No. 24-621

In the Supreme Court of the United States

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, ET AL.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Respondents.

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

BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM; AMERICAN ENCORE; AMERICAN VALUES; SHAWNNA BOLICK, ARIZONA STATE SENATOR, DISTRICT 2; CENTENNIAL INSTITUTE AT COLORADO CHRISTIAN UNIVERSITY; EAGLE FORUM OF ALABAMA; [ADDITIONAL AMICI LISTED ON INSIDE COVER]

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IN SUPPORT OF PETITIONERS

QUESTION PRESENTED

Whether 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

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes American prosperity depends on ordered liberty and self-government.[3] AAF believes that Americans have the fundamental right to associate and disassociate freely. AAF files this brief on behalf of its 140,157 members nationwide.

Amici American Encore; American Values; Shawnna Bolick, Arizona State Senator, District 2; Centennial Institute at Colorado Christian University; Eagle Forum of Alabama; Charlie Gerow; Colin Hanna, President, Let Freedom Ring; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; John Locke Foundation; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Men and

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[1] No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

[3] Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at https://advancingamericanfreedom.com/aaff-independence-index/.

Women for a Representative Democracy in America, Inc.; New York State Conservative Party; Orthodox Jewish Chamber of Commerce; Melissa Ortiz, Principal & Founder, Capability Consulting; Rio Grande Foundation; Robert Schwarzwalder; Stand for Georgia Values Action; Delegate Kathy Szeliga, District 7A, Vice Chair of the Maryland Freedom Caucus; Women for Democracy in America, Inc.; and Yankee Institute believe that the freedom to speak for and associate freely are essential elements of American freedom.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns Congress's ability to make "law . . . abridging the freedom of speech," U.S. Const. amend I, and the necessary and inherent right to freely associate with others in one's speech.

In the Federal Election Campaign Act (FECA), Congress restricted contributions to political candidates under "a functional, not formal, definition of 'contribution,' which includes '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." *Fed. Election Comm'n v. Colo. Republican Federal Campaign Comm'n*, 533 U.S. 431, 438 (2001) (*Colorado II*). As a result, "[e]xpenditures coordinated with a candidate . . . are contributions under the Act." *Id*. These limits "restrict political parties from spending money on campaign advertising with input from the party's candidate for office." *National Republican Senatorial Committee v. Fed. Election*

Comm'n, No. 24-3501 slip op. at 1 (6th Cir. Sept. 5, 2024).

As Petitioners argue in this case, these limitations on parties' ability to coordinate with their candidates is inconsistent with the First Amendment. The Sixth Circuit, en banc, found that this Court's decision in *Colorado II* was controlling and so upheld the FECA's limitations on coordinated campaign spending. As Judge Thapar explains in his concurrence, *Colorado II* "is an outlier in" the Court's "First Amendment jurisprudence." *NRSC*, No. 24-3501 slip op. at 13 (Thapar, J., concurring).

Political association is central to America's history of liberty. According to Alexis de Tocqueville, early in America's history, "[t]he art of association" was "the mother science; everyone studies it and applie[d] it."[4] This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Political parties are not a special, disadvantaged class that have forfeited that right.

The rights protected by the First Amendment are not "second class right[s]," *New York State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 slip op. at 62 (June 23, 2022) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op)), that should be

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[4] 3 Alexis de Tocqueville, *Democracy in America*, 914 (Eduardo Nolla ed., James T. Schleifer trans., Indianapolis: Liberty Fund, Inc. 2010) (1840).

subject to judicial balancing. As this Court has in the Second Amendment context, it should assess the constitutionality of laws that abridge speech according to the history and tradition of American jurisprudence. No law like the one at issue existed in the early period of the republic and initial proposals to regulate campaign finance were met with First Amendment objections.

The Court should rule for Petitioners.

ARGUMENT

I. The Freedom of Association is Just as Central to American Ordered Liberty as the Freedom of Speech and of the Press.

The Freedom of Association is an American tradition and is among those fundamental liberties protected by the Constitution. In America, "[t]he art of association" is "the mother science; everyone studies it and applies it."[5] As Alexis de Tocqueville observed, early Americans made a habit of forming associations. Unlike in aristocratic societies where aristocrats hold the power and those beneath them carry out their will, in America, "all citizens are independent and weak; they can hardly do anything by themselves, and no one among them can compel his fellows to lend him their help. So they all fall into impotence if they do not learn to help each other freely."[6]

The American tradition of association is older than the nation itself. Early colonists left Europe for the New World hoping to establish societies where

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[5] Tocqueville, *supra* note 4 at 914.
[6] *Id*. at 898.

they could worship freely. Over a century and a half later, the American people similarly disassociated from the English Crown while retaining those institutions that experience had taught best vouchsafed their liberties. The freedom to associate and disassociate was, for the founding generation, at the heart of the American project.

The right to free association has thus long been recognized in American law. The Declaration of Independence explains that "Governments are instituted among Men" to secure the fundamental rights of the people. The Declaration of Independence para. 2 (U.S. 1776). The Declaration also describes the higher law upon which government is based and illuminates the "inalienable rights" that are "embedded in our constitutional structure." *McDonald*, 561 U.S. at 807 (Thomas, J., concurring in part and concurring in the judgment).

Among those fundamental rights enumerated in the First Amendment: the free exercise of religion, the freedom of speech and press, the right to assemble peacefully, and the right to petition one's government. U.S. Const. amend. I. The incorporation doctrine of the Fourteenth Amendment applies the Constitution's protections to the States. As the Court said in *NAACP v. Alabama*, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. at 460 (1958) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Staub v. City of Baxley*, 355 U.S.

313, 321 (1958)). Further, this Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. at 2382 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

The Court has explained that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." *NAACP*, 357 U.S. at 460-61. The freedom of association "furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'" *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

Because effective expression so often depends on effective association, association, like speech, is of "transcendent value." *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech."). The Court's explication of the right of freedom of association "stemmed from the Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (alteration in original) (quoting *NAACP*, 357 U.S. 449, 460 (1958)). As Luke Sheahan writes, "Associations in a democracy are not a means to self-government; they

are self-government. They are not one option for the ordering of human life; they are the order of human life."[7] The right to freely speak, and freely associate, strike at the heart of human freedom.

Those freedoms are not forfeited merely because the speaker is a group associating as a political party. Such a content-based and identity-based rule runs contrary to the basic rights the First Amendment protects, allowing the government to force some people or speech outside of that Amendment's protective umbrella. The Court should take this opportunity to restore to political parties the same, full speech and association rights that apply in other areas of life.

II. Freedom of Association is Not a Second-Class Right.

Association and speech are not "second-class right[s]," any more than the rights protected by the Second Amendment are. *See McDonald*, 561 U.S. at 780. However, when courts review allegations of rights-violating government activity under a balancing test, those rights are exposed to unconstitutional violation.

The Court has already recognized this fact in the Second Amendment context. There, the Court declined to apply a balancing test because "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). After all, "[t]he very

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[7] Luke C. Sheahan, *Why Associations Matter: The Case for First Amendment Pluralism* 17 (2020).

enumeration of the right takes out of the hands of government—even the third branch of government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id*. Instead, *Heller* recognized that the content of the Second Amendment is not determined by judicial balancing but by its "scope" it was "understood to have when the people adopted" it." *Id*. at 634-35.

When applied to assess fundamental rights claims, judicial balancing tests, including tiered scrutiny tests, are merely "policy by another name." *United States v. Rahimi*, 602 U.S. 680, 731 (2024) (Kavanaugh, J., concurring). They therefore "depart[] from what Framers such as Madison stated, what jurists like Marshall and Scalia did, what judges as umpires should strive to do, and what this Court has actually done across the constitutional landscape for the last two centuries." *Id*.

The tiers of scrutiny are "a relatively modern judicial innovation" and "'have no basis in the text or original meaning of the Constitution.'" *Id*.

Rather than engaging in "aristocratic judicial Constitution-writing," *id*. at 734 (internal quotation marks omitted) (quoting *McDonald*, 561 U.S. at 804 (Scalia, J., concurring), "[h]istory, not policy, is the proper guide." *Id*. at 717. Assessing constitutional claims according to "history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people." *Id*. at 718.

The First Amendment should not be subject to judicial balancing. *See Heller*, 554 U.S. at 632 (explaining that "We would not apply an 'interest balancing' approach" in the First Amendment

context). Judge Thapar correctly argued in his concurrence below that "[h]istory should . . . guide" the courts' "First Amendment jurisprudence." *NRSC*, No. 24-3501 slip op. at 13 (Thapar, J., concurring). Judge Thapar writes that, "[f]irst, courts should ask 'whether an Amendment's text covers an individual's conduct," *id.* (quoting *Oakland Tactical Supply, LLC v. Howell Twp.*, 103 F.4th 1186, 1203 (6th Cir. 2024) (Kethledge, J., dissenting)) and, if so, should require the government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition." *Id.* at 13-14 (internal quotation marks omitted) (quoting *Oakland Tactical Supply*, 103 F.4th at 1203 (Kethledge, J., dissenting).

Unlike in the Court's Second Amendment jurisprudence at the time of *Heller*, its First Amendment jurisprudence is extensive. However, even in such cases, "text and history still matter a great deal." *Rahimi*, 602 U.S. at 730 (Kavanaugh, J., concurring). Here, the fact that the relevant precedent, *Colorado II*, is an "outlier in our First Amendment jurisprudence generally and in campaign finance doctrine specifically," *NRSC*, No. 24-3501 slip op. at 13 (Thapar, J., concurring), presents the Court with an opportunity to begin the process of establishing a more textually faithful reading of the First Amendment.

If the Court were to assess the provision at issue here according to history, the government (or in this case, court-appointed amicus counsel since the government is not defending the law) would need to show that the restriction on party expenditures coordinated with candidates is consistent with the history of the First Amendment.

The first attempts of some in Congress to regulate campaign finance failed, with members objecting to the bills in part because of their First Amendment implications. The first such bill was introduced in 1837 and prohibited officials of the federal government from making contributions to support the election of candidates for either state or federal office.[8] A similar bill was introduced in 1839 prohibiting government employees from engaging in any activity in support of a candidate other than voting for him.[9] "The most consistent criticism of [these two] bills" was "that they violated the First Amendment."[10] One representative argued that the 1837 bill "looks too much like the old sedition law," "circumscribe[d] freedom of speech and action," and "violate[d] the constitution."[11] On the Senate floor, James Buchanan, the Senator from Pennsylvania and future President, argued that the 1839 bill was "a gag law" and pointed out that the "Constitution, in language so plain as to leave no room for misconstruction, declares that, 'Congress shall make no law abridging the freedom of speech.'"[12] The Senate Judiciary similarly criticized the bill in its report.[13]

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[8] Robert Mutch, *The First Federal Campaign Finance Bills*, 14 J. of Policy History 30 at 35 (2002).
[9] *Id*. at 36.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.

The first federal campaign finance law, "a narrow provision banning some corporate contributions, was passed in 1907."[14]

The government, or here the Court-appointed amicus, would need to show that, despite the relatively recent advent of campaign finance law and historical First Amendment opposition to speech restrictions, nonetheless prohibiting a group from coordinating its speech with a candidate merely because of the speaker's identity is not First Amendment-protected speech. It is unlikely to be able to make that showing.

CONCLUSION

For the foregoing reasons, the Court should rule for Petitioners.

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[14] Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1055 (1996).