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 SPEAKER OF THE HOUSE OF REPRESENTATIVES MIKE JOHNSON, HOUSE MAJORITY LEADER STEVE SCALISE, AND HOUSE MAJORITY WHIP TOM EMMER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Mike Johnson is the United States Representative for Louisiana's fourth congressional district. He currently serves as the 56th Speaker of the United States House of Representatives. In that role, Speaker Johnson is the parliamentary and administrative leader of the House and, functionally, the head of its Republican majority. As an attorney, Speaker Johnson litigated in courts throughout the country to protect First Amendment rights. He has also participated as an *amicus curiae* in many of this Court's cases.

Amicus curiae Steve Scalise is the United States Representative for Louisiana's first congressional district. He currently serves as the majority leader for the United States House of Representatives. Representative Scalise previously served as House majority whip and House minority whip.

Amicus curiae Tom Emmer is the United States Representative for Minnesota's sixth congressional district. He currently serves as the majority whip for the United States House of Representatives. Representative Emmer formerly served as Chairman of the National Republican Congressional Committee (NRCC). During his 2010 campaign for Minnesota governor, Representative Emmer was attacked for two large corporate donations to a PAC that paid for advertising in support of Emmer's

1. No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

campaign. Representative Emmer successfully defended the donations as an exercise of the corporate donors' right to free speech.

As the highest-ranking members of the Republican caucus in the United States House of Representatives, Speaker Johnson, House Majority Leader Scalise, and House Majority Whip Emmer (collectively, the "House Republican Leaders") are dedicated to strengthening and growing their caucus by helping Republican congressional candidates win elections. They are also the individuals who collectively raise the most funds into their representative political party committee, NRCC. For example, in 2024, the House Republican Leaders collectively raised $27,551,952.40 for NRCC, including $18,015,764.10 from Speaker Johnson, $5,736,391.70 from Majority Leader Scalise, and $3,799,796.60 from Majority Whip Emmer. Similarly, during the first half of 2025, they collectively raised $21,257,544.60 for NRCC, including $13,452,351.60 from Speaker Johnson, $4,611,896.68 from Majority Leader Scalise, and $3,193,296.32 from Majority Whip Emmer. Those fundraising numbers represent contributions from tens of thousands of individual contributors. And those numbers do not include the tens of millions of dollars that *amici* collectively raised for candidates—in the first half of 2025, the House Republican Leaders raised a combined total of $21,515,371.49 for congressional candidates, including $13,215,615.87 from Speaker Johnson, $5,809,788.46 from Majority Leader Scalise, and $2,489,967.16 from Majority Whip Emmer.

Further, as elected members of Congress who are committed to growing the Republican majority in Congress, the House Republican Leaders have a strong

interest in how American citizens elect their federal representatives. While running for office, *amici* are subject to various limitations on their ability to coordinate with the political party they lead, which hampers their ability to raise funds and present a unified political message to voters. As leaders of the Republican party, *amici* are again subject to various restrictions on their ability to coordinate with members of their party and their caucus to effectively raise public support for their party's political activities. As a result, *amici* have first-hand knowledge of the impact that Federal Election Commission (FEC) regulations like 52 U.S.C. § 30116(d) have on political speech and campaigns for national office. *Amici* are therefore uniquely situated to comment on the efficacy, workability, and constitutionality of 52 U.S.C. § 30116(d).

SUMMARY OF THE ARGUMENT

In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), this Court created and applied a two-tier framework in which laws that restrict "expenditures" on campaign speech undergo *strict scrutiny*, while laws that restrict campaign "contributions" undergo *intermediate scrutiny*.[2] 52 U.S.C. § 30116(d) does not survive application of that framework. For that reason alone, this Court should overrule *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"). *Colorado II* also fails for another, far more important reason: it applied an unconstitutional and ahistorical two-tier framework that ought not exist. As Judges Thapar and Bush explained

2. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014).

in their respective concurring opinions, the two-tier standard of review created by *Buckley* and developed by *Citizens United* and *McCutcheon* is wrong. This Court should use this case to right the ship and adopt the history-and-tradition test articulated in *Bruen*[3] for its First Amendment jurisprudence. When the *Bruen* framework is applied to restrictions on coordinated party expenditures, it becomes clear that Section 30116(d) is unconstitutional. Regardless, Section 30116(d)'s coordinated-expenditure limits are also manifestly unconstitutional under *Buckley*'s tiers-of-scrutiny analysis.

ARGUMENT

After this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), "the Courts of Appeals . . . coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combine[d] history with means-end scrutiny."[4] For the first step, the government could justify its regulation by demonstrating that the regulated activity fell outside the historical meaning of the right to keep and bear arms.[5] For the second step, the government got a second bite at justifying its regulation if it could show the regulation burdened an ancillary, as opposed to a core, aspect of the right to keep and bear arms. If core, courts applied strict scrutiny—if ancillary, intermediate scrutiny.[6] The problem with this

3. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 31–70 (2022).

4. *Id.* at 17.

5. *Id*. at 18.

6. *Id*. at 18-19.

approach is that, as this Court explained, "it is one step too many."[7]

This Court rejected "applying means-end scrutiny in the Second Amendment context," instead requiring the government to "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[8] Second Amendment jurisprudence, summarized this Court, "demands a test rooted in the Second Amendment's text, as informed by history."[9]

The First Amendment deserves the same treatment.

I. *Buckley's* tiers-of-scrutiny system is inconsistent with the Constitution's text, history, and tradition.

In *Buckley*, this Court coalesced around a two-step framework for analyzing First Amendment challenges to the constitutionality of restrictions on election-related spending. At step one, the government must show that the regulated activity falls outside the scope of the First Amendment. At step two, the government must satisfy a means-end test that, as with pre-*Bruen* Second Amendment jurisprudence, involves a tiers-of-scrutiny analysis.[10] One tier, which applies to attempts to regulate campaign *expenditures*, is "subject to strict scrutiny" and must be "narrowly tailored" to prevent corruption or the

7. *Id.* at 19.

8. *Id.*

9. *Id.*

10. *See, e.g.*, *McCutcheon*, 572 U.S. at 197.

appearance of corruption.[11] The second tier, which applies to attempts to regulate campaign *contributions*, is subject to mere intermediate scrutiny, and the restriction must only be "closely drawn" to serve the same anti-corruption and anti-appearance-of-corruption interests.[12]

The two-tiers-of-scrutiny framework created by *Buckley* and its progeny dilutes the rights enumerated in the First Amendment. To begin, the two-tiers of scrutiny system stacks the deck in the Government's favor. "Speech is an essential mechanism of democracy[,]"[13] and "[d]iscussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[14] Free speech thus "has its fullest and most urgent application precisely to the conduct of campaigns for political office."[15] That is exactly why the Constitution provides "Congress shall make no law . . . abridging the freedom of speech, or of the press."[16] Under the First Amendment, the burden for justifying attempts to regulate "speech" should rest on *the Government*—not the speaker.

Buckley and *McCutcheon*'s two-tiers-of-scrutiny framework also lightens the Government's burden by subjecting restrictions on certain kinds of speech to mere

11. *Citizens United*, 558 U.S. at 340.

12. *McCutcheon*, 572 U.S. at 197.

13. *Citizens United*, 558 U.S. at 339.

14. *Buckley*, 424 U.S. at 14.

15. *FEC v. Cruz*, 596 U.S. 289, 302 (2022).

16. *See* U.S. Const. amend. I.

intermediate scrutiny. And as this Court noted in *Bruen*, "federal courts tasked with making . . . difficult empirical judgments . . . under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures."[17] Such judicial deference is not what the Constitution demands here.[18] Indeed, the People carefully considered the degree of deference that Government attempts to restrict speech are subjected to and memorialized their determination in the text of First Amendment. Accordingly, the First Amendment "is the very product of an interest balancing by the people."[19] Yet by giving the Government *more* deference when regulating non-core speech, *Buckley* requires courts to balance the Constitution's protections with the Government's policy preferences. And by applying intermediate scrutiny to restrictions on certain kinds of speech, *Buckley* and its progeny rebalance the interests that the Constitution has already weighed. Such re-balancing is inconsistent with the text, history, and tradition of the Constitution.

In sum, the two-tiers-of-scrutiny approach erodes the First Amendment by allowing the Government to regulate speech if it advances a "sufficiently important" government interest and is "closely drawn" to that interest.[20] That approach does not pass Constitutional muster. Instead, what "demands [this Court's] unqualified

17. *Bruen*, 597 U.S. at 26.

18. *Id.*

19. *Id.* (quoting *Heller*, 554 U.S. at 635).

20. *McCutcheon*, 572 U.S. at 197 (quoting *Buckley*, 424 U.S. at 25).

deference" is the "balance . . . struck by the traditions of the American people."[21]

The two-tiers of scrutiny system also invites judges to depart from jurisprudential *terra firma*—history, tradition, and text-based jurisprudence—and sets them adrift in a sea of means-end, policy-based decision making. The chief problem with means-end decision making is that "judges will mistake their own predilections for the law."[22] With more than 850 authorized Article III judgeships in the United States, the First Amendment's protections could, under the two-tiers of scrutiny approach, be composed of more than 850 predilections. An accompanying problem is that the two-tiers of scrutiny system "strains courts' institutional competence" by removing those "creatures of precedent and legal history" from the substance of their craft.[23] That is why "[h]istory, not policy," is the "proper guide" for judges—it is "less subjective" than means-end, policy-oriented judging.[24]

For the above-described reasons, means-end decision making is incompatible with the judiciary's role. Perhaps

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21. *Bruen*, 597 U.S. at 26.

22. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 863 (1989).

23. App.730 (Thapar, concurring) (citing *United States v. Rahimi*, 602 U.S. 680, 732 n.7 (2024) (Kavanaugh, J., concurring)).

24. *Id.* (quoting *Rahimi*, 602 U.S. at 717 (Kavanaugh, J., concurring)); *see also United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (arguing that tiers of scrutiny "cannot supersede . . . those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts").

that is why "even where means-ends scrutiny reigns supreme, courts 'still often rel[y] directly on history' to resolve cases."[25] Indeed, this Court too has relied on history and tradition when resolving other First Amendment challenges.[26] As Judge Thapar explained in his concurrence, "there's a growing chorus of voices casting doubt on a tiers-of-scrutiny approach to constitutional law."[27] And for good reason. "[C]ourts invented this doctrine by accident, and tiered scrutiny lacks any basis in our Constitution's text, history, and tradition."[28]

II. The present case highlights the flaws inherent in the two-tiers of scrutiny system.

The tiered-scrutiny framework's unworkability is apparent in this case. It is undisputed that 52 U.S.C § 30116(d) regulates speech protected by the First Amendment.[29] Despite this being a First Amendment case about the "fullest and most urgent application" of

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25. App.731 (citing *Rahimi*, 602 U.S. at 732 n.7) (Kavanaugh, J., concurring).

26. *See e.g.*, *Vidal v. Elster*, 602 U.S. 286 (2024); *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 477 (2022).

27. App.730 (Thapar, concurring) (citing *Bruen*, 597 U.S. at 17-19).

28. *Id*. (citations omitted).

29. *See Buckley*, 424 U.S. at 14 ("Discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."); *Cruz*, 596 U.S. at 302 (noting that free speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office").

that right, the court below decided this case without ruling on the First Amendment issue—i.e., whether the government's speech restriction is constitutional in light of the text, history, and tradition surrounding the First Amendment at the time of its ratification.

To be sure, the Sixth Circuit majority decided the case based on *Colorado II* after concluding that it remains binding on the lower courts even though its foundation has been eroded. But that merely adds another layer to the problem because *Colorado II* also failed to consider 52 U.S.C. § 30116(d) in light of the First Amendment's text, history, and tradition. Thus, although the lower court felt duty-bound to apply this Court's precedent faithfully, in doing so it effectively failed to apply the First Amendment.

Here, *Colorado II*'s application of *Buckley's* tiers-of-scrutiny analysis to coordinated-party-expenditure limits *prevented* the lower courts from considering both (1) the actual constitutional question and (2) the facts of the case. That's because, as Petitioners explain, since *Colorado II*, the legal and factual landscape has been changed by this Court's increasing skepticism towards free-speech restrictions on campaign-finance regulation, the 2014 amendments to FECA, and the rise of unlimited spending by Super PACs.[30] Indeed, the majority below recognized that, but for *Colorado II*, the change in the legal landscape "might affect the analysis."[31]

This case exemplifies why *Buckley*'s two-tier scrutiny framework as applied by *Colorado II* does not work. One

30. Pet.2 (quotation omitted).

31. *Id.* at 9.

of *Colorado II*'s principle justifications for upholding 52 U.S.C. § 30116(d) is that determining whether a coordinated contribution is a proper restriction on speech is a fact-intensive inquiry, necessitating a "functional, not a formal, line."[32] In *Colorado II*, this Court upheld the limits on coordinated expenditures because they theoretically prevented "attempts" to circumvent candidate-contribution limits by limiting contributions that "might be" an attempt to exercise a corrupting influence on a candidate.[33] In other words, the *Colorado II* Court was concerned with the theoretical possibility of corruption or bribery divorced from any evidentiary support for that premise. Indeed, as Judge Thapar noted in his concurring opinion, "[d]espite having decades to look for [examples of corrupt, *quid pro quo* coordination,] the FEC identifies only one case that comes close to meeting these criteria."[34] In that case, a construction company made a $6,000 earmarked contribution to the county-level Democratic Party, thereby securing the *quid pro quo* of a $96,000 construction contract.[35] *Allegedly*, the Democratic Party used 4,850 of those earmarked dollars for the candidate's election campaign. This example tells us three things.

First, because the alleged *quid pro quo* corruption was caught without the aid of 52 U.S.C. § 30116(d), a similar alleged wrong in a race subject to FECA would be adequately handled through anti-bribery laws without

32. *Colorado II*, 533 U.S. at 443.

33. *Id.* at 446 (quoting *Buckley*, 424 U.S. at 47).

34. App.738 (Thapar, J., concurring).

35. *Id.*

application of 52 U.S.C. § 30116(d)'s restriction on speech. 52 U.S.C. § 30116(d) is thus reduced to a vestigial appendage in a five-tiered prophylaxis-upon-prophylaxis framework.[36]

Second, this singular example of a relatively small sum of money is all that supports the sweeping free-speech restrictions imposed by 52 U.S.C. § 30116(d). *One* example of alleged *quid pro quo* corruption in which a donor and politician *allegedly* exchanged $6,000 of earmarked contributions for $96,000 of benefits in an Ohio school-board member election undergirds Section 30116(d)'s sweeping limitations on free speech of every single political party organization in the entire country.

Third, this "example" is not even a sure thing. As Judge Thapar notes, the facts are merely that the earmarked funds were *allegedly* funneled to their intended source.[37] Thus, this example may actually be an example of a political party resisting the temptation to bend to a donor's attempt to earmark funds—if so, then this "example" actually cuts *against* the need for Section 30116(d).

Briefing by other *amici* buttresses the conclusion that the Government's attempt to restrict speech by imposing coordinated spending limits do not deserve any latitude or thumb-on-the-scale jurisprudence. Other *amici* briefs demonstrate that state-level experience "contradicts the government's contention that limits on coordinated party expenditures are necessary to prevent donors from

36. *Id.* at 738-39.

37. *Id*. at 739.

circumventing donor-to-candidate contribution limits."[38] That's because, even though more than half the States do not restrict coordinated party expenditures, there is no correlated swell of corruption in those States.[39] All told, the briefing, arguments, and facts of this case demonstrate that the specter of promised corruption and *quid pro quo* contributions that the Government used to rationalize the need for 52 U.S.C. § 30116(d) in *Colorado II* is inconsistent with reality.

This case also exemplifies the error of *Colorado II* and *Buckley* because it demonstrates the symbiotic relationship between parties and candidates. In *Colorado II*, this Court considered "[t]he Party's argument that . . . because a party's most important speech is aimed at electing candidates and is itself expressed through those candidates, any limit on party support for a candidate imposes a unique First Amendment burden."[40] There, the political party plaintiff argued that "coordination with a candidate is a party's natural way of operating, not merely an option that can easily be avoided."[41] This Court rejected that argument, finding it "at odds with the history of nearly 30 years under the Act."[42] But as Justice Thomas pointed out in his dissent, a 30-year statutory rule should not trump 200-year Constitutional bedrock.[43] In this case,

38. *Id.* (citing *Colorado II*, 533 U.S. at 457).

39. *Id*.

40. *Colorado II*, 533 U.S. at 445.

41. *Id*.

42. *Id*. at 449.

43. *Id.* at 472-73 (Thomas, J., dissenting).

Judge Bush laid out in his concurrence *dubitante* an extensive and instructive history of this nation's political parties, coordinated speech, and the Founders' practice of accepting coordinated speech that predates FECA by more than a century, thus showing that *Colorado II* adopted an ahistorical rule that prevents parties and candidates from coordinating their political speech even though they have been doing so since the Founding.[44] And just because political parties have learned to live with the unconstitutional free speech restrictions imposed by FECA does not mean that those restrictions have become any less smothering to protected First Amendment conduct. *Id.*

In sum, this case shows that the policy concern raised in *Colorado II*—*i.e.*, that 52 U.S.C. § 30116(d) is necessary to prevent political corruption from running rampant—was unfounded and that the restrictions *Colorado II* imposes on the First Amendment rights of political parties are shortsighted, ahistorical, and unconstitutional. Simply put, the founding political parties have exercised their First Amendment rights hand-in-glove with their candidates since the dawn of this nation, and political parties are not going away. It defies reality to defend the restriction on political parties' speech rights imposed by 52 U.S.C. § 30116(d)—a creature of the last few decades that does not exist at the state-level in a majority of the country—by arguing that corruption will overrun American politics without it. Coordination between political parties and candidates did not lead to rampant bribery and corruption during the first 200 years of our nation's history, and the defenders of 52 U.S.C. § 30116(d) cannot now use that as an excuse to burden all speech.

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44. App.753-70 (Bush, concurring)].

Amici therefore respectfully ask this Court to overrule *Buckley*'s and *Colorado II's* two-tier framework and replace it with a new test mirroring the one it applied in *Bruen* that analyzes the constitutionality of Government restrictions on coordinated expenditures between political parties and candidates by considering the First Amendment's text, as informed by history. The First Amendment deserves nothing less.

III. The Court should replace *Buckley's* two-tiers-of-scrutiny system with *Bruen's* history-and-tradition test.

In *Bruen*, this Court held that New York's "proper cause" law requiring an individual who "wants to carry a firearm outside his home" to "demonstrate a special need for self-protection distinguishable from that of the general community" violated the Second Amendment.[45] In reaching that holding, the Court discarded the two-step analysis previously used to assess Second Amendment claims in favor of a new two-part test based on history and tradition.[46]

As noted above, under this framework, the Court first asks whether the plain text of the Constitution covers the proposed course of conduct—if so, "the Constitution presumptively protects that conduct."[47] The Court then determines whether the government has shown that the regulation at issue "is part of the historical tradition

45. *See Bruen*, 597 U.S. at 12.

46. *See Heller*, 554 U.S. at 634.

47. *See id.* at 17, 32.

that delimits the outer bounds of the right" in question.[48] Applying that new framework, the *Bruen* Court held for the first step that the "plain text of the Second Amendment protects . . . [the] proposed course of conduct—carrying handguns publicly for self-defense."[49] For the second step, the Court held that the government had "failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement."[50] As a result, the Court found the New York law unconstitutional.

Since *Bruen*, the Court has applied the history-and-tradition test not only in Second Amendment decisions but also when evaluating the constitutionality of laws affecting certain rights under the First and Eighth Amendments.[51] Consistent with this trend, the Court should apply the history-and-tradition test here to analyze restrictions on coordinated expenditures. As shown above, applying the history-and-tradition test here would avoid the pitfalls of the *Buckley/Colorado II* test,[52] minimize the ability of individual judges to "implement [their] own policy judgments,"[53] and foster an accurate and proper historical understanding of the issue.

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48. *See id.* at 19.

49. *Bruen*, 597 U.S. at 32.

50. *Id.* at 38-39.

51. *See*, *e.g.*, *Rahimi*, 602 U.S. at 691-92; Vidal, 602 U.S. at 301; *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022); *City of Grants Pass v. Johnson*, 603 U.S. 520, 541-43 (2024).

52. *See supra* sections I, II.

53. *See Rahimi*, 602 U.S. at 714 (Kavanaugh, J., concurring).

This matters because the historical context surrounding an issue involving core political speech will inform both the meaning of the corresponding constitutional right and the types of regulations with which it is compatible.[54] Since constitutional rights must be interpreted "with the scope they were understood to have when the people adopted them,"[55] the history-and-tradition test looks to practices "deeply embedded in the history and tradition of this country" when defining the contours of a particular right.[56] And this makes sense: if a court is to consider a right as it was understood at the time of its ratification, the history and traditions surrounding that right's adoption are a logical place to start.[57] That history might also shed light on the "linguistic meaning at the time of ratification," which "may differ from what it is today," as well as "evidence of how Americans ordered their lives after ratifying a particular constitutional text," both of which can "help reveal that text's original meaning."[58] Accordingly, applying the history-and-tradition test here would provide the Court with an avenue for evaluating limits on coordinated expenditures that avoids the flaws of the *Buckley/Colorado II* test while faithfully adhering to the text and historical scope of the First Amendment.

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54. *See id.* at 739-40 (Barrett, J., concurring).

55. *Id.* at 634–635.

56. *See Rahimi*, 602 U.S. at 739-40 (Barrett, J., concurring).

57. *See id.* at 717-18 ((Kavanaugh, J., concurring) ("History can supply evidence of the original meaning of vague text. History is far less subjective than policy.").

58. App.747-48 (Bush, J., concurring).

IV. FECA's restrictions on coordinated spending between candidates and political parties are unconstitutional under the history-and-tradition test.

Applying the history-and-tradition test to the facts of this case shows that 52 U.S.C. § 30116(d)'s restrictions on coordination between political parties and their candidates run afoul of the Constitution. Regarding the first step, *amici*'s proposed course of conduct of coordinating campaign expenditures falls within the scope of the First Amendment. Regarding the second step, limits on coordinated expenditures in 52 U.S.C. § 30116(d) are consistent with the historical tradition of regulating political speech.

The first step of the history-and-tradition test asks whether the plain text of the Constitution covers the regulated conduct.[59] Here, it's clear that's the case.

The First Amendment reads, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[60] "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas,

59. *See Bruen*, 597 U.S. at 32.

60. U.S. Const. amend. I.; *see also Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) (quotation marks and quotation omitted) ("[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others.").

its subject matter, or its content."[61] This provision has long been understood to include both the physical act of speaking and the funding of political speech.[62] It also encompasses the act of running for political office, which involves the making and funding of political speech.[63] Therefore, coordination of campaign spending between political parties and their candidates falls within the bounds of the Free Speech clause.[64] In short, because the conduct regulated by 52 U.S.C. § 30116(d)—coordination between political parties and candidates—is covered by the plain text of the First Amendment, that conduct is "presumptively" constitutional under the First Amendment.[65]

The second step of the history-and-tradition test shifts the burden to the Government to identify a historical American tradition justifying the kind of limit Section 30116(d) presents, and to show that tradition "is part of

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61. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (quotation marks and quotation omitted).

62. *McConnell v. FEC*, 540 U.S. 93, 250-55 (2003) (Scalia, J., concurring in part) (collecting cases supporting the principle that "an attack upon the funding of speech is an attack upon speech itself"); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

63. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

64. *See*, *e.g.*, *Roy*, 401 U.S. at 272; *Citizens United*, 558 U.S. at 883-84.

65. *See Bruen*, 597 U.S. at 17.

the historical tradition that delimits the outer bounds of the right" in question.[66] But no such tradition exists.

In determining whether a relevant historical tradition exists, "[a] court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances."[67] If few or no such laws existed at the time of ratification, that might suggest that the Constitution protects the conduct the Governments seeks to regulate. If, on the other hand, it was common for the government to regulate the subject conduct during the time of ratification, that might support an inference that the regulation at issue is valid.

Here, the history surrounding the ratification of the First Amendment demonstrates that there is no American tradition of limiting coordinated speech or political expenditures in the way 52 U.S.C. § 30116(d) does. When the First Amendment was ratified, there were a number of like-minded political interest groups that, while not officially organized as political parties, functioned much like modern political parties.[68] Those political interest groups advanced opposing viewpoints, promoted certain candidates for office, campaigned against each other, and supported their candidate of choice with funds and

66. *See id.* at 19.

67. *Id.*

68. These included the Patriots, Loyalists, Federalists, and Anti-Federalists. *See, e.g.*, Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* 8 (2016).

publicity.[69] To bolster these efforts, they spent money to write, promote, and distribute political newspapers and pamphlets. In one famous example, the Federalists and the Republicans engaged in a newspaper duel funded almost entirely by secret payments from the parties, as well as sizeable contributions from private donors.[70] These examples suggest that the funding of political speech during the time of ratification was both ubiquitous and essentially unregulated.

Against this widespread funding of political speech stood only a few regulatory strictures—*none of which regulated coordination*. The Sedition Act of 1798 made it illegal to print, utter, or publish any "false, scandalous, or malicious writing" against the President, Congress, or government as a whole.[71] But the Sedition Act did not limit political contributions or restrict the extent to which parties could coordinate with their candidates in how they used those contributions.[72] Another example—though not from the time of ratification—is the 1907 Tillman Act, which limited corporate contributions to political

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69. App.753-70 (Bush, concurring) (compiling examples of political interest groups' activities during the time of the First Amendment's ratification).

70. *See id.*

71. *See* David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 Am. J. Legal Hist. 154, 154-55 (2001).

72. *Dennis v. United States*, 341 U.S. 494, 522 n.4 (1951) (Frankfurter, J., concurring) (noting that the Sedition Act was aimed at two types of conduct: conspiring against the United States and publishing or uttering false or malicious writings against the United States).

campaigns.[73] (Notably, the fact that an act passed in 1907 is the only statute somewhat similar to 52 U.S.C. § 30116(d) further suggests that there was no American tradition *at the time of ratification*—or for more than a century afterwards—of regulating political funding and coordination of expenditures in the way 52 U.S.C. § 30116(d) does). In any event, the Tillman Act did not limit political parties' ability to coordinate with their candidates in how they used those contributions.

Overall, the only measure Congress took to address the possible corruption associated with political spending or coordination thereof was to investigate aggressively any charges of bribery. Several bribery charges were raised in the years surrounding the First Amendment's ratification, including a bribery accusation against Benjamin Franklin after King Louis XVI of France gave him a valuable gift.[74] Yet all of these charges centered on whether the person had been paid to do something for the personal benefit of another person or party—not whether they had received or given contributions for the purpose of advancing a political campaign or cause. Far from being indicative of a Founding-era prohibition on coordinated political expenditures, these bribery episodes show, if anything, that limiting the ways parties and their candidates could coordinate in using political contributions

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73. *See Citizens United*, 558 U.S. at 394 (Stevens, J., concurring in part).

74. *See, e.g.*, Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (2014), http://www.jstor.org/stable/j.ctt7zswx5 (last accessed Aug 24, 2025).

was *not* the mechanism the Framers used to address any corresponding possibility of corruption.

In sum, nothing like 52 U.S.C. § 30116(d) existed in the founding era. *Amici* are aware of no laws or regulations at the time of ratification (or for more than a century afterwards) that limited the ability of political candidates and political parties to coordinate political spending. In short, whatever concerns the Framers may have had about the possibility of corruption arising from political funding, they did not address those concerns by limiting parties and candidates' ability to coordinate expenditures for political speech. The history and tradition surrounding the enactment of the First Amendment therefore stand in sharp contrast to the restrictions on speech imposed by 52 U.S.C. § 30116(d). Thus, the Government cannot satisfy its burden of identifying an American tradition that justifies the kind of limit on coordinated expenditures that 52 U.S.C. § 30116(d) presents. That provision is therefore unconstitutional.

V. Even under *Buckley*'s tiers-of-scrutiny analysis, restrictions on coordinated spending between a political party and its candidates cannot pass constitutional muster.

A. *Colorado II* should be expressly overruled.

In *Colorado II*, this Court upheld the constitutionality of FECA's limits on coordinated expenditures by a political party committee based on its conclusion that such limits advance the government's interest in fighting political "corruption." But, the "corruption" contemplated by this Court included "not only . . . *quid pro quo* agreements,

but also . . . undue influence on an officeholder's judgment, and the appearance of such influence."[75]

That reasoning may have held water under this Court's then-current approach to the appearance of corruption.[76] But since *Colorado II*, this Court has decisively jettisoned that expansive notion of corruption.[77] Instead, this Court has made clear that the government's interest in "preventing corruption or the appearance of corruption" is "limited to *quid pro quo* corruption."[78] And *quid pro quo* corruption means "a direct exchange of an official act for money."[79] Thus, since *Colorado II*, this Court has consigned the foundation of that decision's upholding of coordinated-party-expenditure limits to the ash heap of history. The briefs submitted by the parties and other *amici* ably demonstrate why *Colorado II* is out of step with this Court's subsequent precedent and must be overruled. Regardless, FECA's restrictions on coordinated party expenditures cannot pass Constitutional muster.

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75. *Colorado II*, 533 U.S. at 441.

76. *See*, *e.g.*, *McConnell*, 540 U.S. at 150 (upholding the constitutionality of contribution limits designed to curb the "appearance" that contributors have "access" to, or "influence" over, "high-level government officials.").

77. *Citizens United*, 558 U.S. at 359-60 ("Ingratiation and access . . . are not corruption.").

78. *Id.*; *Cruz*, 596 U.S. at 305-06 ("[R]ecogniz[ing] only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance.").

79. *McCutcheon*, 572 U.S. at 192.

B. FECA's restrictions on coordinated party expenditures is unconstitutional under this Court's current tiers-of-scrutiny analysis

As shown above, this Court should accept the invitation contained in Judge Thapar's concurrence and Judge Bush's concurrence *dubitante* and apply *Bruen*'s two-step history-and-tradition rubric to determine whether coordinated-party-expenditure limits and other restrictions on political speech run afoul of the First Amendment. Regardless, whether this Court accepts Judge Thapar's and Judge Bush's invitation, FECA's limits on coordinated party expenditures are still unconstitutional under either level of this Court's current tiers-of-scrutiny approach.

Under *Buckley* and its progeny, to pass constitutional muster, campaign-finance limits on political spending or other political speech must advance a "sufficiently important" governmental interest, and be "closely drawn" to that interest.[80] As noted above, there is "only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance."[81] And *quid pro quo* corruption requires "a direct exchange of an official act for money.[82] So attempts to limit a donor's "access" to, or "influence" over, a candidate are

80. *Id.* at 197 (citations omitted).

81. *Cruz*, 596 U.S. at 305.

82. *McCutcheon*, 572 U.S. at 192; *FEC v. NCPAC*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.").

constitutionally unsound.[83] Here, it is clear that FECA's limitations on coordinated party expenditures do not advance a valid anti-corruption interest.

It has been suggested that limits on coordinated-party spending might prevent political parties from corrupting their own candidates. But "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes."[84] And, "achiev[ing] that aim . . . does not . . . constitute a subversion of the political process."[85] So the concept of a party "corrupting" its candidates makes no sense. Indeed, a candidate or elected official's decision to "alter or reaffirm" their positions on an issue "in response to political messages paid for by [political parties] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view."[86] Indeed, the practical reality of political parties confirms this—because a party's members possess a wide range of (often conflicting) views, interests, and priorities, a single "corrupting" influence is "unlikely . . . to predominate."[87]

It has also been suggested that limits on coordinated-party expenditures might be warranted to prevent donors

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83. *Citizens United*, 558 U.S. at 360; *Cruz*, 596 at 305-06.

84. *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 646 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

85. *Id.* (quotation marks and quotation omitted).

86. *NCPAC*, 470 U.S. at 498.

87. App.734.

from circumventing direct candidate contribution limits. On the surface, preventing circumvention of contribution limits can be a "permissible" governmental purpose for restricting campaign speech.[88] That assertion, however, is dubious, given that such spending limits reflect a "prophylaxis-upon-prophylaxis" approach by which political speech is restricted for the supposed purpose of fighting corruption.[89] Indeed, as Judge Thapar recognized, the fact that FECA's limitation on coordinated party expenditures is part of a five-layered, "prophylaxis-upon-prophlyaxis-upon-prophlyaxis-upon-prophlyaxis-upon-prophlyaxis" approach should be "a significant indicator that" limiting coordinated-party expenditures "may not be necessary" to prevent corruption.[90] The idea that tacking coordinated-party-expenditure limits on top of four other prophylactic measures—(1) donor-to-candidate contribution limits; (2) donor-to-party contribution limits; (3) prohibition on earmarking funds; and (4) public-disclosure requirements—would somehow have a meaningful effect on preventing political corruption is rather inconceivable. This is especially true where there is no "record evidence or legislative findings demonstrating" that coordinated-party-expenditure limits "further[] a permissible anti-corruption goal."[91]

As a result, FECA's coordinated-party spending limits do not further the government's interest in preventing *quid pro quo* corruption or its appearance—i.e., the "only

88. *Buckley*, 424 U.S. at 35-36.

89. *See Cruz*, 596 U.S. at 306.

90. App.737 (quoting *Cruz*, 596 U.S. at 306) (cleaned up).

91. *Cruz*, 596 U.S. at 307, 313.

. . . permissible ground for restricting political speech."[92] And even if they did, they would still run afoul of the "closely drawn" prong.[93]

To be "closely drawn," coordinated-party-expenditure limits must be "narrowly tailored to achieve the desired objective,"[94] and "avoid unnecessary abridgment of associational freedoms."[95] Under this approach, restrictions on political speech are not closely drawn if Congress had "multiple alternatives available" that would serve the government's anti-corruption interests while simultaneously "avoiding unnecessary abridgment of First Amendment rights."[96] Applying that rigorous analysis here shows that coordinated-party-expenditure limits are not closely drawn.

First, as others have pointed out, the anti-circumvention rationale for limiting coordinated-party expenditures appears to rest on the disparity between FECA's limit on contributions to federal candidates and its much greater limit on contributions to political parties. Leaving aside that the *government* created this disparity, *compare* 52 U.S.C. § 30116(a)(1)(A) *with* 52 U.S.C. § 30116(a)(1)(B), any problems created by the disparity could be easily solved

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92. *Id.* at 305.

93. *McCutcheon*, 572 U.S. at 197 (citations omitted).

94. *Id.* at 218.

95. *Buckley*, 424 U.S. at 25.

96. *McCutcheon*, 572 U.S. at 218, 221 (quotation marks and quotation omitted).

by lowering the donor-to-party contribution limits—a far narrower approach.[97]

Second, coordinated-party-expenditure limits do not restrict the category of actors who are the source of the supposed corruption (i.e., donors). Rather, the actors who have their speech restricted are a political parties, an entirely different category altogether. So there is a "substantial mismatch" between the restrictions on speech imposed by coordinated-party-spending limits and the supposed corruption they purport to target.[98] Simply put, the "*quid*" in the targeted *quid pro quo* is not even present in the context of spending coordination between political parties and candidates.

Indeed, restricting coordinated party expenditures results in overbreadth because coordinated-party-expenditure limits restrict a wide variety of categories of speech protected by the First Amendment that present absolutely no possibility of *quid pro quo* corruption. For example, aside from contribution-like conduct like directly paying for a candidate's bills, restrictions on coordination effectively prevent a political party committee from speaking with a candidate it supports regarding the timing of an advertising campaign, the messaging of a particular advertisement, or even the medium by which political advertising is distributed (e.g., digital, television, radio, social media, or print). Such activity by a political party simply carries no possibility of "a direct exchange

97. App.715; *see Cal. Med. Ass'n. v. FEC*, 453 U.S. 182, 198-99 (1981) (upholding constitutionality of limits on political contributions).

98. *McCutcheon*, 572 U.S. at 199.

of an official act for money."[99] As a result, coordinated-party-expenditure limits restrict a far broader category of protected political speech than can be justified on anti-corruption or anti-circumvention grounds.

In sum, coordinated-party-expenditure limits: (1) restrict political parties' speech based on a fundraising disparity created by Congress; (2) restrict the speech of the wrong actor for anti-corruption or anti-circumvention purposes (i.e., they restrict the speech of political parties rather than individual donors); and (3) restrict a broad range of protected First Amendment conduct that has absolutely no potential for *quid pro quo* corruption and, thus, unnecessarily abridges associational freedoms. So, aside from the lack of any legitimate anti-corruption rationale, FECA's limits on coordinated-party spending are not "closely drawn" and therefore fail intermediate scrutiny.[100]

C. The relationship between *amici* and the relevant political party committees underscores why limits on coordinated party expenditures are unconstitutional

The failure of coordinated-party-expenditure limits to advance an anti-corruption or anti-circumvention interest or to satisfy the closely drawn prong is demonstrated by interaction between *amici* and the political party committee with the closest ties to Congress, petitioner NRCC.

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99. *Id.* at 192.

100. *Id.* at 218.

The House Republican Leaders are the three highest-ranking members of the Republican caucus in the United States House of Representatives. Aside from supporting President Donald J. Trump and his administration by passing legislation to promote freedom and improve the lives and economic circumstances of all Americans, one of *amici*'s primary goals is to defend and expand the Republican majority in Congress. That requires winning elections in congressional districts across the country.

The political party committee focused on electing Republicans to the United States House of Representatives is petitioner NRCC. To help NRCC achieve its goals, the House Republican Leaders help it raise funds to support Republican congressional candidates in districts across the nation. And those efforts have yielded results. The House Republican Leaders are consistently among NRCC's biggest fundraisers. For example, in 2024, the House Republican Leaders collectively raised $27,551,952.40 for NRCC. Similarly, during just the first half of 2025, they collectively raised $21,257,544.60 for NRCC. Those fundraising numbers represent contributions from tens of thousands of individual contributors. And those numbers do not include the tens of millions of dollars that *amici* collectively transferred directly to candidates—in the first half of 2025, Speaker Johnson raised $13,215,615.87 for congressional candidates, Majority Leader Scalise raised $5,809,788.46 for congressional candidates, and Majority Whip Emmer raised $2,489,967.16 for congressional candidates, for a combined total of $21,515,371.49.

Despite raising significant funds for NRCC, the House Republican Leaders do not control what happens with that money once it lands in NRCC's bank account.

Rather, NRCC does.[101] And, neither the House Republican Leaders nor the individual donors dictate how NRCC uses the funds, or which candidates those funds are used to support. That shouldn't be surprising (otherwise, the House Republican Leaders would be violating FECA's and the FEC's earmarking rules).[102]

The House Republican Leaders also do not condition their fundraising efforts on whether a particular member of Congress votes a certain way, or whether a candidate promises to do so. That's because the House Republican Leaders' fundraising efforts are not focused on ensuring that members of their caucus vote a particular way. Rather, they are focused on maintaining and growing the caucus generally. To that end, the House Republican Leaders work symbiotically with NRCC to support the election efforts of the entire Republican caucus in Congress.

The relationship between the House Republican Leaders and NRCC underscores the paucity of the supposed anti-corruption rationale for FECA's coordinated-party-expenditure limits. Indeed, defenders of coordinated spending limits focus on the theoretical possibility of corruption posed by an individual donor who colludes with a political party to bribe a political candidate in exchange for political favors. But, when the

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101. *Id.* at 210-211 (stating that when a donor contributes to a candidate or political party, the donor "must by law cede control over the funds" to the recipient of the funds).

102. App.737 (Thapar, concurring) (reasoning that earmarking rules target the same interest claimed below by the government, a "significant indicator" that limits on coordinated spending by political parties "may not be necessary").

House Republican Leaders raise money for NRCC, there are multiple intermediate entities between the donor and the candidate, which mitigates the possibility of corruption by making it less likely that the donor could enforce its desire to (illegally) earmark the funds. The added layers of attenuation also reduce the likelihood that a specific donor's contribution would induce a candidate to provide a political favor illegally in exchange for such a bribe.

That's especially true where, like here, the aggregate value of contributions combined with the large number of donors involved in the House Republican Leaders' fundraising efforts related to NRCC significantly dilutes the potential for any particular donor to exercise a corrupting influence over any particular candidate.[103]

Finally, the wide range of conduct that falls within the definition of "coordination" means that the limitations on coordinated-party expenditures impose significant and "unnecessary" restrictions on the speech rights and "associational freedoms" of the House Republican Leaders and the members of their caucus.[104] The coordinated-party-expenditure limits prevent current (and potential) members of the House Republican caucus from working

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103. *See McCutcheon*, 572 U.S. at 212 (stating that donors are unlikely to circumvent candidate-contribution limits by contributing to PACs because the donor's contributions "will be significantly diluted by all the contributions from others to the same PACs").

104. *See Buckley*, 424 U.S. at 25; *see also* App.735 (Thapar, concurring), citing *Colorado II*, 533 U.S. at 468 n. 2 (Thomas J., dissenting) ("Coordination comes in all shapes and sizes, and not all of it is equivalent to a direct contribution.")

with NRCC—the party organization dedicated to helping them win elections—to optimize the timing of political advertising campaigns, ensure consistent messaging, and allocate resources efficiently. As a result, the restrictions on the speech of the House Republican Leaders, their caucus, and NRCC that are imposed by FECA's coordinated-party-expenditure limits—speech which cannot possibly give rise to *quid pro quo* corruption—demonstrate that the limits are overly broad and necessarily *not* "closely drawn."

For multiple reasons, therefore, FECA's limitations on coordinated party expenditures violate the First Amendment and must be struck down as unconstitutional.

CONCLUSION

When the validity of a Government regulation is challenged under the Second Amendment, courts turn to the text of the amendment as informed by history and tradition. That is the only test that satisfies the judiciary's duty of fidelity to the Constitution, as opposed to its own varied predilections. Because of *Buckley*, courts do *not* look to the First Amendment as informed by history and tradition when resolving a challenge to the validity of a Government regulation that restricts political speech. For that reason alone, Petitioners should prevail and this Court should hold 52 U.S.C. § 30116(d) is unconstitutional. But even if this Court retains *Buckley*'s ahistorical two-tier test, Petitioners should still prevail because 52 U.S.C. § 30116(d) does not further an important Government

interest and is not closely drawn to that interest. Either way, 52 U.S.C. § 30116(d) must fall.

Respectfully submitted,

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