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 INSTITUTE FOR FREE SPEECH AND THE MANHATTAN INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. Along with scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. The Institute has an interest here because the Sixth Circuit decision affirming the continued applicability of *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), undermines the First Amendment rights of millions of Americans and introduces confusion into an area of the law that this Court has recently endeavored to clarify.

The Manhattan Institute (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting constitutionally protected liberties, advocating for economic opportunity, and opposing government overreach. This case concerns MI because it highlights an ongoing and prevalent misinterpretation of the First Amendment's applicability in the marketplace of political ideas. MI also has institutional expertise in urban politics, including with respect to multi-party-line ballots in New York City.

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1. No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amici or its counsel, financially contribute to preparing or submitting this brief. S. Ct. R. 37.6.

SUMMARY OF THE ARGUMENT

Colorado II stands out as an aberration in recent First Amendment cases. Rather than scrutinizing the government's claims, the Court largely deferred to Congressional judgment based on its own intuition about the corrupting influence of money in politics. That decision should be overruled because its speculation about the necessity of FECA's limits on coordinated party expenditures turned out to be wrong, and its deferential standard of review turns the First Amendment on its head.

But no serious examination of *Colorado II* can overlook how inextricably intertwined its flaws are with the Court's original missteps in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). Like *Colorado II*, *Buckley*'s analysis upholding FECA's individual contribution limits rested on a thin record and conjecture about corruption and trust in government. And like *Colorado II*, that conjecture has been proven wrong over the last five decades. The Court's deferential approach in *Colorado II* has its roots in *Buckley*, which must be removed.

All this is made worse by the fact that Congress has no constitutional authority to regulate campaign speech at all. *Buckley* mistakenly conflated speech about elections with the election itself, and in doing so, summarily concluded that Congress has authority under the Elections Clause to regulate political speech. But talking about issues and the candidates running for office is not the same as the "Times, Places and Manner of holding" an election. U.S. Const. Art. I, § 4. The Court's nonchalant approval of Congress exercising authority over election-related speech in *Buckley* set the stage for the mess that campaign-finance jurisprudence has become. The Court

should start untangling that mess by returning to first principles and reexamining Congress's authority to regulate political speech in the first place.

ARGUMENT

FECA's limit on coordinated party expenditures fights a problem that no one can prove exists. That should settle the matter. The First Amendment does not allow the government to limit political speech based on "mere conjecture." *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) (quotation omitted). So the government's hunch that limiting party coordination is necessary to stop donors from circumventing individual contribution limits is not enough.

Colorado II is an aberration in modern campaign-finance law. But at the time, it fit right in. The "deferential form of review" that Chief Judge Sutton identified below, JA721, "has firm roots in *Buckley* itself," *see McCutcheon*, 572 U.S. at 208. And for the last fifty years, the bulk of federal and state law limiting campaign speech has rested on unproven theories about money in politics. This trend that started in *Buckley* and persists today "provide[s] core political speech with less protection than other forms of speech." Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* 133 (2001). It should end here.

I. Recent experience proves the conjecture in *Colorado II* wrong.

Colorado II upheld FECA's coordinated spending limits on the theory that "unlimited coordinated spending by a party raises the risk of corruption (and its appearance) through circumvention of valid contribution limits."

533 U.S. at 456. But even at the time, there was little evidence that donors used coordinated party spending for such circumvention. The Court attributed this to the fact that federal law did not allow "unlimited coordinated spending," precluding "recent experience" to draw from. *Id.* at 457. So instead, the Court relied on evidence that "parties test the limits of the current law" to conclude "beyond serious doubt" that unlimited coordination would open the floodgates to nefarious behavior. *Id.*

Set aside (for a moment) whether that kind of predictive and deferential analysis conforms to this Court's more recent decisions. *See FEC v. Ted Cruz for Senate*, 596 U.S. 289, 307–08 (2022). The "recent experience" the Court lacked in *Colorado II* exists today because many states have enacted the exact kind of system the Court feared.

More than half the states do not prevent political parties from coordinating with their candidates on expenditures. JA722. Many of those states cap the amount that individuals can donate to candidates while allowing parties to make unlimited donations.[2] Other states allow parties to coordinate expressly[3] or through in-kind

2. *See* Cal. Gov't Code § 85301; 10 Ill. Comp. Stat. 5/9-8.5(b); Kan. Stat. Ann. § 25-4153(a), (f); Ky. Rev. Stat. §§ 121.150(6), 121.015(3); La. Rev. Stat. § 18:1505.2(H)(1)(a), (b); N.J. Stat. Ann. § 19:44A-29; N.J. Admin. Code § 19:25-11.2; N.Y. Elec. Law § 14-114(1), (3); N.C. Gen. Stat. § 163-278.13(a), (h); S.D. Codified Laws §§ 12-27-7 & 12-27-8; Vt. Stat. tit. 17, § 2941(a); Wis. Stat. §§ 11.1101(1), 11.1104(5); Wyo. Stat. § 22-25-102(a).

3. Ariz. Rev. Stat. §§ 16-911(B)(4)(b) & 16-912; W. Va. Code §§ 3-8-5c; 3-8-9b(a).

contributions[4] without restriction, even though they also limit individual donations to candidates. All told, at least 17 states that prevent individuals from making unlimited contributions impose virtually no restriction on how parties financially coordinate with their own candidates.[5]

Given the large number of states that restrict individual contributions but do not restrict party coordination, one would expect to see evidence that donors use party coordination to circumvent individual contribution limits—at least, if *Colorado II* was right in holding that it is "beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." 533 U.S. at 457. But that's not the story the states' experience tells. Even the FEC's own expert could not identify a single example of a donor using the party as a conduit

4. 970 Mass. Code Regs. 1.04(12); N.M. Stat. § 1-19-34.7(A), (J); Ohio Rev. Code § 3517.102(B)(1), (6).

5. Two more states—Maryland and Washington—restrict party support but at much higher levels than what the FEC allows, even though both states impose smaller contribution caps than the federal government for individual donors. *Compare* Md. State Bd. of Elections, *2026 Election Cycle Central Committee Coordinated Campaign Contribution Limits*, available at https://perma.cc/VZ9K-CYX5 (approximately $2.7 million in coordinated spending), & Wash. Public Disclosure Commission, *Contribution Limits*, available at https://perma.cc/D2R6-L6KS (approximately $5.7 million in coordinated spending), *with* FEC, *Coordinated party expenditure limits*, available at https://perma.cc/D6AU-3PXU ($595,000 for Maryland and $761,900 for Washington); *compare* Md. Elec. Law Code Ann. § 13-226, Wash. Rev. Code. § 42.17A.405, & Wash. Admin. Code § 390-05-400, *with* FEC, *Contribution Limits*, available at https://perma.cc/QS5T-EHN6.

to circumvent the individual contribution limits to further a *quid pro quo*.

Consider a state like Vermont. It has some of the lowest contribution limits for statewide candidates, *see* Alec Greven, *State Contribution Limits Report* (March 11, 2024), https://perma.cc/NQN9-T86A, and a history of enacting even lower limits than exist today, *see Randall v. Sorrell*, 548 U.S. 230, 250 (2006). The limits double for donations to parties, Vt. Stat. tit. 17, § 2941(a)(5), and Vermont allows parties to make unlimited contributions to privately financed candidates, Vt. Stat. tit. 17, § 2941(a)(3)(B). This should be the perfect storm: Individuals who max out to a candidate under one of the nation's lowest contribution limits can triple that contribution by giving to the party, knowing that the party can make unlimited donations back to the candidate. If "the inducement to circumvent would almost certainly intensify" with unlimited party coordination, *Colorado II*, 533 U.S. at 460, Vermont would be fertile ground for such unscrupulous donors.

Yet in the record below, the FEC was "unable to identify a single case of *quid pro quo* corruption in this context." *Cruz*, 596 U.S. at 307. Even after the district court allowed discovery, and even after the FEC hired an expert to prove its factual claims, the FEC produced no evidence that Vermont (or any state with a legal regime like Vermont's) has been susceptible to systematic *quid pro quo* corruption—or even anecdotal *quid pro quo* corruption—from donors using parties as a funnel to support specific candidates.

This is not for lack of trying. Focusing on Ohio (where this suit originated), the FEC's expert identified several political scandals to bolster his view that parties are

particularly likely to engage in corruption. JA56–58. But in doing so, he admitted (as he had to) that "coordinated expenditures do not feature prominently in the examples of (quid pro quo) corruption" on which he relied. *Id.* at 57. No matter, the expert explained: the lack of evidence "should be taken as a triumph of the existing legal regime" because "[t]he fact that scandals specifically involving coordinated federal expenditures have not been more common suggests that the current regulations are working as intended." *Id.* at 57–58.

Perhaps. But what to make of the fact that Vermont does not limit coordinated expenditures from parties in its elections? Nor does California? Nor Kansas? Nor Kentucky? And so on.

If the lack of *quid pro quo* corruption involving coordinated party expenditures is "taken as a triumph of the existing legal regime," *id.* at 57, then that triumph in states lacking coordination limits undermines any claim that restricting party coordination is "necessary to prevent an anticipated harm," *Cruz*, 596 U.S. at 307. The "evidentiary grounds . . . to sustain the limit [on party coordinated spending]," *Colorado II*, 533 U.S. at 456, does not exist.

Indeed, three of the ten states with the lowest individual contribution limits also allow unlimited party coordination or contributions.[6] Ky. Rev. Stat. § 121.150(6); 121.015(3); 970 Mass. Code Regs. 1.04(12); Vt. Stat. tit.

6. Until this year, that number was four. Kansas allows unlimited party coordination, Kan. Stat. Ann. § 25-4153(f), but it recently increased its contribution limit for individuals so it longer falls within the ten lowest in the nation, Kan. Stat. Ann. § 25-4153(a).

17 § 2941(a); Greven, *supra*. And those states all allow individuals to make significantly higher contributions to parties than to candidates. *Compare* Ky. Rev. Stat. § 121.150(6), *with* Ky. Rev. Stat. § 121.150(11); *compare* 970 Mass. Code Regs. 1.04(12)(4), *with id.* 1.04(12)(14); *compare* Vt. Stat. tit. 17 § 2941(a)(1)–(3), *with* Vt. Stat. tit. 17, § 2941(a)(5). And so those states should all show "how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." *Colorado II*, 533 U.S. at 457. Yet no such evidence exists in these states.

In fact, the FEC's expert could not point to even one example from *any* state where a candidate used coordinated party expenditures to circumvent contribution limits and route more funds to his or her campaign. JA330–31; JA58 (conceding his examples of corruption do not involve coordinated party expenditures). In New York, for example—a state that restricts individual contributions but allows parties to make unlimited contributions during the general election—the FEC's expert confirmed he is "not aware of" a situation where candidates engaged in "*quid pro quo* routing through a party." JA331.

All this casts serious doubt on *Colorado II*'s prediction that unlimited coordination would lead to donors circumventing contribution limits. Or perhaps that's putting it too softly. *Colorado II*'s prediction was wrong, plain and simple. Yet that prediction served as the entire basis for the Court's opinion. *See* 533 U.S. at 457–65. If party coordination does not "intensify" the risk of circumvention, *id.* at 460, the government has no legitimate interest in restricting it.

II. *Colorado II*'s reliance on unproven conjecture has its roots in *Buckley*.

The Court's deferential review in *Colorado II* looks strange given more recent decisions, such as *Cruz* and *McCutcheon*, scrutinizing the government's evidence. But at the time, *Colorado II* simply followed the path laid out in *Buckley*, where the Court upheld FECA's limits on individual contributions based on unproven claims with a "shaky empirical basis." Smith, *supra* at 131.

A. *Buckley* set the stage for a deferential and evidence-free review of campaign-finance regulations.

1. *Buckley* held that limits on "large contributions" satisfy the First Amendment because they prevent systematic *quid pro quo* corruption as well as its appearance. 424 U.S. at 26–27. And limiting the appearance of corruption might be "critical" to preventing "confidence in the system of representative Government" from being "eroded to a disastrous extent." *Id.* at 28. These are bold claims, and they have been invoked to justify governmental limits on political speech over the last fifty years.

Yet *Buckley* made these sweeping pronouncements about the corrupting influence of contributions on a "meager" record that would not survive scrutiny today. *See Cruz*, 596 U.S. at 310. *Buckley*'s asserted danger of using contributions for *quid pro quo* relied on a handful of anecdotes arising from a single election cycle. 424 U.S. at 27 & n.28. Most of that evidence concerned vague "perception[s] of the public" about the corrupting effect of large contributions, *Buckley v. Valeo*, 519 F.2d 821, 839

n. 36 (D.C. Cir. 1975)—not examples of actual *quid pro quo*, *see Buckley*, 424 U.S. at 27 & n.28 (citing *Buckley*, 519 F.2d at 839–40 & n. 36–38).

In fact, *Buckley*'s one-sentence analysis of the evidence supporting Congress's justification for contribution limits began by conceding that "the scope of such pernicious practices can never be reliably ascertained." 424 U.S. at 27. No matter, the Court reasoned. The "deeply disturbing examples surfacing after the 1972 election" showed "that the problem is not an illusory one." And with that, the Court justified unprecedented deference to the legislature's choice to restrict campaign contributions. *Id.* One prominent scandal, with a most tenuous connection to political donors, served to greenlight wide latitude for Congressional interference into the political speech of millions of Americans.

More remarkable still is *Buckley*'s discussion of the "appearance of corruption." The government defended the law as combating the "appearance of corruption spawned by the real *or imagined* coercive influence of large financial contributions." *Id.* at 25 (emphasis added). But surely "the imaginations of Americans regarding politics [cannot] be the basis for an entire body of constitutional law." David M. Primo & Jeffrey D. Milyo, *Campaign Finance & American Democracy* 7 (2020). It's inconceivable that one's First Amendment rights might depend on whether "the American public is misinformed about campaign finance law" and the prevalence of *quid pro quo* corruption. *Id.*; *see also* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption & Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 174 (2004).

Yet that's the rule *Buckley* adopted. Data or evidence about actual corruption did not ultimately matter as "the appearance of corruption" was "[o]f almost equal concern." *Buckley*, 424 U.S. at 27. And that's because, *Buckley* explained, the appearance of corruption could lead to a "disastrous" erosion of "confidence in the system of representative Government." *Id.*

Perhaps that's true. One can certainly imagine that large contributions could cause a collapse in the trust of our government. But there's also good reason to doubt that claim. *See, e.g.*, Primo & Milyo, *supra* at 143–47 "Most Americans are sophisticated enough to recognize that [political] donors usually represent large numbers of persons with similar views[.]" Smith, *supra* at 131. And "[i]t is simply improbable that legislators frequently take actions against the wishes of their constituents and their own ideology or best judgment in return for mere campaign contributions." *Id.* at 128; *see also* John Samples, *The Fallacy of Campaign Finance Reform* 111–17 (2007) ("The appearance rationale says that we should restrict fundamental rights to achieve some competing goal even though the purported cause and effect depend on a mistaken notion.").

Ultimately, *Buckley*'s claim about the problematic effects of the "appearance of corruption" is an empirical one. But instead of answering it by scrutinizing the available evidence, the *Buckley* court deferred to Congress in a manner inconsistent with the "exacting scrutiny" it purported to apply. 424 U.S. at 27. Concluding that the appearance of corruption was "*inherent* in a system permitting unlimited financial contributions," *id.* at 28 (emphasis added), it held that the First Amendment posed

no obstacle to Congress exercising its own judgment to decide whether restricting speech was a sufficiently good idea.

This deferential approach to approving FECA's contribution limits stands in stark contrast to this Court's recent and rigorous review.

Over the past decade, this Court has reaffirmed the once-lost notion that "mere conjecture" is not "adequate to carry a First Amendment burden." *Cruz*, 396 U.S. at 307 (quotation omitted). And it's done so with real teeth—scrutinizing the government's proffered evidence and arguments with the rigor the First Amendment demands. *See id.* at 307–11; *McCutcheon*, 572 U.S. at 213–18. This Court has faulted—rather than excused—the "the absence" of cases illustrating the anticipated harm. *Compare Cruz*, 596 U.S. at 307, *with Buckley*, 424 U.S. at 27. And instead of summarily accepting a small set of "deeply disturbing examples" to draw sweeping conclusions, *Buckley*, 424 U.S. at 27 & n.28, it has thoroughly questioned the methodology of polling data, the conclusions of scholars, the anecdotes from legislators, and more as it weighed the government's justification for intruding on the right to engage in core political speech, *Cruz*, 596 U.S. at 308–09.

This Court's recent approach is nothing new to the First Amendment. It follows the long and well-established rule that "[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks omitted). That rule even applies to commercial speech, which some argue

falls outside the core of the First Amendment's protection. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999). But when it came time to scrutinize Congress's judgment to impose contribution limits, *Buckley* deferred to rather than scrutinized the government's judgment and predictions. 424 U.S. at 26–27. In doing so, *Buckley* "provided core political speech with less protection than other forms of speech." Smith, *supra* at 133; *see also McConnell v. FEC*, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part).

2. *Colorado II* followed this errant path. It dismissed the lack of significant evidence of circumvention because none was available, and it turned instead to anecdotes and debatable assumptions. *Buckley* assumed that the public's trust in government would crater absent limits on large contributions. 424 U.S. at 27. *Colorado II* likewise took it as an intuitional truth that "the inducement to circumvent [contribution limits] would almost certainly intensify" in the wake of unlimited party coordination. 533 U.S. at 460. Both courts had anecdotal nostrums supporting their intuitions about human nature. But neither had any real evidence corroborating those beliefs.

In any other First Amendment case, that would have ended the matter. *See Greater New Orleans Broad. Ass'n*, 527 at 188. Restrictions on speech require the government to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* The government failed to do that in *Colorado II*, but the law survived. And that's because *Buckley* paved the way.

B. Like recent state experience undermining *Colorado II*, the fifty years since *Buckley* have failed to corroborate the Court's predictions.

A persistent problem for the First Amendment is the unflappable "belief that a new layer of campaign finance regulations will improve perceptions of government by clearing a path for the enactment of 'better' public policies." Primo & Milyo at 5. But it turns out that many "well intentioned" proposals do little—if anything—to prevent *quid pro quo* corruption or its appearance. *Cruz*, 596 U.S. at 306. FECA's limit on coordinated party expenditures is just one example on a list that includes bans on corporate independent expenditures, *Citizens United v. FEC*, 558 U.S. 310, 356–59 (2010), limits on aggregate contributions, *McCutcheon*, 572 U.S. at 210, limits on post-election fundraising to repay personal debt, *Cruz*, 596 U.S. at 306–07, and more. One could make plausible arguments from intuition that these laws would stop a real problem with corruption. But when it came time, the government could not prove any of these laws meaningfully reduced *quid pro quo* corruption or its appearance.

What if the problem has always been with *Buckley*'s original unproven claims? If *Buckley* erred in predicting that limiting large contributions will reduce *quid pro quo* corruption and its appearance, then of course *Colorado II* erred in predicting that a second (or third, or fourth, or fifth, *see* JA736–37), prophylactic layer of regulation would reduce it even further. *Colorado II* was wrongly decided because it inherited *Buckley*'s original sin.

Since *Buckley*, "claims of widespread corruption simply have not been supported by any systematic studies of

legislative activity." Smith, *supra* at 127. "Rather, such studies have consistently found little or no connection between campaign contributions and legislative action." *Id.* (citing studies). That's so even though a dozen states allow unlimited contributions, and many more allow contributions for statewide officers in amounts two to three times more than what's allowed under FECA. *See* Greven, *supra*. If limiting large contributions had a meaningful effect on *quid pro quo* corruption, the army of political scientists eager to justify campaign-finance regulations would have surely uncovered evidence to support *Buckley*'s thesis by now. Yet no such evidence seems to exist.

The response, of course, is the same as *Buckley*'s: we cannot ever know how much potential corruption is out there, perhaps being stopped by FECA's limits. 424 U.S. at 27. But that kind of unfalsifiable claim subjugates First Amendment rights to the faith and intuition of Congress and the courts—and it does so in "an area in which the importance of First Amendment protections is at its zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (quotation marks omitted). If "mere conjecture" cannot carry a First Amendment burden in other contexts, it should not justify regulating core political speech inherent in political contributions and expenditures.

Buckley's prediction about the appearance of corruption fares even worse. Recall that *Buckley* hypothesized that even the imagined corruption arising from large contributions would so undermine the public's trust in government as to erode the foundations of democracy itself. But recent research contradicts—if not outright disproves—that prediction. It turns out that the public's trust in government has no relationship to the kind of

campaign-finance restrictions in place. Primo & Milyo, *supra*, at 143–47. The public distrusts the government in states with contribution limits and in states without. *Id.* And that level of distrust does not change when states enact or repeal various campaign-finance regulations. *Id.* Given this kind of empirical data, it's clear in retrospect that the *Buckley* court should not have greenlighted intrusions on core First Amendment liberties on the basis of its own intuition about human behavior and psychology.

But *Buckley* persists not only in maintaining FECA's general structure of contribution limits. It also serves as the basis for shifting the ordinary burden of proof from the government to speakers challenging similar restrictions in other circumstances. *See Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377, 391–92 (2000). If Pennsylvania—after years of allowing unlimited contributions from individuals—enacts a new limit tomorrow, any challenger would be asked to overcome the fact that this Court treats "*Buckley*'s evidentiary showing" as "a sufficient justification for contribution limits." *Id.* at 391. Even when "*[s]tare decisis* instructs [courts] to treat like cases alike," that requires comparing the "factual findings" from one case to another. *June Med. Servs. LLC v. Russo*, 591 U.S. 299, 358 (2020) (Roberts, C.J., concurring in the judgment). For contribution limits, however, *Buckley*'s unproven conjecture has turned into a super-precedent of factual findings about the alleged necessity of limiting campaign contributions.

It is impossible to separate the flaws of *Colorado II* and similar decisions from *Buckley*'s missteps. The Court should overrule *Colorado II*. It need not reject *Buckley*'s holding to do so, but it should reject *Buckley*'s evidentiary standard of conjecture and speculation.

III. *Buckley*'s deference to Congress is made worse by the fact that Congress lacks any authority to regulate political speech in the first place.

Experience over the past half century casts doubt on the theoretical justifications for campaign-finance regulations. That problem should worry everyone. This is, after all, a matter of protecting core political speech—the very "means to hold officials accountable to the people" that ensures a functioning democracy. *Citizens United*, 558 U.S. at 339. Yet *Buckley* deferred to Congress when it came to regulating how people can speak, publish, and assemble when deciding whether to reelect the legislators who wrote the campaign speech rules. No theory of democratic accountability can justify that inversion of power—which, perhaps, is why, the Constitution never granted Congress the authority to regulate political speech in the first place.

When the first challenge to FECA reached this Court in *Buckley*, it remarked in passing that "[t]he constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case." 424 U.S. at 13. For that, it cited the Elections Clause—Article I, § 4 of the Constitution, which grants Congress the power to regulate the "Times, Places and Manner" of electing federal officials.

But campaign-finance laws do not regulate the time, place, or manner of an election. *See* Bradley A. Smith, *Separation of Campaign and State*, 81 Geo. Wash. L. Rev. 2038, 2057–71 (2013). Elections are about casting and counting votes. What day will the election take place, and what time will the polls open? *See* 2 U.S.C. § 7. How is voter registration conducted? *See* 52 U.S.C. § 20507.

How are votes cast? *See* 52 U.S.C. § 21081. These are the kinds of issues "governing the voting process itself" that Congress can address through its power under the Elections Clause. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344 (1995).

Campaign-finance laws, however, "[do] not control the mechanics of the electoral process." *Id.* at 345. That much should be obvious. These are "regulation[s] of pure speech." *Id.*

The atextual interpretation of the Elections Clause as authorizing regulations on campaign speech in addition to the election process itself leads to some curious—and highly improbable—conclusions. Consider just one: If the Elections Clause allows Congress to limit political speech about elections, then those ratifying the Constitution granted authority to the First Federal Congress to ban anyone from speaking negatively about public officials running for reelection. The First Amendment, after all, was not ratified until 1791. So when the First Federal Congress convened in 1789, the Elections Clause would have granted plenary authority to limit—or even ban—core political speech. Never mind how inconceivable it is that the Founders, having just won their independence from a government that regularly tried to stifle unfavorable speech, *see McConnell*, 540 U.S. at 253–53 (Scalia, J., dissenting), would have vested its new federal government with unlimited authority to do just that. That Congress did not even attempt to regulate campaign contributions and expenditures until more than a century after ratification, *see* The Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907), says a lot about whether this incredible power really lies in such an obscure provision.

And what exactly does this sweeping power to regulate speech about elections cover? The numerous arbitrary distinctions that this Court has had to draw—between "independent" and "coordinated expenditures," or between "express advocacy" and "issue advocacy," just to name a couple—highlight the problem. Nothing in the Elections Clause gives any guidance about what kind of speech falls under Congress's apparently sweeping regulatory authority.

Nor are any of these distinctions particularly persuasive. If a campaign is part of an election, what is left of speech about public affairs? Is a news report about transgender participation in high school athletics campaign speech if it persuades voters to support a candidate? Is California Governor Gavin Newsom campaigning for President now? Or Vice President J.D. Vance? Almost all speech about public affairs is, at some level, "campaign speech." After all, "[e]very idea is an incitement." *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). But surely the Elections Clause is not a grant of power to regulate all speech about public policy and affairs. Yet no constitutional principle—and certainly no administrable principle—can explain why, and this Court's repeated effort to tweak the line between permissible and impermissible campaign-finance regulations strains its institutional competency. *See* JA730 (Thapar, J., concurring).

The Court should start untangling the mess created by *Buckley* by reexamining its roots. Political campaigns are political speech, and "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United*, 558

U.S. at 339 (quotation modified). It's time to take those words seriously by taking the government out of the business of regulating campaign speech.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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