes but has determined that this is the rare case that calls for a departure from that approach. Cf., *e.g.*, *United States* v. *Windsor*, 570 U.S. 744, 754 (2013). This case involves a campaign-finance law that carries serious consequences for how our political system conducts election campaigns. In *Buckley* itself, the Department filed a brief on behalf of the FEC defending the statute, but filed a separate brief on behalf of the United States offering a more skeptical view of many of the statute's provisions. See Att'y Gen. & FEC Br. at 13-83, *Buckley*, *supra* (No. 75-436); Att'y Gen. & United States Br. at 8-103, *Buckley*, *supra* (No. 75-436). Solicitor General Robert Bork explained that, where constitutional issues go "to the heart of our method of democratic government," it would be "a betrayal of profound obligations to the Court and to constitutional processes to take the simplistic position that whatever Congress enacts [the Department] will defend." *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 501 (1975-1976). Indeed, had the Department failed to inform this Court of its concerns about the party-expenditure limit, that might have dissuaded the Court from granting review—thereby indefinitely leav-

ing in place a statute that violates core First Amendment rights. And, given that this case turns upon the vitality of one of the Court's own precedents, only this Court can ultimately resolve the issue.

Given the government's position, this Court should appoint an amicus curiae to defend the judgment below. The Court has taken that course in other cases where the government has declined to defend a judgment or a federal statute. See, *e.g.*, *Erlinger* v. *United States*, 602 U.S. 821, 828 (2024); *Patel* v. *Garland*, 596 U.S. 328, 336 (2022); *Collins* v. *Yellen*, 594 U.S. 220, 236-237 (2021); *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 209 (2020).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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