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 AMERICA FIRST POLICY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Gina D'Andrea
Counsel of Record
AMERICA FIRST POLICY INSTITUTE
1455 Pennsylvania Ave., NW,
Suite 225
Washington, DC 20004
(516) 993-3154
gdandrea@americafirstpolicy.com

Counsel for Amicus Curiae

August 28, 2025

QUESTION PRESENTED

Prohibitions on coordinated campaign expenditures are a judge-made policy that has proven unworkable and violates the rights to free political speech of all speakers. Should this Court declare that all prohibitions on coordinated campaign communications violate the Free Speech Clause, regardless of the parties involved?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

FEC Opinions & Matters Under Review

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The America First Policy Institute (AFPI) is a 501(c)(3) non-profit, non-partisan research institute. AFPI exists to advance policies that put the American people first. Our guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do.

AFPI is a strong defender of free speech, which we believe is paramount to a thriving democracy. In addition to developing policies that promote free speech, AFPI represents clients whose free speech rights have been violated. *See Anderson v. Oregon School Activities Ass'n*, No. 3:25-CV-01302-YY, (D. Or.). AFPI has an interest in this case to see political speech protected not just for the political party litigants but for all Americans.

[1] No counsel for a party authored this brief, in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Sup. Ct. R. 37.6.

SUMMARY OF THE ARGUMENT

The Court should abandon the entire concept of coordinated expenditures. The Court invented the concept by claiming to find it in the text of the Federal Election Campaign Act of 1971, but it was not there.

The Act delineated expenditures and contributions in separate sections with separate rules. The Court conflated the two by treating coordinated expenditures as contributions and subjecting them to limits. Since then, the Court has found that limits on virtually all other expenditures are an unconstitutional violation of free speech. The Court should apply this same reasoning to coordinated expenditures.

Furthermore, since its creation, the concept of coordinated expenditures has caused numerous problems which have chilled free speech. First, it cannot be defined. Congress could not define it, so it instructed the Federal Election Commission to define it. But the commission could not define it either. Twice it defined "coordinated communication" in a way that was rejected by the District Court for the District of Columbia, before the third definition was accepted. Such a nebulous concept should not form the basis for prohibited conduct.

Second, even the third definition is largely unenforceable. Candidates regularly fundraise for so-called independent expenditure committees that they know will be supporting their campaign. They also share messaging information publicly on their websites that they know will be used by independent expenditure committees to support their campaign.

Finally, when the commission or the Department of Justice decide to enforce prohibitions on coordinated expenditures, they do so in ways that are arbitrary and unfair. The different treatment of similarly situated individuals results in justified claims of favoring one's friends or selective prosecution of one's enemies.

In sum, the creation of coordinated expenditures was a judge-made policy, and it has proven to be a bad policy in practice. The Court should abandon it wholesale, enjoining the entirety of 52 U.S.C. § 30116(a)(7)(B) and (C), as well as (d), as a facially unconstitutional violation of the Free Speech Clause.

ARGUMENT

I. The prohibition on coordinated campaign expenditures is judge-made law that has proven impossible to define.

A. The Supreme Court invented coordinated campaign expenditures.

The very concept of a coordinated campaign expenditure was invented by the Supreme Court: "*Buckley* introduced the notion of 'coordinated expenditures.'" *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 85 (D.D.C. 1999) (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)). The Supreme Court's flawed decision in *Buckley* confusingly blurred the line between campaign contributions and campaign expenditures right after the Court had made the distinction preeminent to the future of campaign finance.

The Federal Election Campaign Act of 1971, as amended in 1974 ("FECA"), inhibited political speech by placing limits on both campaign contributions and campaign expenditures. *Buckley*, 424 U.S. at 189-193, App. (quoting former 18 U.S.C. § 608). In *Buckley*, this Court correctly enjoined limitations on campaign expenditures, but it also allowed limitations on campaign contributions. It reasoned that campaign contributions could be limited because they could lead to corruption, but campaign expenditures are protected free speech that could not be limited: "[The Supreme] Court has allowed Congress and the FEC wide berth to promulgate 'prophylactic' rules limiting contributions[; b]y contrast, the Court has progressively struck

down or severely curtailed . . . limitations on independent expenditures." *Christian Coalition*, 52 F. Supp. 2d at 84.[2]

"But the distinction was recognized to be problematic from the moment it was announced." *Id*. Even within the *Buckley* decision, the Court blurred the line between contributions and expenditures. The circuit court had upheld the FECA $1,000 limitation on expenditures that mention a candidate, agreeing with supporters "that it [wa]s necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." *Buckley*, 424 U.S. at 46. The *Buckley* Court rejected this characterization of the former Section 608(e)(1) and found that the provision violated the Free Speech Clause by prohibiting third-party political speech. *Id*. at 51.

But in so doing, the *Buckley* Court created a new exception for "expenditures controlled by or coordinated with the candidate and his campaign." *Id*. at 46. The Court erroneously claimed that "such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act." *Id*. (citing former Section 608(b)). But Section 608(b) of the

---

[2] This market distortion has led political parties to overwhelmingly recruit candidates for office who can self-fund, or spend unlimited amounts of money promoting their own campaigns and not have to worry about the limitations on campaign contributions that the Court left in place. This trend has marginalized and discouraged the vast majority of Americans from running for office, and it has further contributed to the United States Senate's designation as the "Millionaires' Club." *See, e.g.,* Keith Olbermann, *The millionaires' club*, NBC News, June 16, 2004, available at https://www.nbcnews.com/id/wbna5226122.

Act said nothing of the sort. It limited contributions only and made no mention of expenditures that should be treated as contributions. *Id.* at 189-90, App.[3]

By inventing coordinated campaign expenditures, the *Buckley* Court turned what Congress deemed an expenditure into a new quasi-contribution. Thus, it allowed limitations on certain types of expenditures: those that were "coordinated with the candidate." *Id.* at 46. This court-created doctrine meant expenditures that should not be limited would now be treated as contributions that could be limited. As will be explained, this doctrine, which limits free speech, has caused harm and confusion.

B. Coordinated campaign expenditures have proven nearly impossible to define.

Courts, Congress, and the Federal Election Commission ("FEC") have all struggled to define coordination since its inception. In the 1976 amendment to FECA, Congress first tried to define "coordination" through its inverse, an "independent expenditure,"

---

[3] Further, the *Buckley* Court correctly claimed that the former Section 608(e)(1) did not apply to expenditures made "on behalf of a candidate" because those expenditures were covered by the former Section 608(c)(2)(B). *Id.* at 47, n. 53. But then it erroneously claimed that, under Section 608(c)(2)(B), expenditures "'authorized or requested by [a] candidate, [his] authorized committee, or [his] agent' . . . are to be treated as expenditures of the candidate *and contributions* by the person or group making the expenditure." *Id.* (quoting former 18 U.S.C. § 608(c)(2)(B) (emphasis added)). Once again, the section made no mention of treating expenditures as contributions. *See id.* at 192, App. Nor was there a need for Congress to blur the line between contributions and expenditures because both were limited under the congressional framework.

and thus left all other expenditures unprotected, including those that were coordinated. *See FECA Amendments of 1976*, Pub. L. No. 94-283, 90 Stat. 475 (1976). In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress again tried to implement the Court's decision in *Buckley* to protect independent but not coordinated expenditures, but it failed to do so. BCRA stated that certain third-party expenditures should be "treated as a contribution to the candidate" if they were "coordinated with a candidate," but it, too, failed to define "coordination." *BCRA*, Pub. L. No. 107-155, 116 Stat. 81 (2002) (formerly codified at 2 U.S.C. § 441a). Perceiving the inadequacy of its missing definition, Congress directed the FEC to define the term: "The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees." *Id.* (Note to former 2 U.S.C. § 441a).

But the FEC also struggled mightily to define the term. For nearly a decade, it tried to balance this Court's constitutional decision to protect the free speech of so-called independent expenditures with its policy decision to allow limitations on so-called coordinated expenditures. In 2003, the FEC issued its first post-BCRA definition of a "coordinated communication." Coordinated and Independent Expenditures, 68 Fed. Reg. 421-458. But in 2004, the District Court for the District of Columbia found that the definition was contrary to the statute and ordered the FEC to revise it. *Shays v. FEC*, 337 F.Supp.2d 28 (D.D.C. 2004). That decision was affirmed by the circuit court in 2005. *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). In 2006, the FEC issued two revised definitions: first of the term "agent," which was used within the definition

of "coordinated communication." Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975-4980. Then, on June 8, 2006, the FEC published its second attempt at the definition of a "coordinated communication." Coordinated Communications, 71 Fed. Reg. 33190-33211. But in 2007, this second definition was also enjoined by the district court. *Shays. v. FEC*, 508 F.Supp.2d 10 (D.D.C. 2007). In 2008, the decision was also affirmed on appeal. *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). Therefore, in 2010, the FEC issued its third definition of a "coordinated communication," finally bringing the regulation into compliance with BCRA, as interpreted by the courts. Coordinated Communications, 75 Fed. Reg. 55947-55961. This laborious process confirmed that the judicial creation of "coordinated expenditures" proved nearly impossible to define and should be abandoned all together.

II. This Court should reject prohibitions on coordinated campaign expenditures, regardless of the parties involved, because they are all enforced rarely and unfairly.

The Supreme Court's policy of treating coordinated expenditures as contributions and allowing them to be prohibited should be abandoned because the policy has proven unworkable in practice. The definition of "coordinated expenditures" is vague, nuanced, and overbroad. Because the term is nearly impossible to define, it is also nearly impossible to enforce, and when it is, it is enforced unevenly and unfairly.

A. The prohibition on coordinated campaign expenditures is largely unenforceable.

Candidates have largely found ways to avoid the prohibition on coordinated campaign expenditures. They purport to follow the letter of the law while openly violating the spirit of the law.

For example, it is common practice for a federal candidate to attend a fundraiser for an independent expenditure committee that supports his candidacy. Brennan Center for Justice, *Strengthen Rules Preventing Candidate Coordination with Super PACs*, Feb. 4, 2016.[4] At the event, the candidate can and often does describe the committee as a fine organization that supports the important causes that he supports. The candidate is permitted to say that the committee has endorsed him and is supporting him. He can even say, "I recommend the committee to you, and I hope you will support it. I am restricted in the amounts you can give directly to my campaign and that I can ask for. I hope you will support the committee." Left unsaid is that donors can give unlimited amounts of money to the independent expenditure committee, which in turn will spend that money in support of the candidate. This type of political activity frequently occurs out in the open, *id.*, and is considered protected political speech under the Free Speech Clause. It is not prohibited even by the third FEC "coordinated communication" rule. *See* 11 C.F.R. § 109.21.

---

[4] Available at https://www.brennancenter.org/our-work/research-reports/strengthen-rules-preventing-candidate-coordination-super-pacs.

Candidates also receive support from independent expenditure committees by publishing their political plans on the internet for the whole world to see. A candidate's website is the primary vehicle by which a voter can quickly find out the most important reasons why that candidate thinks the voter should elect him. Simultaneously, candidates' websites are commonly used to openly share information with independent expenditure groups that support them. In some cases, this practice is carried out through "redboxing," highlighting key strategic information in a red box on the website for the entire public to see. Then, independent expenditure groups use that information, which came directly from the candidate, to make so-called independent decisions on how best to spend their money to support the candidate. This is coordination in plain sight. Gabriel Foy-Sutherland & Saurav Ghosh, *Coordination in Plain Sight: The Breadth and Uses of "Redboxing" in Congressional Elections*, 23 Election L.J.: Rules, Pol., & Pol'y 2, June 17, 2024.[5]

These practices are so common that it is now virtually impossible to win a congressional or larger race without an independent expenditure group running ads in favor of the winning candidate. *Id.* ("candidates who engaged in redboxing [received independent expenditures that were] often hundreds of times larger" than those who did not.) By attempting to prohibit coordinated expenditures, the *Buckley* Court merely created a shell game, in which those funds are shifted to shadowy organizations that operate with far less

---

[5] Available at https://www.liebertpub.com/doi/full/10.1089/elj.2023.0038#:~:text=Abstract,independent%20expenditures%20in%20congressional%20races.

transparency than candidate committees. The entire coordination doctrine has been of no use and has caused more harm than good. It should be shelved.

B. Enforcement of prohibitions on coordinated campaign expenditures is inconsistent and inequitable.

The ambiguous definition of what constitutes a coordinated communication leads to enforcement of the prohibition that is inconsistent and unfair.

For example, it is common practice for a candidate to approach an independent expenditure committee and say, "I hope you will support me in this race." Such support could take a myriad of legal avenues, including a public statement of endorsement. But if the group decides, on its own, to run advertisements promoting the candidate, then are those expenditures made "at the request or suggestion of [the] candidate," thereby transforming his request from legal to illegal? 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20-21. The line between lawful requests for support and unlawful coordination is critically important for enforcement purposes yet difficult to discern. It leaves candidates at considerable risk of both civil and criminal liability and it, thus, unnecessarily chills legal, political speech.

Further, the definition of who constitutes a candidate's "agent" also opens the candidate to unnecessary liability because an agent cannot coordinate campaign expenditures under FECA. 52 U.S.C. § 30116(a)(7)(B)(i) and (C)(ii). But under FEC rules, an agent can be given authority either explicitly *or implicitly*. 11 C.F.R. § 300.2(b). The vague notion of im-

plicit assignment of agency could easily occur inadvertently. In the informal context of day-to-day campaigning and divining the future of the race and what could happen, it is difficult to determine when a conversation with a politically attuned friend turns into implicitly giving the friend authority to coordinate with a third party on the candidate's behalf. Vague concepts such as implicit authority lead to selective enforcement of campaign coordination prohibitions.

The vast majority of allegations of campaign coordination are dismissed by the FEC with no penalty, and a small number result in a civil fine. But those that remain are prosecuted criminally and result in a punishment that is strikingly out of proportion with those that are dismissed or receive a civil fine. This unfair treatment of the same underlying activity is yet another reason to scrap the *Buckley* Court's decision to treat certain campaign expenditures as contributions.

For example, in *In re Steelman for U.S. Senate*, MUR 6616 (FEC First General Counsel's Report), the chairman of a federal campaign contributed funds from his state committee to another state committee, which then contributed $25,000 to an independent expenditure committee, which supported the federal candidate. Media articles speculated that the federal campaign chairman had maintained control over the intermediary state committee, but the FEC determined the evidence was insufficient to open an investigation into the matter. The FEC dismissed similar complaints in *In re Steve Oelrich*, MUR 6601 (FEC Factual & Legal Analysis, July 26, 2014); FEC Advisory Op. 2009-26 (Coulson); and FEC Advisory Op. 2007-1 (McCaskill).

In rare instances, the FEC reaches a negotiated settlement with a candidate and imposes a civil fine. For example, in *In re Beth Harwell*, MUR 8091 (Enforcement, April 12, 2024), the complainant alleged that Harwell had illegally given funds from her state account to an independent expenditure group, which ran ads in support of her congressional race. Ultimately, the FEC reached an agreement with Harwell, in which she paid $16,000 as a civil penalty.

Finally, in a handful of cases, the Department of Justice has pursued criminal penalties for coordinating campaign expenditures. *See, e.g., United States v. Emmons*, 8 F.4th 454, 470-73 (6th Cir. 2021). In *Emmons*, one of the defendants, who was alleged to have unlawfully coordinated with his own daughter, received a prison sentence of 21 months. *Id.* at 465.[6] This disparate treatment for political speakers in similar circumstances is entirely unjust. This Court should prevent this inequitable system of punishments by ending the prohibition on coordinated campaign communications.

CONCLUSION

This Court's invention of coordinated expenditures has created issues that only this Court can rectify. The myriad problems with defining and enforcing coordinated expenditures support abandoning this project wholesale. This Court should enjoin the entirety of 52 U.S.C. § 30116(a)(7)(B) and (C), as well as (d), to end

---

[6] He was later pardoned by President Joe Biden. *Statement from President Joe Biden*, "Gerald G. Lundergan," January 20, 2025, available at https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2025/01/20/statement-from-president-joe-biden-16/.

prohibitions on coordinated communications, regardless of the parties involved.

Respectfully submitted,

Gina D'Andrea
Counsel of Record
AMERICA FIRST POLICY INSTITUTE
1455 Pennsylvania Ave., NW,
Suite 225
Washington, DC 20004
(516) 993-3154
gdandrea@americafirstpolicy.com

Counsel for Amicus Curiae

August 28, 2025