

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL REPUBLICAN SENATORIAL)
COMMITTEE, ET AL.,)
 Petitioners,)
 v.) No. 24-621
FEDERAL ELECTION COMMISSION,)
ET AL.,)
 Respondents.)
- - - - -

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Place: Washington, D.C.
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11
12 Washington, D.C.
13 Tuesday, December 9, 2025
14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:02 a.m.
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8 Court-appointed amicus curiae in support of the
9 judgment below.

10 MARC E. ELIAS, ESQUIRE, Washington, D.C.; on behalf of
11 the Intervenors.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 24-621, National
5 Republican Senatorial Committee versus the
6 Federal Election Commission.

7 Mr. Francisco.

8 ORAL ARGUMENT OF NOEL J. FRANCISCO

9 ON BEHALF OF THE PETITIONERS

10 MR. FRANCISCO: Mr. Chief Justice, and
11 may it please the Court:

12 The coordinated party spending limits
13 are at war with this Court's recent First
14 Amendment cases. The theory is that they're
15 needed to prevent an individual donor from
16 laundering a \$44,000 donation through the party
17 to a particular candidate in exchange for
18 official action.

19 But that Rube Goldberg theory fails
20 for the same reasons this Court rejected it in
21 McCutcheon. First, it's unlikely to work
22 because the donor has to cede control of his
23 money to the party committees, which have their
24 own interests. Second, it's already prevented
25 by other things, including the \$44,000 base

1 limit, the earmarking rule, disclosure
2 requirements, and the bribery laws. And,
3 third, there's no need for it since a would-be
4 briber would be better off just giving a
5 massive donation to the candidate's favorite
6 super PAC. That's why no one has identified a
7 single case in which a donor has actually
8 laundered a bribe to a candidate through a
9 party's coordinated spending even though 28
10 states allow it.

11 All this is why my friend tries so
12 hard to argue that this case is moot. But that
13 fails too. He has to show that it is
14 impossible to grant either Vice President Vance
15 or the committees any effective relief. But
16 there's no evidence that the Vice President has
17 abandoned his intention to run for federal
18 office in 2028. To the contrary, he has an
19 active statement of candidacy, an active Senate
20 campaign committee that's already raised
21 \$50,000 in this year alone, and at least 15 of
22 the last 18 vice presidents have gone on to run
23 for the presidency.

24 And, regardless of the current
25 executive's views of the First Amendment, it

1 would be insane for Vance or the committees to
2 knowingly violate this law since it is a
3 criminal statute with a five-year statute of
4 limitations. So this case remains alive and
5 well.

6 I welcome this Court's questions.

7 JUSTICE THOMAS: Well, Mr. Francisco,
8 the RNC is not here. I think you would have to
9 explain why the groups, the Republican groups
10 here, fit the bill of a national party.

11 MR. FRANCISCO: Well, for a couple of
12 reasons, Your Honor. I think, first of all, I
13 actually think you can set the committees
14 entirely to the side --

15 JUSTICE THOMAS: Mm-hmm.

16 MR. FRANCISCO: -- and focus just on
17 Vice President Vance. And I take it your
18 question is addressing 30110.

19 JUSTICE THOMAS: Yeah.

20 MR. FRANCISCO: So I'd like to explain
21 that.

22 The Sixth Circuit plainly had both
23 Article III jurisdiction and statutory
24 authority at the time it ruled solely with
25 respect to Vice President Vance. When the

1 Sixth Circuit ruled, the Vice President had not
2 yet been elected to the vice presidency. He
3 was still a sitting United States Senator.

4 So even under my friend's position, he
5 would be within the Article III jurisdiction of
6 the Sixth Circuit and -- and as --

7 JUSTICE THOMAS: Yeah, I'm -- I'm
8 comfortable with him. It's the committees that
9 I was interested in.

10 MR. FRANCISCO: Oh, sure. Sure. And
11 I can get to the committees. My -- just to
12 finish up that point, I think, even if you
13 didn't have the committees here, you would have
14 jurisdiction solely with respect to Vice
15 President Vance.

16 Now, as to the committees, the first
17 point I would raise is that they waived this
18 issue. The first sentence of 30110 simply sets
19 forth a cause of action. As then-Judge
20 Kavanaugh made clear in his dissent in the
21 Grocery Manufacturers case on the D.C. Circuit,
22 which this Court later adopted, that can be
23 waived.

24 But, even if you turn to the text and
25 look at what it means to be a national

1 committee of a political party, this text makes
2 quite clear that that phrase includes the
3 national congressional campaign committees, and
4 it doesn't matter whether it begins with the
5 word "a" or the word "the." If you look at
6 the -- if you look at, for example, the 2018
7 amendments, they repeatedly refer to "the
8 national committee of the" -- to "a" national
9 committee of the United States as including
10 "the" national congressional campaign
11 committees. And if you look at the BCRA
12 amendments that were added in 2002 -- and,
13 specifically, I'd point you to
14 30125(b)(2)(B)(iv)(II); that's a mouthful -- it
15 specifically refers to "the national committee
16 of a political party" as including "a national
17 congressional campaign committee."

18 But I think my more -- my more
19 important point is you could disagree with me
20 on everything that I said with respect to the
21 national committees. The Sixth Circuit plainly
22 had jurisdiction over Vance at the time that it
23 ruled. Now that we're in this Court, 30110
24 doesn't really matter because it doesn't apply
25 to you. All that matters in this Court is that

1 you have jurisdiction under the certiorari
2 statute, which you plainly do, and Article III
3 jurisdiction over the case, which you do not
4 only with respect to Vance but also with
5 respect to the committees who are also being
6 harmed by this statute.

7 JUSTICE THOMAS: So the -- with
8 respect to the Vice President, what does he
9 mean when he says in effect that it was way too
10 early to decide whether or not to run?

11 MR. FRANCISCO: Your Honor, I think
12 that what he is doing is what virtually every
13 candidate for the presidency does, is wait
14 until after the midterm elections in order to
15 announce his specific intentions.

16 But I think it's important to remember
17 here that the question is mootness. And when
18 it comes to mootness, they bear the burden of
19 showing that it's impossible to grant any
20 relief. So they have to show that Vice
21 President Vance has actually abandoned his
22 intentions to run for federal office.

23 But, here, we know a few things. We
24 know he's got an active statement of candidacy
25 and an active Senate campaign committee that's

1 not sitting around doing nothing. It's raised
2 \$50,000 this year alone. We also know that
3 virtually every vice president goes on to run
4 for the presidency, particularly young ones
5 like Vice President Vance. And with respect to
6 my friend, this Court doesn't have to blind
7 itself to the reality that's obvious to
8 everybody else.

9 CHIEF JUSTICE ROBERTS: It's important
10 for you to draw a distinction, isn't it,
11 between coordinated expenditures and actual
12 contributions? And, if -- if so, how do you
13 tell that? It seems to me that that's kind of
14 a fiction that, oh, you know, they're just
15 coordinated expenditures; they're not making
16 direct contributions. I don't know in
17 substance what the difference is.

18 MR. FRANCISCO: Well, Your Honor, when
19 it comes to coordinated expenditures, for
20 example, when we run an ad using coordinated
21 expenditures, it actually has to say "Paid for
22 by the Republican Party," "Paid for by the
23 National Republican Senate Campaign Committee."
24 So it is very much our speech. I think the --

25 CHIEF JUSTICE ROBERTS: Well, I -- I

1 guess what I would say is you've -- you know,
2 you've identified the fiction. In other words,
3 you see the candidate is, you know, giving
4 speeches on opposition --

5 MR. FRANCISCO: Yeah.

6 CHIEF JUSTICE ROBERTS: -- to a
7 particular -- you know, farm subsidies --

8 MR. FRANCISCO: Mm-hmm.

9 CHIEF JUSTICE ROBERTS: -- or whatever,
10 and then -- you know, then you can start
11 making -- engaging in speech on that same
12 platform, that same --

13 MR. FRANCISCO: Yeah.

14 CHIEF JUSTICE ROBERTS: -- priority.
15 And I don't see that there's much difference
16 between giving him the money to let him do it
17 and doing it yourself in the practical, if not
18 legal, coordination.

19 MR. FRANCISCO: Sure. And that's my
20 second point, which is it doesn't really
21 matter. I can assume for the sake of argument
22 that in theory, a coordinated expenditure can
23 be roughly the equivalent to a contribution.
24 The difference here is the -- the theory of
25 corruption.

1 When I make a direct donation to a
2 candidate, I can bribe the candidate in
3 exchange for that contribution. I can also say
4 to the candidate: If you engage in official
5 action for me, I will spend money on your
6 behalf. That's not their theory when it comes
7 to coordinated spending.

8 Nobody is arguing that the party is
9 trying to bribe the candidate. Instead, the
10 theory here is that the donor is trying to
11 bribe the candidate through the party by using
12 the party as its mule in the form of
13 coordinated expenditures.

14 That's the type of conduit bribery
15 that this Court addressed in McCutcheon when
16 you said it was unlikely to work, it's already
17 prevented by other things, and there's no need
18 for it given the rise of super PACs, why do
19 that rather than just cutting a million-dollar
20 check directly to the candidate's favorite
21 super PAC, which I think is why they have no
22 evidence this has ever occurred.

23 The FEC actually had an expert below
24 --

25 JUSTICE KAGAN: But why do that is

1 that the super PAC can't be coordinated and
2 these party expenditures can be coordinated, so
3 they're more helpful to the candidate because,
4 for the reason that the Chief Justice said,
5 they effect -- effectively function as
6 contributions to the candidate. There can be,
7 you know, coordination to the max so that
8 everything that the candidate would want is
9 done through these coordinated contributions.

10 And that's more valuable to a
11 candidate than giving money to a super PAC that
12 is generally on the same page but may do things
13 that the campaign actually doesn't want done.

14 MR. FRANCISCO: Except that a
15 contribution to a party is limited to \$44,000,
16 whereas a contribution to a super PAC is
17 unlimited. I think --

18 JUSTICE KAGAN: Well, there's the
19 \$44,000, and then you give to the joint
20 committee, and then the joint committee
21 disburses it, and then it comes back and it
22 ends up in the party. And all together, it's
23 not just the 40 plus the 3.

24 MR. FRANCISCO: Mm-hmm.

25 JUSTICE KAGAN: It's probably about a

1 half million, even putting aside the segregated
2 accounts --

3 MR. FRANCISCO: Sure.

4 JUSTICE KAGAN: -- plus the three. So
5 you've taken a base limit of \$3,000 and you've
6 amplified it into a half million -- half-
7 million-dollar contribution which is going to
8 exactly what the candidate would put it to
9 himself.

10 MR. FRANCISCO: So two responses, Your
11 Honor. The first is what I was initially
12 giving you because, yeah, I recognize the
13 hypothetical you're drawing out. But super
14 PACs have unlimited contributions. And I would
15 much rather have, you know, \$10 million of
16 independent spending if I were a candidate than
17 even \$44,000 or even \$500,000 of coordinated
18 spending.

19 I think you addressed this issue in
20 McCutcheon.

21 JUSTICE KAGAN: Maybe, maybe not.

22 MR. FRANCISCO: But I'll put that to
23 the side and I'll take on your hypothetical
24 directly. First of all, again, I think
25 McCutcheon answers this because McCutcheon

1 directly addressed the joint fundraising
2 context and it rejected it, making quite clear
3 that joint fundraising wasn't a mechanism for
4 evading the base limits or the earmarking
5 rules, but I'd also say think about how
6 implaus- --

7 JUSTICE KAGAN: But, Mr. Francisco,
8 even in rejecting the -- the mechanism, even in
9 saying that the mechanism at issue there was
10 okay, one of the things that the Court said in
11 McCutcheon was that these limits actually
12 served to mitigate any problems that you would
13 have from the aggregation limits that were at
14 issue there.

15 MR. FRANCISCO: Sure.

16 JUSTICE KAGAN: So it clearly
17 conceived of a world in which these campaign
18 coordinated limits would be in place.

19 MR. FRANCISCO: Sure. But I think
20 that the joint fundraising theory that my
21 friends lay out in their briefs is the same
22 highly implausible theory that this Court
23 rejected in McCutcheon. Think about how it
24 works.

25 I donate to 20 different committees,

1 political committees, candidate committees.
2 All of those committees then agree to transfer
3 all of that money to one committee. That one
4 committee then agrees to spend all of that
5 money for one candidate all so that one
6 candidate can deliver official action back to
7 me.

8 If this were a real problem, you'd
9 think that they'd have evidence of it occurring
10 one time in all of American history, yet they
11 don't. The reason they don't are the reasons
12 you gave in McCutcheon.

13 And in addition, why would I go
14 through that circuitous scheme rather than just
15 give, call it 1 million, call it 10 million,
16 call it a hundred million dollars to my
17 candidate's favorite super PAC --

18 JUSTICE SOTOMAYOR: You -- you keep --

19 MR. FRANCISCO: -- which, again, is
20 the issue you addressed in McCutcheon.

21 JUSTICE SOTOMAYOR: You keep saying
22 there's no evidence of this kind of
23 coordination resulting in a quid pro quo or the
24 appearance thereof, but the whole Campaign
25 Finance Board is based -- law is based on just

1 such an evidence.

2 In the early 1970s, that's what led to
3 all of this congressional action. The dairy
4 industry channeled millions of dollars to
5 President Nixon through the Republican party
6 and its committees. The industry landed a
7 hundred-million-dollar subsidy from President
8 Nixon in return. Was there a quid pro quo?
9 There certainly was an appearance of quid pro
10 quo.

11 That's what started the entire
12 campaign finance reform legislation. The
13 threat hasn't diminished. One impetus behind
14 the Bipartisan Campaign Reform Act, the more
15 recent one, was to address how donors were
16 funneling soft money to national parties that
17 those parties would then use to benefit federal
18 candidates to national parties, that there was
19 ample evidence -- and I'm citing from our own
20 case law on this -- about how parties were
21 willing intermediaries.

22 The evidence in McConnell showed that
23 this circumvention was effective. Donations
24 from the tobacco industry to Republicans
25 scuttled tobacco legislation, just as

1 contributions from trial lawyers to Democrats
2 stopped tort reforms.

3 And in Colorado II, this Court cited
4 the tallying scheme used by the DNC. That was
5 an informal agreement between the DNC and
6 candidates in which candidates encouraged
7 donors to give to that party with the tacit
8 understanding that the party would funnel that
9 contribution back to the candidate through
10 coordinated expenditures.

11 I don't understand how you can say
12 there's a lack of evidence. It's replete in
13 all of our cases and in the history. And if
14 there's not direct evidence, it's because our
15 umbrella is working.

16 Your party said to us that we did not
17 have to worry about independent expenditures
18 and a limit because we had -- we had laws that
19 stopped coordinated contributions. So what you
20 told us was the prophylactic that was enough
21 to -- for us to rule in favor of unlimited
22 expenditures, you now want to take that
23 umbrella completely away.

24 MR. FRANCISCO: May I?

25 JUSTICE SOTOMAYOR: That's your point.

1 MR. FRANCISCO: So, Your Honor,
2 there's a lot in there, and to unpack it a
3 little bit, I think where I'd start is the FEC
4 actually had an expert below and built a
5 record, and the FEC's own expert conceded that
6 none of the examples that he had or any of the
7 other historical examples actually involved
8 coordinated party spending.

9 So there's no example of coordinated
10 party spending ever being used --

11 JUSTICE SOTOMAYOR: Because it hasn't
12 happened. We've been prohibiting it since
13 Buckley.

14 MR. FRANCISCO: And, Your Honor,
15 that -- that is my second point. We actually
16 have 28 states in this country that impose no
17 limits on a party's ability to coordinate with
18 its candidates, none. We don't have any
19 example from those 28 states.

20 We have the 2014 amendment, which
21 tripled the size of the base limit for certain
22 types of contributions, completely excused it
23 from coordinated party expenditures. We have
24 absolutely zero examples of coordinated-party
25 spending in that context being used for quid

1 pro quo bribery.

2 We also have existing law that allows
3 \$44,000 contributions to us, which can be
4 coordinated in amounts ranging from \$60,000 to
5 \$4 million depending on the race. The number
6 of examples of the type of quid pro quo conduit
7 bribery they're concerned about in that
8 context, zero as well.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: This is a question I
14 will ask you and Mr. Elias, and it has to do
15 with who is helped and who is hurt by the
16 provision that is before us.

17 In our much maligned, I think unfairly
18 maligned, decision in Citizens United, the
19 effect of the provision at issue was to
20 privilege certain corporations, namely the
21 corporations that control all of the national
22 media, and disadvantage other corporations like
23 Citizens United, and the effect of our decision
24 was to level that playing field.

25 Here, it is not apparent to me who is

1 benefitted by this provision and who is
2 disadvantaged by the provision, and I would
3 appreciate your enlightening me on that
4 subject.

5 MR. FRANCISCO: Sure. I think one
6 thing that we have seen as a result of this
7 provision -- and this is actually a point that
8 is embraced by many of those who are actually
9 in favor of very robust campaign finance
10 reform -- it's the idea that the relative power
11 of the super PACs has increased dramatically
12 and the relative power of the political parties
13 has been diminished as a result.

14 I think you'll see in the materials
15 graphs that show how the changes in spending
16 have -- have gone over time, and what you've
17 seen is an explosion in the size of super PACs,
18 whereas the spending of the political parties
19 has been relatively minimal.

20 And I -- we think that that actually
21 has many dangers to our democracy. Political
22 parties serve a moderating influence by forcing
23 essentially compromises within a party in order
24 to put forward a platform and to put forward
25 candidates, whereas PACs and super PACs can

1 often be focused on narrower issues. So, to
2 me, that's one of the big sets of winners and
3 losers that have -- have resulted.

4 We think, by invalidating the
5 coordinated party expenditure limits, you start
6 to restore the political powers to the relative
7 -- the political parties to the relative
8 political power that they've ultimately had,
9 which I think is ultimately to the benefit of
10 democracy itself.

11 JUSTICE ALITO: Well, you represent a
12 political party, and the Intervenor Respondents
13 represent a political party, and I know you're
14 both here simply making arguments that you
15 think will advance the public good. But I
16 wonder whether there is a reason why you have
17 provided an argument in support of -- in
18 defense of the role of political parties, but
19 both of the -- both you and the Intervenor
20 Respondents represent political parties. So
21 that doesn't quite answer my question.

22 MR. FRANCISCO: Sure. Historically,
23 we've been aligned on this issue. The two
24 political parties have been aligned on this
25 issue. Historically, both of the parties have

1 resisted these types of incursions into their
2 own ability to engage in free speech.

3 I'm going to venture into the realm of
4 speculation here, Your Honor, to answer your
5 question because I don't think the record
6 actually really does answer your question, but
7 I think one answer might lie in the fact of
8 where the different parties' relative
9 fundraising strengths have been over the years.
10 Over the years, I think that there's some sense
11 that the Republican Party apparatus is raising
12 more money relative to the candidates, whereas
13 the -- within the Democratic apparatus, the
14 candidates are raising more money relative to
15 the party apparatus.

16 If that is true, you could understand
17 why one party might favor more robust party
18 structures and the other party less so. I am
19 absolutely not relying on that. I'm relying on
20 the same free speech principles that in the
21 past we and my friends on the Democratic side
22 have been locked in arms on in defending.

23 JUSTICE ALITO: All right. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: Your answer's
2 suggesting to me that every time we interfere
3 with the congressional design we make matters
4 worse. You're telling us that Citizens United
5 and McCutcheon ended up, yes, in amplifying the
6 voice of corporations but diminishing another
7 voice, that of the party.

8 Now you want to now tinker some more
9 and try to raise the voice of one party. Our
10 tinkering causes more harm than it does good.

11 MR. FRANCISCO: Your Honor, I -- I
12 personally never think free speech makes things
13 worse. I think it virtually always makes it
14 better. I --

15 JUSTICE SOTOMAYOR: So you think it's
16 okay from McCutcheon that in the 2016 election,
17 Hillary Clinton set up a joint victory fund
18 with the DNC and 32 state parties which allowed
19 a single donor to give up to \$356,000? That's
20 quite a difference from the individual limit.

21 In 2024, Donald Trump's campaign
22 launched a joint fundraising operation with his
23 own leadership PAC, the RNC, and 40 state
24 Republican Party committees that sought
25 donations of up to \$814,600, and because of the

1 disclosures, he knows exactly who gave all that
2 money. I'm not picking on Donald Trump. Joe
3 Biden's victory fund, together with the DNC and
4 the party committees of all 50 states, raised
5 up to \$1.3 billion.

6 And now you want to say we want to
7 take -- because, once we take off this
8 coordinated expenditure limit, then what's
9 left? What's left is nothing, no control
10 whatsoever.

11 MR. FRANCISCO: So, with -- with all
12 respect, Your Honor, I don't have a problem
13 with the various statistics you just cited in
14 the absence of any evidence or any suggestion
15 it was ever tied to quid pro quo corruption.
16 And that is the teaching of this case, is more
17 speech is always better than less speech.

18 JUSTICE SOTOMAYOR: You mean to
19 suggest that the fact that one major donor to
20 the current president, the most major donor to
21 the current president got a very lucrative job
22 immediately upon election from the new
23 administration does not give the appearance --

24 MR. FRANCISCO: Your Honor --

25 JUSTICE SOTOMAYOR: -- of a quid pro

1 quo?

2 MR. FRANCISCO: Your Honor, I'm not a
3 hundred percent sure about the example that
4 you're looking at, but, if I am familiar, if I
5 think I know what you're talking about, I have
6 a hard time thinking that his salary that he
7 drew from the federal government was an
8 effective quid pro quo bribery, which may be
9 why nobody has even remotely suggested that to
10 be the case.

11 JUSTICE SOTOMAYOR: Maybe not the
12 salary, but, certainly, the lucrative
13 government --

14 MR. FRANCISCO: Yeah.

15 JUSTICE SOTOMAYOR: -- contracts might
16 be.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: I'm wondering,
19 Mr. Francisco, whether your answer to Justice
20 Alito didn't contradict or at least is in
21 tension with your answer to me because --

22 MR. FRANCISCO: Mm-hmm.

23 JUSTICE KAGAN: -- when I talked to
24 you about some of the dangers that taking off
25 these expenditure limits would have, you said

1 no worries because, really, everybody's just
2 going to continue to contribute to super PACs.
3 That's really the way to -- to favor a
4 candidate. But, to Justice Alito, you said,
5 no, this is going to reshape the balance
6 between super PACs and parties.

7 And I'm inclined to say that you can't
8 have it both ways.

9 MR. FRANCISCO: So, Your Honor, I
10 think that what I was getting at in response to
11 your question -- and, if I wasn't clear, maybe
12 I can clarify it now -- is that there's not the
13 risk that somebody is going to try to launder a
14 bribe through the party to the candidate in
15 exchange for official action, particularly when
16 that so-called bribe is capped out at \$44,000,
17 when --

18 JUSTICE KAGAN: Which it's really not
19 \$44,000, which it's --

20 MR. FRANCISCO: -- when they can --
21 call it 500,000 --

22 JUSTICE KAGAN: Yeah.

23 MR. FRANCISCO: -- call it whatever
24 you want through this very circuitous --

25 JUSTICE KAGAN: Well, 500,000, that's

1 a lot more than 44,000, no?

2 MR. FRANCISCO: -- through -- through
3 this -- through this very circuitous joint
4 fundraising operation that has never occurred
5 in the quid pro quo context in history.

6 JUSTICE KAGAN: Yeah, nobody seems to
7 find the circuitry all that difficult to deal
8 with.

9 MR. FRANCISCO: But -- but put all
10 that to the --

11 JUSTICE KAGAN: I mean, at this point,
12 all of these committees are in constant
13 communication with each other and funnel money
14 back and forth without any difficulty because,
15 you know, once you have the joint fundraising
16 committees in place, this is not very
17 difficult.

18 MR. FRANCISCO: And then you would
19 think that if it were so easy and it were so
20 common, it would be fairly easy to find at
21 least one example in of all American history to
22 find where it has been used to effectuate this
23 type of quid pro quo conduit bribery, yet there
24 is none, not in that context, not in any other
25 context, even though there are lots of laws

1 that will allow that type of scheme if you
2 wanted it.

3 But my only --

4 JUSTICE KAGAN: Let me -- let me take
5 you in a -- let me ask you another question,
6 which is, on your theory, as I understood your
7 theory, it -- if you took everything that you
8 said to me about why we shouldn't worry
9 about -- and to the Chief Justice about why we
10 shouldn't worry about these -- these limits, I
11 would think that that would apply just as well
12 if it was another kind of group rather than a
13 party that was coordinating with the candidate
14 or, indeed, if it was an individual
15 coordinating with the candidate.

16 Why wouldn't everything you say apply
17 to --

18 MR. FRANCISCO: Mm-hmm.

19 JUSTICE KAGAN: -- individuals and
20 private groups --

21 MR. FRANCISCO: Sure.

22 JUSTICE KAGAN: -- such that now,
23 rather than telling those individuals you can
24 go contribute to a super PAC or do your own --

25 MR. FRANCISCO: Mm-hmm.

1 JUSTICE KAGAN: -- independent
2 expenditures, but, no, you cannot coordinate
3 with the candidate for more than \$3300, now you
4 can?

5 MR. FRANCISCO: Mm-hmm. And it's all
6 of the reasons that this Court gave in
7 McCutcheon why this type of conduit bribery
8 scheme is less of a risk than a direct bribery
9 scheme between the donor and a party.

10 JUSTICE KAGAN: No, I understand that
11 that's your argument. And what I'm asking you
12 is that that argument applies just as well if,
13 instead of a party, we substitute another group
14 or an individual.

15 MR. FRANCISCO: Oh, I very much
16 disagree with that, Your Honor. If I'm an
17 individual and I want to directly bribe a
18 candidate, I can say to the candidate I will
19 either give you 50,000 cash, \$50,000 donation,
20 or spend \$50,000 on your behalf. I am directly
21 bribing that candidate with whatever benefit
22 I'm offering.

23 With a conduit bribery scheme, you by
24 definition don't have that direct relationship
25 between the donor and the candidate.

1 JUSTICE KAGAN: Yeah, boy, you are --
2 you are --

3 MR. FRANCISCO: Instead, you have to
4 go through the party.

5 JUSTICE KAGAN: -- you are assuming a
6 lot there about people's, honestly, dumbness.
7 I mean, everybody knows where the money is
8 coming from when it's done this way. So the
9 fact that I have a party as a conduit, the fact
10 that I have a different private group as a
11 conduit, it's not hard to figure out where the
12 money is coming from either for that person,
13 the original source of the money, or for the
14 candidate.

15 MR. FRANCISCO: Yeah.

16 JUSTICE KAGAN: And all I'm suggesting
17 to you is that if your -- if your argument sort
18 of depends on, in fact, this is very
19 complicated, people don't do this, you know,
20 it's -- it -- it -- you know, you have to
21 devise a flow chart to see how it works, I can
22 be skeptical of that, but even if I put that
23 skepticism aside, it would -- it would apply
24 just as well to a conduit that was not a
25 political party, to a conduit that was another

1 private group or, indeed, to, you know, an
2 individual.

3 MR. FRANCISCO: So two responses to
4 that, Your Honor. The first is that I think
5 I'm simply assuming, whether it's dumb or not
6 dumb, I'm simply assuming the same chain of
7 reasoning that this Court adopted in McCutcheon
8 when it explained that the risk of conduit
9 bribery was not nearly as significant when you
10 had the party standing in between the donor and
11 between the --

12 JUSTICE KAGAN: See, I don't agree
13 with that. I think that McCutcheon says -- you
14 know, I was on the other side in McCutcheon,
15 but McCutcheon says we can -- we take these
16 circumvention rationales seriously.

17 Now they said there was no reason to
18 fear circumvention there, but the entire thrust
19 of the opinion was, if you could show us that
20 this was a way to circumvent the base limits,
21 that would be a reason to keep these limits in
22 place.

23 And -- and then, in evaluating why the
24 aggregate limits were not necessary in order to
25 further anti-circumvention goals, the Court

1 specifically pointed to this limit as part of
2 the status quo that would prevent
3 circumvention.

4 MR. FRANCISCO: So, Your Honor, maybe
5 we just have different readings of McCutcheon,
6 but I'm relying on the statement, for example,
7 where McCutcheon said there's not the same risk
8 of quid pro quo corruption or its appearance
9 when money flows through independent actors to
10 a candidate as when a donor contributes to a
11 candidate directly because, the Court
12 explained, when an individual contributes to a
13 party committee, the individual must by law
14 cede control over the funds.

15 And then the Court went on to cite the
16 assistant attorney general's testimony about
17 how there should be "fewer cases of conduit
18 contributions directly to parties" because
19 donors who wish to influence elections or
20 officials will no longer need to attempt to do
21 so through conduit contribution schemes that
22 be -- can be criminally prosecuted. Instead,
23 they are likely to simply make unlimited
24 contributions to super PACs.

25 So that's the portion of McCutcheon

1 I'm relying on. I actually think that -- you
2 know, I -- I fully understand and appreciate
3 the concerns that you're raising, but I don't
4 think that they're tied to quid pro quo
5 corruption. I think they're tied to a broader
6 understanding of corruption that was adopted
7 by the McCutcheon dissenters, where it wasn't
8 simply limited to quid pro quo corruption but
9 rather the corrupting influence that many
10 believe that money can have in politics.

11 JUSTICE KAGAN: All of my questions to
12 you have assumed that that ship has sailed.
13 All of my questions to you have assumed that
14 what we're doing is preventing quid pro quo
15 corruption. And the portions of McCutcheon
16 that I could cite back to you are the portions
17 that make it quite clear that if there's a
18 limit that is necessary to prevent
19 circumvention of the base contribution limits,
20 that that is a reason to have that limit.

21 MR. FRANCISCO: Well, respectfully, I
22 think McCutcheon would have come out the exact
23 opposite way in that case because that was the
24 whole point of the aggregate limits.

25 JUSTICE KAGAN: I think that the point

1 of McCutcheon was that they didn't need -- in
2 those particular circumstance, with respect to
3 aggregate limits, that there wasn't a
4 circumvention problem. But that is not to say
5 that in these particular different
6 circumstances, with these limits, which,
7 indeed, McCutcheon specifically pointed to,
8 that there's also not a circumvention problem.
9 There is --

10 MR. FRANCISCO: So, yeah --

11 JUSTICE KAGAN: -- because of -- of
12 this thing that we started off with, with the
13 fact that coordinated contributions, you might
14 as well just be giving money to the candidate.

15 MR. FRANCISCO: McCutcheon pointed to
16 Colorado II, I think, once when it was batting
17 down the barrage of hypotheticals that were
18 asserted by the dissent in that case, but I
19 think that the thrust of the reasoning of
20 McCutcheon is that if you have an implausible
21 theory and zero evidence to back it up, that's
22 generally not going to be a strong First
23 Amendment case.

24 Here, you've got the same implausible
25 theory that you had in McCutcheon, the kind of

1 conduit bribery scheme, and they've got zero
2 evidence to back it up.

3 JUSTICE KAGAN: Thank you.

4 MR. FRANCISCO: I simply don't see how
5 you can hold up Colorado II and McCutcheon side
6 by side and say that both were correctly
7 decided.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Gorsuch?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: Just to start, I
13 am concerned, as you said, that the combination
14 of campaign finance laws and this Court's
15 decisions over the years have together reduced
16 the power of political parties as compared to
17 outside groups with negative effects on our
18 constitutional democracy. So I start from
19 that, and I'm trying to figure out how this
20 case fits into that with respect to political
21 parties and the strength of political parties.

22 On the other hand, you're also -- I'm
23 also concerned, of course, about quid pro quo
24 corruption and the circumvention concerns. And
25 one of the things that I think you rely on

1 pretty heavily are the earmark -- earmarking
2 rules to prevent the circumvention in this
3 case.

4 Now the other side and a lot of the
5 amici say the earmarking rules are really
6 pretty toothless in practice and really don't
7 do much. And this picks up on some of Justice
8 Kagan's concerns as well. They reach only the
9 most clumsy efforts to pass contributions to
10 candidates. They're -- it's difficult to
11 police. Donors rarely need to explicitly
12 earmark -- earmark to accomplish their goals.

13 So, if earmarking's a key to the quid
14 pro quo corruption piece of this, how can we be
15 sure that those are actually going to do much
16 in the real world?

17 MR. FRANCISCO: Sure. And what I
18 would say is earmarking is one part of it, and
19 violating the earmarking rules is, I believe, a
20 crime. But I think it's important to
21 understand where it fits within the mosaic and
22 why there are multiple prophylaxes here that
23 are aimed at preventing the type of quid pro
24 quo corruption at issue here.

25 I start out with the fact that the

1 money has to actually go through the political
2 party, so the donor who's trying to bribe a
3 single candidate has to go through the party
4 who's trying to get elected lots of candidates
5 and hope that the can -- that the party spends
6 that money on behalf of the candidate that the
7 donor is trying to bribe. That's prophylaxis
8 1.

9 Prophylaxis 2 are the base limits.
10 The most they can contribute to the political
11 party is \$44,000.

12 JUSTICE KAVANAUGH: Can I stop you
13 there? Do you think those limits are
14 constitutional? I assume you think they're not
15 constitutional --

16 MR. FRANCISCO: Your Honor --

17 JUSTICE KAVANAUGH: -- and that in a
18 future case, kind of how this march has
19 proceeded, that you would argue those limits on
20 parties are not constitutional so as, to get
21 to my first point, to equalize the strength of
22 political parties and outside groups. That's
23 the real source of the disadvantage, right?
24 You can give huge money to the outside group,
25 but you can't give huge money to the party.

1 And so the parties are very much weakened
2 compared to the outside group.

3 So, to cite that as a prophylaxis, I'm
4 not sure five years from now, three years from
5 now, you know, how that will look.

6 MR. FRANCISCO: Well, Your Honor, what
7 I can say is that we are not here challenging
8 that limit. And under Buckley and the
9 longstanding notion that --

10 JUSTICE KAVANAUGH: Do you think it's
11 constitutional?

12 MR. FRANCISCO: Your Honor, I don't
13 have a position on whether it's constitutional
14 or not. I'm willing to assume for the sake of
15 argument here that it's constitutional, but
16 it's still only the second of the two --

17 JUSTICE KAVANAUGH: You're not going
18 to want that cited back to you in a couple
19 years.

20 (Laughter.)

21 MR. FRANCISCO: The --

22 JUSTICE KAVANAUGH: Assume for the
23 sake of argument. Okay, that's -- all right.

24 MR. FRANCISCO: The -- the -- the
25 third thing I'd point to after that is the

1 earmarking rule, and it's actually a crime to
2 violate the federal earmarking rules.

3 The fourth thing I'd cite to you are
4 the disclosure requirements, which allow the
5 FEC and the public to follow the money to
6 figure out if something nefarious is going on.

7 The fifth, of course, is the bribery
8 laws, which make all of this a crime. So this
9 isn't an example of one prophylaxis, but -- but
10 it's five -- probably I could come up with
11 others -- prophylaxes on top of one another.

12 And if you kind of put it all
13 together, suppose that a donor does want to
14 bribe a particular candidate by going through
15 the party in coordinated spending. It's got to
16 hope that the -- that the party is going to
17 spend that money on behalf of the candidate
18 when the party's got a much broader set of
19 interests.

20 Lots of candidates are running
21 unopposed or they have very little chance of
22 winning or they're just generally in safe
23 seats. Parties don't want to spend money on
24 behalf of those candidates. So, if I'm trying
25 to submit a bribe to bribe that candidate, it's

1 not likely going to get through to the
2 candidate at the end of the day.

3 And if it does, it's going to be
4 pretty blazingly obvious. Why on earth is the
5 party spending all of this money on behalf of a
6 candidate who is in a safe seat or who's
7 running unopposed? That's when the disclosure
8 requirements kick in. That's when the FEC
9 kicks in. That's when the bribery laws kick
10 in. So all of these things work together.

11 JUSTICE KAVANAUGH: I -- I take that
12 happens sometimes. I mean, sometimes it's
13 pretty obvious, though, I think, in the real
14 world, and I think you would acknowledge that
15 too. But I'll stop there. Thanks.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: No.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: So I have a couple
22 questions. One is just I'm just trying to get
23 a clear answer on whether or not your client is
24 going to come back and attempt to suggest that
25 the guardrails that would still exist will no

1 longer exist in the future.

2 What do I mean by that?

3 In McCutcheon, your clients filed a
4 brief saying that the sky wouldn't fall if the
5 Court struck down aggregate limits because we
6 still have coordinated expenditure limits.

7 And now here we are today with your
8 clients saying no more coordinated expenditure
9 limits. And so I -- I'm wondering if -- and I
10 think others have --

11 MR. FRANCISCO: Mm-hmm.

12 JUSTICE JACKSON: -- sort of raised
13 that concern as well -- we're -- we're going to
14 be back here with the other kinds of limits
15 you -- with you making the same kinds of
16 arguments.

17 MR. FRANCISCO: Well, Your Honor, I
18 think different limits are on stronger footing
19 than others. I am not going to say that my
20 clients are not going to come back and try to
21 challenge other limitations. I think it's well
22 known that we have discomfort with different
23 parts of the campaign finance laws.

24 JUSTICE JACKSON: I understand --

25 MR. FRANCISCO: What I am saying is --

1 JUSTICE JACKSON: -- but then -- then
2 your argument --

3 MR. FRANCISCO: -- that that's not
4 what we're challenging here.

5 JUSTICE JACKSON: I appreciate that,
6 but -- but how can your argument be today that
7 these limits can fall and it will be okay
8 because the other limits exist if you can't
9 make a representation that we're still going to
10 have those other limits?

11 I mean, we're trying to --

12 MR. FRANCISCO: Mm-hmm.

13 JUSTICE JACKSON: -- prevent the kind
14 of circumvention that would indicate or allow
15 for quid pro quo corruption. I think everybody
16 is in agreement on that. And to the extent
17 that you say these kinds of limits aren't going
18 to be a problem to get rid of them, that's
19 because these other guardrails exist, right?

20 MR. FRANCISCO: I think I can do that
21 in two ways. The first is just through a very
22 straightforward application of McCutcheon. I
23 think you can just march through the analysis
24 of McCutcheon, do nothing further, and say that
25 this is incompatible with McCutcheon.

1 JUSTICE JACKSON: But -- but --

2 MR. FRANCISCO: My friends are --

3 JUSTICE JACKSON: -- but -- but

4 McCutcheon was aggregate bans that functioned
5 as expenditure limits, right?

6 MR. FRANCISCO: And --

7 JUSTICE JACKSON: McCutcheon was a
8 different set of circumstances.

9 MR. FRANCISCO: Well, actually,
10 McCutcheon was a true contribution limit. And
11 that's why I actually think this is an easier
12 case than McCutcheon and an easier case than
13 Cruz. They're concerned about the dominos
14 falling forward. To me, this is an example of
15 the domino falling backward. I just don't see
16 how this can stand alongside of McCutcheon.

17 The second point that I would make,
18 though, is I could eliminate the -- the base
19 limit issue that Justice Kavanaugh and I were
20 just talking about. And I'll say -- look, I'll
21 put that to the side. I'm perfectly happy to
22 rely on the fact that the -- a would-be briber
23 has to assume that the party is going to do his
24 bidding as -- as part of the bribery scheme
25 here, that the earmarking rule is going to kick

1 in, that the disclosure requirements are going
2 to kick in, that the federal bribery laws are
3 going to kick in.

4 I -- I think that those four
5 prophylaxes would be fully sufficient --

6 JUSTICE JACKSON: Right. But I guess
7 my --

8 MR. FRANCISCO: -- wholly apart from
9 the base --

10 JUSTICE JACKSON: -- I -- I guess my
11 argument is, if we didn't have those other
12 things, would you -- would you be making the
13 same argument?

14 MR. FRANCISCO: Your Honor, I might,
15 but I certainly don't need to given that we
16 have all of these other things. By
17 definition --

18 JUSTICE JACKSON: You have them today,
19 but you're not even -- you're not even
20 committing --

21 MR. FRANCISCO: Yeah.

22 JUSTICE JACKSON: -- to not
23 challenging them in the future.

24 MR. FRANCISCO: By definition,
25 coordinated party spending requires the

1 political party that's standing in between the
2 donor and the recipient of the bribe to be in
3 cahoots on the crime. I am willing --

4 JUSTICE JACKSON: Okay. Let me ask
5 you --

6 MR. FRANCISCO: I -- I -- I -- I guess
7 I am willing to assume that the bribery laws
8 aren't going to go away. I can't imagine that
9 Congress is going to eliminate the bribery
10 laws. So, frankly, I would be making the
11 argument if I had only those two prophylaxes --

12 JUSTICE JACKSON: All right. Let me
13 ask you --

14 MR. FRANCISCO: -- but I have multiple
15 ones in addition to those.

16 JUSTICE JACKSON: Let -- let -- let me
17 ask you about the record upon which we found in
18 Colorado II that there was circumvention
19 happening, that it was likely to happen in the
20 absence of these kinds of limits.

21 Are you prepared to represent that the
22 record that we considered in Colorado II is no
23 longer sound?

24 MR. FRANCISCO: I don't think I have
25 to say that that record is no longer sound

1 because I think the problem in Colorado II was
2 the legal standard that applied. Colorado II
3 defined corruption so that it wasn't limited to
4 quid pro quo corruption but instead included
5 the corrupting -- the so-called corruption
6 caused by influence and access in politics.

7 If you -- you accept that as a
8 definition of corruption, then I think that the
9 record in Colorado II arguably does satisfy
10 that standard. It's just that this Court has
11 repeatedly rejected Colorado II's understanding
12 of corruption.

13 JUSTICE JACKSON: All right. So what
14 is the implication of that now? I guess I'm
15 just trying to understand what factual basis we
16 have right now to make a determination as to
17 the impact of the rise of super PACs and the
18 advancements in disclosure technology. These
19 are things that you say --

20 MR. FRANCISCO: Mm-hmm.

21 JUSTICE JACKSON: -- have happened
22 subsequently post-Colorado II that should make
23 a difference in how we view the likelihood --

24 MR. FRANCISCO: Mm-hmm.

25 JUSTICE JACKSON: -- of quid pro quo

1 corruption.

2 And I just don't know that we in the
3 first instance can make that sort of
4 determination. Don't we have to have some sort
5 of record to determine what -- how super PACs
6 are actually operating and engaging with
7 contributions so that we can have something to
8 base our determination on?

9 MR. FRANCISCO: Well, we do have a
10 record in this case, Your Honor, and what this
11 record shows is that 28 states impose no
12 limitations on a party's ability to coordinate
13 with its candidates. Yet there's not a single
14 example of the type of conduit bribery they're
15 concerned about arising in those 28 states.

16 We have the 2014 amendment, which
17 tripled the size of the base limit for certain
18 purposes, completely eliminated the
19 coordination requirements. No example of a
20 single instance of quid pro quo conduit bribery
21 in that context.

22 We've got existing law, which allows
23 \$44,000 contributions to the party, which can
24 be coordinated in amounts ranging from \$60,000
25 to \$4 million depending on the race. Again,

1 zero example of the type of conduit bribery
2 that they are concerned about.

3 JUSTICE JACKSON: And Justice
4 Sotomayor says that's because Colorado II
5 exists.

6 MR. FRANCISCO: Your Honor --

7 JUSTICE JACKSON: That's because --
8 that's because we have a law that --

9 MR. FRANCISCO: -- Colorado II doesn't
10 apply in the 28 states that impose no limits.
11 It doesn't apply with respect to the 2014
12 amendment, which, of course, imposes no limits.

13 JUSTICE JACKSON: All right. I'll
14 have Mr. Martinez respond to that.

15 And, finally, can I just ask the
16 question about whether parties are being
17 treated better or worse? I -- I -- I
18 appreciate the concern about the changes in the
19 way in which they are related to parties, but I
20 understood that parties, as a result of
21 Colorado I, have no limits on independent
22 expenditures and that that in some ways
23 preferences them.

24 So can you help me to understand who
25 has the better set of rules here?

1 MR. FRANCISCO: Well, that certainly
2 doesn't preference them because PACs also can
3 engage in independent spending. And, in
4 addition, PACs aren't faced with the base
5 limits that we're faced with. They can take
6 billion-dollar contributions. We can take a
7 \$44,000 contribution.

8 So, to me, the real difference,
9 though, between other private entities and the
10 political parties is the theory of corruption.
11 They're --

12 JUSTICE JACKSON: And your answer to
13 Justice Kagan with respect to why, if we agree
14 with you, this isn't going to be limit to --
15 limited to parties, why is this going to be
16 limited to parties.

17 MR. FRANCISCO: Sure.

18 JUSTICE JACKSON: Why -- what -- what
19 was the answer to that?

20 MR. FRANCISCO: And that's what I was
21 just getting at. It's -- it's the theory of
22 corruption. The concern with a lot of private
23 entities, individuals, super PACs, is that they
24 are going to directly bribe the candidate.
25 They're going to go to the candidate and say I

1 will give -- I will spend a hundred thousand
2 dollars on your behalf, a million dollars, 10
3 million, if you do my bidding.

4 JUSTICE JACKSON: But parties don't
5 have that same concern.

6 MR. FRANCISCO: That's not even their
7 theory. Nobody is asserting that a party is
8 bribing its candidates. When the DNC goes to
9 Senate can -- to Democratic --

10 JUSTICE JACKSON: No, in both cases,
11 the -- the -- the theory is that the donor is
12 using either a party or a PAC -- this is the
13 theory -- to effectuate this quid pro quo. So
14 why would it make a difference that a donor who
15 wants to do that is going through a PAC versus
16 a party?

17 MR. FRANCISCO: I don't think that's
18 necessarily the theory for PACs. I think the
19 ALF-CIO's PAC, you know, the Amazon.com PAC,
20 corporate PACs --

21 JUSTICE JACKSON: No, I mean in my
22 hypothetical. If the donor is trying to bribe
23 the candidate and, because of the contribution
24 limits on direct contributions, it says I'm
25 going to do this through a conduit scheme, I'm

1 just trying to understand the difference
2 between giving money to a party and having it
3 funnel to the candidate --

4 MR. FRANCISCO: Yeah.

5 JUSTICE JACKSON: -- that way versus
6 giving money to a PAC.

7 MR. FRANCISCO: So I --

8 JUSTICE JACKSON: Is there a
9 difference between the two?

10 MR. FRANCISCO: So -- well, yes, I do
11 think there's a difference.

12 JUSTICE JACKSON: What is it?

13 MR. FRANCISCO: And there are a couple
14 of differences. The first is that, in the
15 private context, you often do have a unity of
16 interests between the donor and the PAC. When
17 the AFL-CIO creates the AFL-CIO PAC in order to
18 further its own interests, I think the risk is
19 really less that the AFL-CIO is going to funnel
20 money through the PAC to the candidate. The
21 risk is that the AFL-CIO PAC is going to
22 directly bribe the candidate.

23 When it comes to political parties,
24 nobody thinks that if the DNC says to
25 Democratic Senate candidates I will only

1 support you if you oppose the Republican tax
2 bill, nobody thinks that that is a bribe,
3 whereas if a private PAC went to a candidate
4 and asked -- and tried to extract the same
5 promise, I think a lot of people would think,
6 yeah, that's a bribe.

7 That's why my friend's theory depends
8 on this type of conduit bribery scheme using
9 the party as its mule, which this Court in
10 McCutcheon said is unlikely to work --

11 JUSTICE JACKSON: Thank you.

12 MR. FRANCISCO: -- prevented by other
13 things, and unnecessary given the rise in super
14 PACs.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Ms. Harris.

18 ORAL ARGUMENT OF SARAH M. HARRIS

19 ON BEHALF OF THE RESPONDENTS

20 SUPPORTING THE PETITIONERS

21 MS. HARRIS: Mr. Chief Justice, and
22 may it please the Court:

23 Limits on party coordinated
24 expenditures unconstitutionally restrict core
25 election speech. Intervening developments have

1 demolished Colorado II's contrary holding.
2 Indeed, even under closely drawn scrutiny, this
3 Court's recent cases dictate invalidation for
4 many reasons.

5 First, these limits do not serve the
6 only valid interest of preventing quid pro quo
7 corruption or its appearance. Parties can't
8 corrupt candidates, and no evidence suggests
9 donors launder bribes by co-opting parties'
10 coordinated spending with candidates.

11 Second, there is a fatal mismatch
12 between any anti-corruption interest and
13 Congress's exception-riddled limits on
14 party-coordinated expenditures, which would be
15 a nonsensically convoluted means of thwarting
16 donor corruption.

17 And, third, alternatives like FECA's
18 disclosure regime and earmarking rules already
19 check quid pro quos and are operating more
20 effectively today.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Ms. Harris, in your
23 reply brief, you say that the FEC would
24 continue to enforce its rules, but how does
25 they -- how do they do that when the government

1 argues that the rules are unconstitutional?

2 MS. HARRIS: Yes. We have not
3 disclaimed enforcement, and it's the same way
4 that the government has done so in cases such
5 as Windsor and cases such as Chadha.

6 The government and executive branch
7 has traditionally distinguished between
8 declining to defend the constitutionality of a
9 statute and continuing to enforce it,
10 particularly in situations like here, where
11 enforcement is something that preserves
12 judicial review.

13 Now you don't even have to agree with
14 that proposition. You can cast doubt on
15 government enforcement if you wish. The reason
16 this case is easy on that score for
17 jurisdictional purposes is that FECA also has a
18 private enforcement mechanism, and it is
19 abundantly clear that there is a very credible
20 risk of enforcement through that private
21 mechanism because many parties avail themselves
22 of it. There's a rich sort of D.C. Circuit
23 jurisprudence on how this happens.

24 So, again, for mootness, the other
25 side would need to establish that there is no

1 possible credible threat of enforcement either
2 way. I really don't think they can do that.

3 Now, again, I think the jurisdictional
4 issues are -- are really to the merits. And,
5 on the merits, we just don't see anything left
6 of Colorado II's standing. That is why the
7 government is here not defending Colorado II
8 and not defending this particular law.

9 And that is for multiple reasons. I
10 think, if you just look at the theory of undue
11 influence upon which Colorado rested, that's
12 probably the cleanest holding in this case.
13 There is no way that you can look at Colorado
14 II and say it rested on the theory that we've
15 all been talking about now, which is preventing
16 circumvention of quid pro quo corruption or its
17 appearance.

18 Colorado II is rife with references
19 instead to a theory that there might be undue
20 influence if donors decide to try to evade
21 campaign finance restrictions so that they can
22 concentrate on having large donors at the
23 expense of attracting many donors. That is not
24 a theory of quid pro quo corruption that this
25 Court has allowed.

1 JUSTICE SOTOMAYOR: Counsel, I find it
2 difficult to accept your theory that Colorado
3 II rested on the undue influence rationale. It
4 certainly described our prior cases as doing
5 so, but, when it was talking about the
6 coordinated expenditure rule, it specifically
7 referenced the -- that it was to prevent quid
8 pro quo corruption.

9 So I think it's an unfair assessment
10 of Colorado II to say that one of its
11 underlying pins was knocked down in some way or
12 has been knocked down because it didn't rely on
13 that.

14 MS. HARRIS: Two responses. One, I
15 think it's very telling that the Court in both
16 McConnell and also McCutcheon and particularly
17 the McCutcheon dissenters said Colorado II
18 stands for the proposition that undue influence
19 is a valid theory of governmental interest, and
20 that is something that the Court in McCutcheon
21 rejected.

22 Second --

23 JUSTICE SOTOMAYOR: Well, but it
24 wasn't what it relied upon for its
25 anti-corruption rationale --

1 MS. HARRIS: Respectfully --

2 JUSTICE SOTOMAYOR: -- which that's
3 why it went through the earmarking rules.
4 That's why it went through the disclosure
5 rules. And in both instances, all the
6 arguments you're making today it rejected, said
7 earmarking wasn't enough, and even with the
8 federal changes with respect to earmarking, the
9 nod -- the nods and winks that Justice
10 Kavanaugh pointed to don't even need to be
11 accepted as a possibility.

12 We know that -- that -- that
13 candidates in the past have asked donors to
14 donate to the Republican -- to the -- not the
15 Republican -- to a party as opposed to
16 themselves, knowing that the party was going to
17 spend the money on them. It -- it's just all
18 too easy to see that coordinated expend --
19 coordinated expenditures is just a different
20 way of having the party contribute to the
21 candidate.

22 MS. HARRIS: So two responses, first
23 of all, with respect to Colorado II and why it
24 really does rely on undue influence and,
25 second, with respect to earmarking.

1 Colorado II: I will point to you
2 multiple parts of Colorado II. I would start
3 with page 456, Footnote 11, where the Court
4 talks about combatting circumvention of
5 contribution limits designed to combat the
6 corrupting influence of large contributions to
7 candidates from individuals, or page 460, where
8 Colorado II is focused on the idea that a
9 candidate enjoying the patronage of affluent
10 contributors would have a strong incentive to
11 promote circumvention as a step towards
12 reducing the number of donors requiring
13 time-consuming cultivation.

14 Or I'd point you to Colorado I, where
15 the -- where the Court recognizes that the
16 whole point of the restrictions was to -- to
17 prevent certain amounts from being spent for
18 certain offices and certain states.

19 Now we can sort of -- and -- and I
20 think that's why this Court has characterized
21 Colorado II as resting on that basis.

22 Earmarking: I think that just
23 reflects --

24 JUSTICE KAGAN: Well, if I could just,
25 Ms. Harris -- I mean, you know, Colorado II has

1 both because, in that period, it wasn't only
2 quid pro quo corruption. So there's certainly
3 language that you can pick out from Colorado II
4 in the way you just did that goes beyond quid
5 pro quo corruption.

6 But there's no question that it was
7 talking about quid pro quo corruption as well.
8 You know, the risk of coordinated expenditures
9 was that they could be as useful to the
10 candidate as cash and, thus, could be given as
11 quid pro quo for improper commitments from the
12 candidates. That was a very important part of
13 Colorado II. As useful as cash, could be given
14 as a quid pro quo.

15 MS. HARRIS: Again, the problem with
16 that is that we are now in a world of
17 McCutcheon, where the reason why Colorado II
18 may have even mentioned that theory was not
19 something that was borne out by the evidence it
20 was talking about. It just said we will defer
21 to Congress on this. We will not look for
22 evidence, we will not look for narrow
23 tailoring. We won't look for substantiation.
24 And even if I -- I -- I agreed with that
25 characterization of Colorado II, which I don't,

1 I think it really is about undue influence and
2 you can't just sever that part out.

3 The problem is we also now have an
4 evidentiary record and a series of amendments
5 that completely demolish the idea that what
6 Congress was trying to do here is ferret out
7 quid pro quos.

8 JUSTICE KAGAN: But that -- that's a
9 different question. That's not a -- that's not
10 something that focuses on what Colorado II is
11 based on. That's the question of whether
12 something has changed after Colorado II. And
13 I -- I guess I -- I don't really quite
14 understand your argument that it has.

15 MS. HARRIS: Okay. Well, I guess
16 three levels of this. One is doctrinally
17 because that's the first problem with Colorado
18 II. I think Colorado II, when it's looking at
19 tallying and other things, even if I spot you
20 are we talking about quid pro quo, are we
21 talking about something else, I think it's
22 undue influence, we disagree, you still are in
23 a world where Colorado II cited by McConnell as
24 an example of super-duper deference to Congress
25 where there's no narrow tailoring.

1 Doctrinally, that's been thrown out.
2 That is incompatible with McCutcheon and Cruz,
3 where this Court says no, narrow tailoring is
4 actually exacting, rigorous, requires
5 legislative findings, which we don't have here
6 in evidence.

7 JUSTICE KAGAN: So I -- I -- I'll sort
8 of spot you that that there has to be some kind
9 of tailoring, that, you know, whether
10 Colorado -- I don't think Colorado II is
11 inconsistent with that, that we certainly have,
12 as a function of McCutcheon and Cruz, that the
13 restriction has to be connected, has to have,
14 like, a means-end connection to the -- the
15 circumvention interest.

16 So I'll -- I'll spot you that one. I
17 don't think that this has any difficulty
18 meeting that one.

19 MS. HARRIS: And I think the
20 difficulties are rampant, and the exception
21 scheme that Congress has designed shows why.
22 If you're looking to ferret out quid pro quo
23 corruption, the idea that you think that people
24 in Wyoming are more corrupt than people in
25 California and need to be subject to, like, 10

1 times less the limits for races cannot be
2 explained by some sense of detecting quid pro
3 quo corruption, not least because there's no
4 evidence of it.

5 If you think that there's a real
6 incentive for donors to use party coordinated
7 expenditures, co-opt the party, break a lot of
8 campaign finance rules that are criminal
9 penalties in the meantime just to pass through
10 a bribe, you would certainly wonder why
11 Congress would then create a gaping hole in the
12 scheme in 2014 by saying that the one thing
13 where you can accept three times the normal
14 contributions to parties and the one thing --
15 one of the things where you can have unlimited
16 party coordinated spendings is in recounts and
17 in election litigation, which is like ground
18 zero for extremely high-stakes
19 election-dispositive situations.

20 And then you also can't explain the
21 state limits. Why is it that state -- state
22 committees but not national committees can do
23 unlimited party-coordinated spending on "get
24 out the vote" efforts and everything else?

25 Nothing in this scheme in any way

1 matches some sort of quid pro quo interest.
2 And that's only, again, first-level mismatch.
3 Then we get to the evidence. The state
4 evidence that the Petitioner has talked about
5 with respect to the 28 states in which there
6 are no limits on party-coordinated
7 contributions or expenditures is very telling
8 because, again, of those 28, you can even look
9 for, like, a but-for world of what would happen
10 in this case if you didn't have this one limit.

11 That but-for world exists in Arizona
12 and -- and -- and West Virginia. Those states
13 have very similar schemes to the federal
14 scheme. They just don't have party coordinated
15 expenditure limits. And there's no evidence
16 from those states that the sky has fallen, that
17 there's rampant quid pro quos being passed
18 through, or anything else.

19 So you can -- you can do it as a
20 mismatch problem with this law. You can do it
21 as a lack of evidence problem with this law.
22 Under the framework of McCutcheon, it just
23 doesn't work. And that's -- that explains our
24 position in this case.

25 JUSTICE KAVANAUGH: Are limits on

1 outside groups' coordinated expenditures
2 constitutional?

3 MS. HARRIS: We don't have a position
4 on that, and we think they're easily
5 distinguishable. And here is why: The real
6 problem with party coordinated expenditures and
7 the reason why I think this case comes in with
8 built-in limits, even more so than a case like
9 McCutcheon, is that the encroachment here is
10 upon 200 years of history that preceded FECA,
11 where parties and candidates were joint --
12 engaged in joint activity all the time.
13 Parties actually ran the campaigns.

14 Parties and candidates have a unique
15 confluence of influence -- influence and
16 interests, which is both why there's no
17 possibility that a party would itself bribe a
18 candidate and also explains why it's different
19 from these other actors.

20 As Petitioners' counsel noted, there
21 may well be a risk that individual donors or
22 individual PACs might try to engage in a bribe
23 scheme through coordinated expenditures with a
24 candidate. That might differentiate this case,
25 where no one is arguing, not even Colorado II

1 accepted the proposition, that the party itself
2 is a source of potential quid pro quos.

3 Rather, it's the indirectness of the scheme.

4 And I think that limits that. And I
5 also think the greater First Amendment
6 interests of a party coordinating with a
7 candidate who's -- you know, standard bearer is
8 the candidate and engaging in fundamental
9 communications about how to time campaign ads,
10 how to spend scarce resources, how best to get
11 across the party's message, what deviations are
12 acceptable, is fundamentally different as an
13 integral part of our democracy --

14 JUSTICE KAVANAUGH: Are limits on
15 contributions to parties constitutional in the
16 government's view?

17 MS. HARRIS: We aren't -- we aren't
18 saying that they're unconstitutional, and we
19 also think they are distinguishable for some of
20 the reasons I talked about. One is the
21 distinction in the First Amendment values in
22 this particular scheme, which is party
23 coordinated expenditures involve joint speech,
24 joint strategizing. The party can say no to
25 spending on particular things if it thinks the

1 candidate's not running the campaign right in
2 ways that just cutting a check don't do.

3 And, second of all, if you want to
4 limit out contributions to parties and preserve
5 limiting principles, we're back to the way that
6 this law works. Unlike contribution limits,
7 which are just you can't spend more than \$5,000
8 for anyone, this scheme has a welter of
9 completely bizarre exceptions that are -- that
10 -- that really exacerbate any mismatch for quid
11 pro quo.

12 JUSTICE KAVANAUGH: Do you think it is
13 constitutional before 2014?

14 MS. HARRIS: No. But I think it was
15 --

16 JUSTICE JACKSON: Ms. Harris -- I'm
17 sorry. Keep going.

18 MS. HARRIS: I'm sorry. I think it's
19 even more obviously unconstitutional after
20 2014.

21 JUSTICE JACKSON: I guess I'm still
22 not clear on the first question that Justice
23 Kavanaugh just asked you, which was, to the
24 extent that we have donations being made to
25 parties and donations being made to PACs, if

1 the theory is not that either the party or the
2 PAC itself is the one who's trying to bribe the
3 candidate, if the theory is that the donor is
4 trying to bribe the candidate through this
5 conduit, why are parties different than PACs?

6 MS. HARRIS: So parties are different
7 than PACs -- and I don't mean to resist the
8 hypothetical, but I think it's important. PACs
9 themselves can also be the source of the
10 bribery.

11 JUSTICE JACKSON: They can also, fine.

12 MS. HARRIS: Yes.

13 JUSTICE JACKSON: I'm -- we have a
14 lovely PAC who's not trying to bribe the
15 candidate. We have a lovely party that's not
16 trying to bribe the candidate. We have a
17 malicious donor who is trying to bribe the
18 candidate, and because of the limits on their
19 ability to give campaign contributions
20 directly, they would like to use a conduit.

21 What I don't understand is what
22 difference it makes that it's a party or a PAC
23 in that circumstance.

24 MS. HARRIS: Okay. So bracketing the
25 PAC bribery hypothetical, I still think parties

1 are different. And one of the reasons is
2 historical, which explains the unique identity
3 of interests between the candidates and the
4 party that differentiate -- differentiates
5 PACs.

6 The reason why there is no -- why --
7 why the sort of party coordination is in some
8 ways a bulwark against the donor circumvention
9 theme -- scheme is that parties and candidates
10 want -- parties exist to get the candidate
11 elected. Parties do not want to spend money in
12 ways that squander electability of candidates.
13 Parties are insulated from the -- from that
14 because they have the candidate -- you know,
15 candidate appears on the ballot as the party's
16 name. That is all very different. And that's
17 part of a rich history of parties and
18 candidates being completely entangled. It's a
19 very different history than any other outside
20 group.

21 And, again, that's not just for
22 purposes of donor circumvention in which there
23 are real reasons why parties in particular will
24 be reluctant to embark upon this campaign
25 finance violating scheme, but also the fact

1 that PACs, as Petitioners' counsel noted, are,
2 in fact, often aligned with donors in ways that
3 don't correspond to parties. So the AFL-CIO
4 PAC and the AFL-CIO donor example is a good
5 one.

6 CHIEF JUSTICE ROBERTS: Thank you.
7 Thank you, counsel.

8 Justice Thomas?

9 Justice Alito?

10 JUSTICE ALITO: One of the reasons for
11 heightened scrutiny is to ferret out whether
12 the asserted reason for a challenged law or
13 provision is actually the real reason for the
14 provision. And I would appreciate it if you
15 would just say a few words about what can be
16 inferred about the real reason for the
17 provision at issue here from the various
18 exceptions and limitations and the differences
19 in the amount that can be contributed -- that
20 -- of coordinated expenses that are allowed in
21 most house districts and in those where the
22 candidate runs at large in the state.

23 MS. HARRIS: Yes. We think the design
24 of that scheme completely refutes any quid pro
25 quo interest and reveals, as Colorado I

1 signaled, that the real interest is in trying
2 to have Congress and its incumbents prescribe
3 how much money is appropriate in particular
4 contexts, how much money should be spent in
5 particular election contexts.

6 I think the Senate limits are the best
7 example of that. They vary in amount. They're
8 keyed not to some sense of corruption but to
9 state population, which is a proxy for perhaps
10 how much a media market would cost or how much
11 an election would cost to run. So, again, you
12 have the situation where, in Wyoming, the party
13 contribution limit is like a hundred -- under
14 \$125,000, whereas in California, because of the
15 state population differential, it's like \$3.3
16 million.

17 And that cannot be explained by some
18 sense that people in Wyoming are more corrupt
19 than people in California are or even that that
20 is an appropriate amount to spend on races,
21 given that a lot of Senate campaigns take place
22 in smaller states, say, in Montana, that might
23 decide control of the Senate. So it's very
24 difficult to discern any quid pro quo rationale
25 from that.

1 And on top of that, the other
2 exceptions, I think, underscore the problem
3 that state limits that I mentioned with respect
4 to having exemptions for get-out-the-vote
5 efforts or bumper stickers, if there's any
6 difference in corrupting potential when a donor
7 decides it wants to somehow ferry through a
8 quid pro quo scheme because there's unlimited
9 money on bumper stickers, versus something
10 else, no one has pointed to one.

11 And then we have sort of thoroughly
12 canvassed the national exceptions as well for
13 recounts in litigation. They just -- in no
14 sane world are those keyed to some sort of
15 concern with quid pro quos. The only
16 reasonable explanation is they're keyed to
17 judgments, impermissible judgments, about how
18 much money is appropriate to spend on
19 particular forms of campaigning or election
20 speech in particular kinds of states.

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: We no longer have
25 expenditure limits, so there isn't any judgment

1 as a courtesy of this Court. So there no
2 longer is a judgment about how much is
3 appropriate on expenditure limits. What is at
4 issue is a very discrete issue of how much is
5 appropriate to avoid the appearance of
6 corruption with respect to contributions.

7 Now, you said something to Justice
8 Kavanaugh that I wanted to underscore. Your
9 brief and Respondents' -- Petitioners' brief
10 spent a lot of time explaining why Colorado II
11 should be overruled because of the changes in
12 the 2014 law.

13 You disavowed that. You think the law
14 was unconstitutional without those changes,
15 correct?

16 MS. HARRIS: I think -- it -- yes, I
17 think it was -- the doctrinal changes in this
18 Court's jurisprudence would be alone
19 sufficient. I think this is just an easy case
20 because you could say those intervening changes
21 in doctrinal --

22 JUSTICE SOTOMAYOR: Why?

23 MS. HARRIS: -- plus the amendments.

24 JUSTICE SOTOMAYOR: Before the change
25 that permits national convention support came

1 in the -- came in the wake of eliminating
2 public funding of conventions, so it's a way to
3 make that up.

4 With respect to the party
5 headquarters, headquarters, once they're built,
6 are not tied to any particular candidate. So
7 there's not a problem.

8 With respect to ballot counting, the
9 election has already happened. That was the
10 whole Cruz case premise, which is how can there
11 be a quid pro quo corruption after an election?
12 I dissented there.

13 Nevertheless, that's the Court's
14 holding. So why would it rely on that change
15 here?

16 With respect to the issue of donation
17 for party headquarters, that was part of the
18 FEC regulations long before the 2014 elections.
19 So I think you were wise to give up those
20 changes as a grounds for saying this law is
21 unconstitutional.

22 What you have to rely on is saying
23 that McCutcheon and Citizens United and Cruz
24 changed the legal landscape, correct?

25 MS. HARRIS: To be very clear, I am

1 relying on both. I think certainly the
2 doctrinal changes alone would be sufficient,
3 but I just want to -- and the reason I think
4 the 2014 amendments are important is I -- I
5 think taking a blinkered look at the import of
6 being able to have unlimited party coordinated
7 expenditures on not only election recounts but
8 litigation over the election is a pretty big
9 deal. The election hasn't been called at that
10 point. That's actually the heat of the moment
11 in the election when one might think --

12 JUSTICE SOTOMAYOR: But you can't --

13 MS. HARRIS: -- if we're --

14 JUSTICE SOTOMAYOR: -- change the
15 voting.

16 Now, can I go back to that point,
17 whether it was McCutcheon, Cruz -- or Cruz,
18 both cases relied in large measure on the lack
19 of coordinated contribution limits.

20 And you are trying to take that
21 central part of our precedent out of the
22 equation now.

23 MS. HARRIS: So just to push back, I
24 don't think both of those precedents treated
25 the party coordinated expenditure limits as the

1 only thing preventing a different result in
2 those cases. Quite the contrary.

3 What the Court said in particular in
4 McCutcheon, it mentioned the party coordinated
5 expenditure limits almost as an aside.

6 What was far more important in that
7 case, and, again, the reason why we're on a
8 multiple prophylaxis/unprophylaxis universe
9 here is the Court was also talking about the
10 increased efficacy of earmarking regulations,
11 went on for quite some time with respect to
12 how that was something not even considered in
13 -- in McConnell, let alone in Buckley, as well
14 as the enhanced disclosure requirements, and
15 the fact that with a click of the mouse you can
16 now see exactly whether there is some grounds
17 to be suspicious of quid pro quos going on
18 because of otherwise irrational donor behavior.

19 So, no, I don't think the party
20 coordinated expenditures were treated as the be
21 all and end all keeping those -- those schemes
22 from otherwise being unconstitutional, nor
23 could it.

24 JUSTICE SOTOMAYOR: And those
25 earmarking rules, if you look at the Crew

1 amicus, you will note that they weren't
2 completely effective in starting -- in stopping
3 the -- the earmarking that occurred in that
4 case.

5 MS. HARRIS: Respectfully, I think
6 that is just an effort to relitigate what
7 McCutcheon looked at and what McCutcheon said,
8 which is that the breadth of earmarking refuted
9 at the observation in Colorado II, that
10 earmarks are just --

11 JUSTICE SOTOMAYOR: In McCutcheon, we
12 were looking at expenditures. We were not
13 looking at contributions. And that's what the
14 Crew amicus brief example was talking about.

15 MS. HARRIS: McCutcheon was a case
16 about the aggregate contribution limits. And,
17 again, the Court said that earmarking
18 restrictions had grown more efficacious over
19 time because the FEC significantly broadened
20 them and you had to run the risk of very
21 significant penalties if you use earmarking to
22 circumvent contri- -- contribution limits.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?
24 Justice Gorsuch, anything further?
25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: Should we be
2 concerned about the overall architecture of our
3 jurisprudence having weakened or disadvantaged
4 political parties as compared to outside
5 groups?

6 MS. HARRIS: I think you should be
7 concerned with that. I think the even greater
8 concern beyond the disadvantage to political
9 parties that was wrought when FECA sort of
10 overturned over a century's worth of
11 uninhibited coordination between parties and
12 candidates is just the see-sawing of the
13 Court's jurisprudence that would happen if
14 Colorado II remained an outlier and remained in
15 place to sow mischief. So I think it's
16 twofold.

17 It's, one, the practical consequences
18 for parties and truly core election speech;
19 and, two, what it means for the sweep of this
20 Court's jurisprudence in this incredibly
21 important area.

22 JUSTICE KAVANAUGH: And I think
23 Respondents or Intervenor raises questions
24 about whether a ruling in Petitioner's favor
25 here really would strengthen parties or

1 actually would weaken parties. They have some
2 arguments that would -- a ruling in
3 Petitioner's favor would actually weaken
4 parties qua parties.

5 Do you have a response to that?

6 MS. HARRIS: I guess the vantage from
7 which we're looking at it is the First
8 Amendment vantage in the first instance.
9 Regardless of how this works out in terms of
10 who gets more money when and who does what with
11 the money, the bigger issue is, is there a
12 restriction right now that is encroaching on
13 truly central campaign speech.

14 And the answer to us is manifestly
15 yes. And the answer is to allow the First
16 Amendment to do its work so that parties can
17 engage in this coordination with candidates in
18 heartland issues for campaigns and let the
19 chips fall where they may in terms of other
20 things.

21 We don't think this is some -- that a
22 restriction about what parties historically did
23 is some special benefit to them.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Of course, whether
3 or not the restriction is truly encroaching on
4 First Amendment values depends on the
5 application of the test and the extent to which
6 the government has a good legitimate reason and
7 is narrowly tailored in its approach, right?
8 So it's not just is this about speech. We have
9 tests that apply. And I think that's what
10 we're trying to ferret out.

11 So let me just ask you about the
12 emphasis in your brief that suggests that the
13 parties are special, and sort of back to this,
14 and are entitled to special First Amendment
15 protections.

16 So are -- are you prepared to say here
17 that other entities, including state
18 committees, PACs, super PACs, won't get or
19 aren't entitled to the same treatment as
20 parties?

21 MS. HARRIS: We're saying they're
22 different. And we're saying that's grounded in
23 this Court's cases in important ways. We're
24 not asking for a special First Amendment rule
25 for parties.

1 What we're saying is the history of
2 parties' coordination with candidates and the
3 manner in which they coordinate with candidates
4 puts them on different footing, both in terms
5 of the particular First Amendment interests
6 we're talking about here, which go to heartland
7 issues of how does a party who selected its
8 candidate through its own primary process and
9 has a very special interest in ensuring that
10 the candidate adheres to the platform,
11 translates that into actions in a campaign, and
12 also the lack of a comparable quid pro quo
13 interest.

14 So, yes, they are special in that
15 sense, but it's not a sort of special
16 constitutional role. It's just a practical
17 role that reflects just the relationship in
18 practice.

19 JUSTICE JACKSON: And one that we
20 could rely on when the super PACs come next if
21 you -- if this wins.

22 MS. HARRIS: That is an important --
23 I think --

24 JUSTICE JACKSON: It is an --

25 MS. HARRIS: -- that is a limiting

1 principle --

2 JUSTICE JACKSON: -- important --

3 MS. HARRIS: -- that makes this
4 case unique, along with the fact that this
5 restriction, unlike other ones you might see,
6 isn't just a uniform, you know, X number of
7 dollars for everyone restriction.

8 JUSTICE JACKSON: Are there limits
9 right now on party-to-candidate contributions?
10 There are, right?

11 MS. HARRIS: Yes, there are limits on
12 party-to-candidate contributions. Parties can
13 donate -- it's \$5,000 with a curly-Q with some
14 exceptions for certain instances.

15 JUSTICE JACKSON: And so it's --
16 are those limits also at risk based on the
17 arguments that you're making here today?

18 MS. HARRIS: I don't think so. I
19 think you could cabin those in a couple of
20 different ways.

21 And, again, the two I would offer you
22 if this is a concern, one is that the
23 coordinated expenditures involve different
24 First Amendment -- heightened First Amendment
25 restrictions. Again, they are -- they are

1 prohibiting the interchange of campaign
2 strategy.

3 JUSTICE JACKSON: But I thought we
4 said coordinated -- this goes back to the Chief
5 Justice's very first question, that coordinated
6 expenditures are like contributions. So if we
7 have limits on party contributions, I don't
8 understand the distinction.

9 MS. HARRIS: Okay. So I think it
10 is correct, and Colorado II recognizes, they're
11 the same for one purpose, which is the pocket
12 -- from the vantage of the candidate's
13 bottom-line financing, you can say if the party
14 pays for it or if the candidate gets money to
15 pay for it, it's the same sort of pocketbook
16 outcome.

17 But I think there's a world of
18 difference, and the Court's cases recognize
19 this, even Buckley, in saying the contribution
20 -- the First Amendment value of a contribution
21 is simply an expression of support that doesn't
22 come with any sort of input on a campaign or
23 anything else.

24 That just is not true for
25 party-coordinated expenditures, even if we're

1 talking about the sort of simple hypothetical
2 of bill paying and setting aside coordinating
3 on an advertising campaign about what the --
4 how the platform should be communicated. So
5 that's the first distinction.

6 But if you're --

7 JUSTICE JACKSON: It's a different
8 message?

9 MS. HARRIS: It's the --

10 JUSTICE JACKSON: Is that what you are
11 saying?

12 MS. HARRIS: I think it's just a
13 different level of First Amendment
14 communications. So it's above and beyond an
15 expression of support, yes, and in ways that I
16 think implicate even more heartland concerns
17 about elections. Again, you can put that
18 aside. You can not want to make that
19 distinction. That's fine.

20 I think the second distinction is what
21 I said before, which is contribution limits are
22 like \$5,000 or 1,000 or whatever it is, they're
23 flat. That differentiates contribution limits
24 from the acute mismatch in this case, which
25 inheres in the fact that this scheme, the

1 exceptions in the scheme, cannot be matched to
2 a quid pro quo interest precisely because they
3 are variable. They vary based on --

4 JUSTICE JACKSON: Yeah. Very, very
5 complicated, very variable.

6 MS. HARRIS: It's not just
7 complicated.

8 JUSTICE JACKSON: Yeah. Yeah.

9 MS. HARRIS: I think it is they are
10 not keyed to quid pro quos. And we -- you
11 could argue that contribution limits that are
12 flat might be different.

13 And I think that's why the way this
14 Court's protected sort of against the dominos
15 is the McCutcheon framework. You have to look
16 at each case at each restriction. Is it trying
17 to advance a quid pro quo corruption interest
18 or not?

19 And how is it tailored? How is that
20 particular law tailored to advancing that
21 interest? Is there specific evidence? There
22 might be different evidence, not the 28 states
23 we have here, but some other evidence if and
24 when the Court is called upon to address those
25 other limits.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Martinez.

5 ORAL ARGUMENT OF ROMAN MARTINEZ

6 COURT-APPOINTED AMICUS CURIAE

7 IN SUPPORT OF THE JUDGMENT BELOW

8 MR. MARTINEZ: Mr. Chief Justice, and
9 may it please the Court:

10 Petitioners have made very clear this
11 morning that they're trying to ask you to
12 overturn not just Colorado II but really 50
13 years of campaign finance law. This is a
14 highly politicized case, and I think the first
15 place to start is with jurisdiction.

16 No Petitioner here is properly before
17 the Court. When Mr. Francisco was asked about
18 that question, he went right to Vice President
19 Vance. So I'd like to talk about why Vice
20 President Vance -- Vance's claim is moot. And
21 there are two reasons.

22 First, Vice President Vance has
23 repeatedly denied having any concrete plan to
24 run for office in 2028. Petitioners say that
25 uncertainty is enough to prevent mootness.

1 That's wrong as a matter of law. The
2 heightened test for mootness that they invoke
3 only applies when the mootness doctrine is
4 being invoked to potentially manipulate the
5 judicial system. Usually, it's a defendant;
6 sometimes it's a respondent; and usually that
7 person is voluntarily stopping the conduct that
8 triggers the injury.

9 You made all this clear in your 2001
10 City News case, which is really on all fours
11 here. There's no manipulation of the facts in
12 this case, so Vice President Vance's claim is
13 moot, unless he has a concrete plan to run.
14 Does he? Well, his public statements
15 repeatedly over and over and over, over the
16 course of the past year, including in new
17 comments that were reported this morning by NBC
18 News, show that he has no concrete plan.

19 If any other plaintiff in this Court
20 told you that his injury is speculative, that
21 it's uncertain, that it's premature, that it
22 might happen and it might not happen, they
23 wouldn't have a prayer under Article III. The
24 same rules apply to the Vice President.
25 There's no politician exception to Article III.

1 Even if you disagreed with me about
2 Vice President Vance's standing because of his
3 concrete plan to run, there's also the absence
4 of any real-world credible enforcement threat.
5 The executive order bars the FEC from enforcing
6 the law. No one thinks President Trump is
7 going to enforce this law and target his own
8 Vice President. And the Solicitor General's
9 suggestion that private parties are the ones to
10 worry about runs head-long into Whole Women's
11 Health, where you said that the threat of
12 private party enforcement cannot create Article
13 III jurisdiction.

14 I'd love to talk about the merits as
15 well and the radical nature of the arguments we
16 heard this morning, but -- I also welcome the
17 Court's questions.

18 JUSTICE THOMAS: Well, before you do
19 that, would you address the committees also in
20 your mootness argument?

21 MR. MARTINEZ: Absolutely. I think
22 the committees are -- are an easier case for us
23 because the committees lack any ability, they
24 had no statutory right to get out of the
25 district court in the first place.

1 There's a federal statute that governs
2 who is allowed to take advantage of the
3 expedited procedures. And that's Section
4 30110. It allows only three entities to go up
5 in an expedited posture for mandatory en banc
6 interlocutory review. The FEC, eligible
7 voters, and the national committee of the
8 political party.

9 The national committee of the
10 political party does not include the NRSC. You
11 said that expressly in the DSCC case. You
12 literally said that expressly after much
13 discussion of the issue at oral argument. More
14 importantly, the text of the statute doesn't
15 allow it. FECA has a statutory definition that
16 defines the term "national committee." And it
17 unambiguously refers only to, in this context,
18 the RNC.

19 It's not a surprise, given what I just
20 said, that my friend on the other side did not
21 address the text of the statutory definition
22 until page 10 and a half of his second reply
23 brief in this case. They have no textual
24 argument. Now, what he said was he has got a
25 textual argument based on an amendment that

1 happened 50 years later in 2002.

2 Well, that -- that doesn't work
3 either. The statutory amendment that he's
4 talking about only -- did not purport to
5 override the definition. It didn't purport to
6 override the DSCC case. So I think it's
7 telling that when my friend got up, and he was
8 asked about the committees, he said, well,
9 let's talk about Vance, because he think Vance
10 is really the only -- the only way to get
11 there.

12 The committees also have other
13 problems too. The enforcement issue is equally
14 as strong as to the committees. And the -- the
15 committees can only have standing here if they
16 actually have rights under this law, which they
17 don't, because they need to rely on an invalid
18 assignment regulation that doesn't survive
19 Loper Bright.

20 CHIEF JUSTICE ROBERTS: Mr. Martinez,
21 if the Vice President came to you and, like, I
22 want legal advice on whether or not I can
23 violate these limits because I've heard that
24 somebody said don't worry about it, they're not
25 going to be enforced, would you tell him to go

1 ahead, or maybe one thing would you tell him to
2 do is you ought to be careful because maybe
3 somebody else will be in the White House next
4 term and they may decide that prosecuting this,
5 what is a violation, makes sense?

6 MR. MARTINEZ: Here's what I would
7 tell him, Mr. Chief Justice: I would tell him
8 that Congress has envisioned this exact
9 scenario, and Congress has created in Section
10 30108 of FECA a specific procedure by which any
11 person can go to the FEC and request an
12 advisory opinion about whether their conduct is
13 lawful. And if the FEC says yes, it's lawful,
14 as they obviously would here because they think
15 the conduct is lawful, then there's a statutory
16 safe harbor that would provide total relief,
17 total protection to the Vice President --

18 CHIEF JUSTICE ROBERTS: Well, but any
19 --

20 MR. MARTINEZ: -- from any enforcement
21 action or any prosecution.

22 CHIEF JUSTICE ROBERTS: Is that true
23 with respect to private enforcement actions?

24 MR. MARTINEZ: I don't know whether
25 it's true with respect to private enforcement

1 actions, but, Your Honor, in Whole Women's
2 Health, this Court made very clear that private
3 enforcement actions are not a basis to -- to --
4 to recognize a case against the government.

5 And -- and I think -- and I'd have to
6 go back and look -- but I would -- I imagine
7 that the safe harbor would apply just as
8 equally to private enforcement actions because
9 otherwise what would be the value of having the
10 safe harbor? But I -- I concede I haven't
11 looked at that question.

12 CHIEF JUSTICE ROBERTS: That's a --
13 yeah, I -- that was kind of the point of the
14 question.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: But -- so you
17 would tell him don't worry about a thing, go
18 ahead and -- it's going to be --

19 MR. MARTINEZ: Well, I would tell him
20 there is a statutory mechanism to take
21 advantage of. And I -- and I don't see why
22 they couldn't have done that. If they had done
23 that, you know, when -- when the administration
24 came into power, the -- the President is in
25 control of the executive branch. We heard

1 about that yesterday. I think the FEC would
2 have taken the position it's taken now. They
3 would have given him an advisory opinion, no
4 problem.

5 But they don't want that. They want
6 an advisory opinion not from the FEC; they want
7 an advisory opinion from this Court. And
8 that's why they're coming to this Court with a
9 bunch of plaintiffs who either don't have
10 statutory jurisdiction or -- or don't have
11 standing.

12 But, Mr. Chief Justice, let me just
13 add to that. Let's say the Vice President
14 said: I don't want an advisory opinion. Tell
15 me what you think. Is this actually going to
16 happen? Is it going to be enforced against me?

17 I would tell him there are three
18 layers of speculation that -- that you have to
19 get through. And it's highly unlikely that
20 even a future FEC would change position and
21 come after you.

22 Number one, they'd have to change
23 their view on the constitutional question.
24 Number two, more importantly, they would have
25 to do something that the D.C. Circuit has

1 unanimously en banc said is not allowed and
2 violates rule of law 101. They would have to
3 file a enforcement action targeting past
4 conduct that occurred at a time when the FEC
5 said the conduct was lawful. The PHH case,
6 unanimous en banc decision ratifying the panel
7 decision which cited seven precedents of this
8 Court that said that's rule of law 101, that's
9 a total due process violation.

10 CHIEF JUSTICE ROBERTS: Well, I can
11 recall a few occasions on which we have
12 overruled en banc decisions from the D.C.
13 Circuit. So I don't know if that's enough of
14 an assurance to -- with speech issues at stake
15 to say that the case is moot.

16 MR. MARTINEZ: I -- I think that --
17 that the best assurance I can give you is the
18 advisory opinion process. I'm aware that the
19 administration in analogous circumstances
20 involving other decisions of this Court and
21 other precedents has been given -- giving
22 letters of assurances to individuals confirming
23 that they believe that -- that certain conduct,
24 even when it's not allowed by statute, is
25 constitutional. I think that would be yet

1 another layer of protection, in addition to the
2 statutory safe harbor.

3 But I just think as a realistic matter
4 an FEC that comes in, even if it wants to
5 change position on the constitutional question,
6 is not going to violate rule of law 101 by
7 saying we're going to go target a bunch of
8 people who were -- were -- were doing things
9 that we said was allowed. I just don't think
10 that's a realistic concern here.

11 And so if Vice President Vance, you
12 know, had that question, I would say we've got
13 statutory mechanisms in place to protect you.
14 Let's take advantage of those. We can go to
15 the administration, which by the way you're the
16 Number 2 official in, and ask for an assurance
17 letter. In addition, as a real-world matter,
18 it's super-unlikely that the FEC is going to
19 violate unanimous decision by the D.C. Circuit,
20 which was written, by the way, by a member of
21 this Court, and -- and go ahead and -- and
22 start violating due process by prosecuting
23 people for conduct that the agency was -- said
24 was allowed.

25 JUSTICE KAVANAUGH: Can I just --

1 MR. MARTINEZ: It's just not
2 realistic.

3 JUSTICE KAVANAUGH: I don't -- if we
4 want to keep going on this. I was going to
5 turn to the merits. But can you address
6 McCutcheon squarely? Because that's --

7 MR. MARTINEZ: Sure.

8 JUSTICE KAVANAUGH: -- that's
9 obviously been the emphasis on the other side,
10 is that McCutcheon changed the landscape from
11 Colorado Republican.

12 MR. MARTINEZ: Sure. I -- I don't
13 think McCutcheon changed it at all. In fact,
14 McCutcheon expressly relied on this provision
15 as a basis to reach the holding in McCutcheon.

16 And I think what -- I think what this
17 highlights is what's really going on here. And
18 we heard it in -- Justice Kavanaugh, in your
19 questions, your colloquy with Mr. Francisco.

20 They are setting up bait-and-switch
21 2.0. Bait-and-switch 1.0 was McCutcheon. They
22 came in and said in McCutcheon, hey, we need to
23 get rid of these aggregate limits. Why?
24 Because we've got all these other protections.
25 Look, coordinated expenditures are limited too.

1 And then you said, okay, well, fine, we'll do
2 that. And you put it in your opinion than that
3 coordinated expenditures was -- was going to
4 protect us.

5 Now they're coming back and saying:
6 Ha, just kidding. Actually, the coordinated
7 expenditure -- expenditure provision is
8 unlawful as well. And -- and why do you not
9 need to worry? Well, we've got these other
10 limits. But then you asked him, Justice
11 Kavanaugh, you said, well, do you think those
12 other limits are constitutional? And they say,
13 well, we're not so sure. We're not going to
14 take a position.

15 JUSTICE KAVANAUGH: Well, they did say
16 the bribery laws --

17 MR. MARTINEZ: Right.

18 JUSTICE KAVANAUGH: -- the disclosure
19 laws --

20 MR. MARTINEZ: Those are the two.

21 JUSTICE KAVANAUGH: -- and I think
22 earmarking, although that was a little
23 questionable.

24 MR. MARTINEZ: I -- I heard two. I
25 heard bribery and disclosure, and I think that

1 gives away the game because what's really going
2 on here -- and --

3 JUSTICE KAVANAUGH: Assume it's three.
4 Assume it -- assume it's bribery, disclosure,
5 and earmarking. Why is that not enough?

6 MR. MARTINEZ: Okay. So bribery,
7 disclosure, and earmarking. You know what that
8 leaves out? All of the other, like, 50 pages
9 of laws in FECA, which you have considered over
10 50 years, you have upheld them decision after
11 decision after decision.

12 And I think what Mr. Frank --
13 Francisco's position is and I think I'm glad he
14 laid it out, this wolf comes as a wolf. He has
15 basically told you that they're going to keep
16 litigating to knock down every single one of
17 the restrictions, and that includes the limits
18 on donors to candidates directly. But just
19 listen to how the -- the donor/candidate limit
20 is going to be undermined by this.

21 JUSTICE KAVANAUGH: I didn't hear -- I
22 didn't hear that.

23 MR. MARTINEZ: Well, he said that the
24 only two prophylaxes you need are bribery and
25 disclosure and maybe earmarks.

1 JUSTICE KAVANAUGH: Well, donors, I
2 mean, we were talking about parties there, not
3 candidates.

4 MR. MARTINEZ: But here's how --
5 here's how you get to the same place, Justice
6 Kavanaugh. If you -- if you rule for them
7 here, okay, what's going to happen, right now,
8 there are two limits that apply, the donor to
9 party and then the party to candidate. So
10 we're essentially going to get rid of the
11 second one because coordinated expenditures are
12 going to be unlimited. That limit goes away.

13 Then you asked him, well, what about
14 the first limit, donor to party? He said, oh,
15 we're not taking a position, and wink, wink,
16 you know, he said don't -- don't be blind to
17 reality. The reality is they're going to be
18 coming back and asking you to overturn that and
19 that the logic that they're asking you to
20 embrace here is going to mean that that
21 provision falls too.

22 So what's that going to leave? It's
23 going to leave the donor with the ability to
24 give infinite money to the party, which the
25 Solicitor General tells you is inextricably

1 intertwined with the candidate, and then the
2 party can make unlimited coordinated
3 expenditures, which, by the way, aren't just
4 about speech. It's paying the electric bill.
5 It's paying the florist bill. It's paying the
6 pizza bill. It's any expense that the campaign
7 wants.

8 JUSTICE KAVANAUGH: What about the
9 idea that the parties are -- I've said this
10 multiple times -- but the parties have been
11 weakened overall and this case is at least, I
12 think Mr. Francisco said, starts to restore the
13 strength of parties, although, obviously, it
14 doesn't get them all the way there in competing
15 with outside groups.

16 MR. MARTINEZ: Look, I think, if that
17 were really concern -- their concern, what they
18 could have done is file a very different type
19 of challenge. And if the problem is look,
20 super PACs have too much ability, then what
21 they should have done is brought --

22 JUSTICE KAVANAUGH: Don't you think
23 that's a real concern?

24 MR. MARTINEZ: I think that if that
25 were their real concern --

1 JUSTICE KAVANAUGH: Is -- do you think
2 that's a real concern? The parties are very
3 much weakened and disadvantaged compared to the
4 outside groups. At least that's the
5 impression.

6 MR. MARTINEZ: I think the -- I think
7 the answer to that concern is to say that
8 parties should be able to get unlimited
9 contributions but only so long as that money is
10 used for their independent expenditures that
11 were blessed in Colorado I.

12 I think that's a solution that's
13 rational, that's consistent with the general
14 framework, with the distinction between
15 expenditures and contribution limits, and that
16 doesn't require unruling and unraveling 50
17 years of campaign finance law. That's not what
18 they asked for and they didn't ask for it for a
19 reason, because what they're really aiming at,
20 what they're really aiming at is all the other
21 laws that they want to take down. This is like
22 the -- the camel's nose under the tent. If you
23 agree with them in this case, you're going to
24 get petition after petition coming to you for
25 this provision and that provision and this --

1 overrule this precedent and that precedent.
2 You're going to be deluged with petitions, the
3 dominos are going to fall, and you're going to
4 have to reconstruct campaign finance law from
5 the ground up.

6 I have a better solution for you.
7 Don't go down this path. We have a doctrine.
8 You have a doctrine, stare decisis. The whole
9 purpose of the doctrine is to preserve the rule
10 of law, to preserve the -- the appearance and
11 fact of the integrity of the judicial process,
12 and it says you don't just throw out one
13 decision when -- when, you know, maybe you're
14 having second thoughts about it later,
15 especially which -- when it's going to mess up
16 a whole broad area of law.

17 JUSTICE ALITO: Well, I have a --

18 MR. MARTINEZ: So you can apply stare
19 decisis if you get there.

20 JUSTICE ALITO: I appreciate your
21 solicitude for the petitions that we might get
22 in the future, but that's -- you -- you talked
23 about speculation. That's speculative. And I
24 did not hear Mr. Francisco say that he has a
25 plan to attack other provisions. Maybe he

1 does. Maybe it's predictable that he would,
2 but --

3 MR. MARTINEZ: He said it in his
4 brief.

5 JUSTICE ALITO: -- we have one
6 provision before us today, right, so don't we
7 have to decide this case and not speculate
8 about what might come later?

9 MR. MARTINEZ: Two things. I think he
10 said don't -- don't -- don't be blind to
11 reality. Let's not be blind to reality. Their
12 own brief reiterates their opposition to the --
13 the -- the contribution limit, expenditure
14 limit, it reiterates their opposition to
15 Buckley.

16 But you asked, Your Honor, Justice
17 Alito, don't we have to do this. No, you don't
18 have to do it. And the reason you don't have
19 to do it is because this case is a walking
20 vehicle problem. Let's imagine we had a time
21 machine and we went back to June.

22 JUSTICE ALITO: All right. Let's talk
23 about the vehicle problem and let's talk about
24 reality. At what point -- you have a vice
25 president or even a sitting president who's --

1 who -- who has been in, you know, may or may
2 not run for a second term.

3 That potential candidate, at what
4 point do you think it would -- that potential
5 candidate would have -- be able to challenge a
6 provision like this? And, here, it's not a
7 question of standing from the outset. It's a
8 question of whether it has been shown that the
9 case has been -- become moot.

10 MR. MARTINEZ: Right. So I think -- I
11 think the -- the analytical question to ask is
12 does the candidate still have a concrete plan
13 to run. And I think the evidence might not
14 be --

15 JUSTICE ALITO: And you would say
16 when -- only when the -- the -- the candidate
17 has a big event and announces --

18 MR. MARTINEZ: No.

19 JUSTICE ALITO: -- I'm going to run,
20 even if the candidate has raised a lot of money
21 and has hired all sorts of consultants and --

22 MR. MARTINEZ: No -- no, Your Honor.
23 I -- I'm not --

24 JUSTICE ALITO: No?

25 MR. MARTINEZ: -- requiring that.

1 What I'm saying is that the analytical question
2 is when does he have a concrete plan. And then
3 you're going to have to look to evidence in the
4 public, in the record, et cetera, about what
5 that plan is.

6 And I think, in a circumstance -- I'll
7 tell you when it's not satisfied. It's not
8 satisfied when the candidate says in comments
9 published today that a 2028 run is "something
10 that could happen, it's something that might
11 not happen."

12 Look at the other comments. In
13 February, he's not --

14 JUSTICE ALITO: Isn't -- isn't that
15 what -- isn't that what every -- potential
16 candidates always say --

17 MR. MARTINEZ: That's what --

18 JUSTICE ALITO: -- until the day when
19 they make the announcement?

20 MR. MARTINEZ: That's what can --

21 JUSTICE ALITO: That's what they
22 always say.

23 MR. MARTINEZ: That's what candidates
24 say when they're running. That's also what
25 candidates say when they're not running. The

1 most -- the most closely analogous candidate to
2 the vice president, the most -- the most recent
3 vice president who was serving a second term
4 president was Vice President Biden in 2013.

5 He was saying virtually identical
6 things to what Vice President Vance is saying
7 now and, of course, he did not run. So I think
8 politicians, we all have seen politicians.
9 They have an interest in not saying what their
10 decision is until they have to because it keeps
11 their name in the news.

12 I think, here -- but -- but I think
13 this poses a really interesting and important
14 question for the Court, which is, are you going
15 to be in the business of second-guessing the
16 public statements of politicians and plaintiffs
17 when they're telling you essentially that they
18 don't have standing or that their case has
19 become moot.

20 I mean, Vice President Vance's lawyers
21 are basically telling you ignore what he's
22 saying publicly, don't believe them, wink,
23 wink, nod, nod, don't be naive. We all know
24 he's really running.

25 If that were true, the -- the easiest

1 thing in the world would be for this plaintiff,
2 like any other plaintiff, could have come
3 forward and said, I'm running, or told his
4 lawyers, put that in the brief, say I'm
5 running, say I have a concrete plan.

6 I understand why, for political
7 reasons --

8 JUSTICE ALITO: I mean, are you
9 serious -- are you serious -- anyway, my time
10 is up.

11 MR. MARTINEZ: I'm -- I'm serious --
12 Your Honor, I'm serious that the same rules have
13 to apply to all plaintiffs. And the fact that
14 someone is a politician who has an interest in
15 perhaps dissembling to the public about their
16 plans is not a reason to relax your normal
17 Article III standards if the plaintiff in Lujan
18 had come to you and said, well, you know, I did
19 have a plan to visit the -- the wildlife refuge
20 to see the spotted owl and I bought plane
21 tickets and all that, but now I'm not so sure.
22 I canceled the plane tickets. The plan is kind
23 of off. I might do it, I might not do it.
24 It's premature to know.

25 Any other plaintiff who is saying the

1 same things that the vice president is saying
2 here, you would say there's no standing and you
3 would say that the case has become moot.

4 CHIEF JUSTICE ROBERTS: All right.
5 Thank you.

6 MR. MARTINEZ: And I think the same
7 rule should apply to anyone.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 I want to follow up on Justice
11 Kavanaugh's question at the outset because I'm
12 not sure it was answered directly, but is there
13 any part of or language in McCutcheon with
14 which you disagree?

15 MR. MARTINEZ: I do think that there
16 are concerns I have about the empirical
17 analysis and the predictions that were made in
18 McCutcheon and its analysis of joint
19 fundraising, so if I could just sort of spell
20 that out.

21 CHIEF JUSTICE ROBERTS: Sure.

22 MR. MARTINEZ: I think the Court in
23 McCutcheon was responding to a hypothetical
24 that the district court had put forward and
25 certain arguments that had been made by the

1 parties. And the Court essentially said, it's
2 just illogical, it's -- it's -- it's
3 unrealistic to think that all this money is
4 going to shift around in the way that's being
5 suggested.

6 And I think the Court's opinion said
7 something like, you know, it's crazy to think
8 that the Iowa Republican Party is going to want
9 to help the Senate candidate from California
10 and send the money to the California Republican
11 Party.

12 And I think that's true insofar as
13 it's limited. It's -- it's true that state
14 parties don't often shift to another state
15 Republican party, but the reality is that what
16 they do do, and this is just a hundred percent
17 objective fact that you could -- that anyone
18 could see if you go to the FEC website, is
19 state parties don't give to each other.

20 What they do is they -- they send
21 their money up to the NRSC, to the NCCC --
22 sorry, NRCC and to the RNC. So just in 2024,
23 for example, state parties sent almost \$30
24 million that they collected and they sent it to
25 the NRSC.

1 And they didn't do it because those
2 states had Senate races and they wanted the
3 NRSC's help. And I'm talking about the
4 Republican Party of D.C., the Republican Party
5 of Georgia, the Republican Party of New
6 Hampshire, state parties that had no -- no, you
7 know, geographic interest in a Senate race.
8 They sent that money up.

9 In the -- in the presidential races,
10 it's even more obvious. So there have been FEC
11 proceedings looking at the joint fundraising
12 campaigns of the Trump and Clinton campaigns
13 from 2016. If you look at the money that the
14 state parties received through those joint
15 fundraising efforts, 80 percent of the money
16 that Democratic state parties collected went to
17 the DNC; 90 percent plus of the money that the
18 Republicans collected went to the RNC.

19 So I think, in McCutcheon, probably
20 because this wasn't properly put before you,
21 but the -- the -- the hypothetical was not the
22 exact hypothetical that needed to be
23 considered. And so, if the question is are
24 these state parties being used, essentially, as
25 cash cows to kind of launder money through and

1 get it back up to the national parties, the
2 answer is absolutely yes, and that raises the
3 -- the very serious problems of quid pro quo
4 corruption that -- that I think we should all
5 be worried about.

6 CHIEF JUSTICE ROBERTS: Thank you.

7 Justice Thomas?

8 Justice Alito, anything?

9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: You spent a lot of
11 time on standing, more than I would have hoped,
12 but I do want to say that whether he runs for
13 President or Senate, how do you eliminate that
14 if he doesn't get to run for President, that
15 he'll run for Senate, given that he has a
16 committee with \$50,000?

17 MR. MARTINEZ: Oh, I --

18 JUSTICE SOTOMAYOR: I don't want you
19 to spend a lot to --

20 MR. MARTINEZ: -- I'm so glad you
21 asked. So I don't think there's any realistic
22 chance that he's running for Senate. There --
23 there's a sitting Republican senator who's
24 currently in that seat who's running for re-
25 election. It's -- in 2026. And he is likely

1 to win -- I think he's likely to win. If he
2 wins, he's going to be the sitting incumbent.
3 It's extremely unlikely that he's running for
4 Senate. The Vice President has never said
5 since becoming Vice President that he's
6 considering running for Senate.

7 On the \$50,000 question, look at it in
8 context. Real Senate candidates do not --
9 would be way beyond \$50,000. I think Mark
10 Kelly, who's running for Senate in Arizona, has
11 raised \$9 plus million. John Fetterman, who's
12 running for Senate in 2028 in Pennsylvania,
13 \$1.2 plus million. So \$50,000 is actually a
14 sign that he's not a real candidate for Senate.

15 JUSTICE SOTOMAYOR: All right. Now
16 let's go back to the merits.

17 MR. MARTINEZ: Sure.

18 JUSTICE SOTOMAYOR: All right?
19 Justice Kavanaugh said there are three
20 prophylactics, the bribery statute, the
21 earmarking statute, and what was the third?
22 Now I've forgotten the third.

23 JUSTICE KAVANAUGH: Disclosure.

24 MR. MARTINEZ: Disclosure.

25 JUSTICE SOTOMAYOR: Disclosure. Thank

1 you.

2 McCutcheon seemed to say that those
3 were enough. Why is this different?

4 MR. MARTINEZ: I don't think
5 McCutcheon said that they were enough, but I
6 think the -- the -- the key thing to realize,
7 there's -- there's some language in McCutcheon
8 talking about conduits and independent actors.
9 I think it's a crucial point for this Court to
10 appreciate that there's an internal
11 contradiction in the arguments that the
12 Solicitor General's Office is making together
13 with Petitioners.

14 They want you to believe two things
15 that are diametrically opposed. On the one
16 hand, the whole theory for giving parties
17 special treatment is because -- and why, you
18 know, parties can't corrupt candidates is
19 because they are inextricably intertwined.
20 That's the language that comes out of this
21 Court's case law that the Solicitor General
22 really emphasizes over and over again in their
23 brief. The parties and the candidates,
24 inextricably intertwined.

25 But then we get to talk about quid pro

1 quo corruption. What's their theory there?
2 Their theory there is, oh, these are
3 independent actors, totally different actors,
4 and that's why we don't have to worry about
5 quid pro quo corruption.

6 Well, they can't have it both ways.
7 If the parties are inextricably intertwined for
8 purposes of getting special rights, they can't
9 be totally independent actors for purposes
10 of -- of dismissing concerns about quid pro quo
11 corruption.

12 And I think that sort of gets to the
13 heart of it. I think, when you look at
14 McCutcheon, McCutcheon relied on the validity
15 of this provision, and I think it's perfectly
16 fair to say that just as in McCutcheon we
17 treated this provision as valid, we're going to
18 continue treating it as valid in this case.

19 JUSTICE SOTOMAYOR: What about --
20 Mr. Francisco pointed to the fact that there
21 was no evidence of a quid pro quo involving
22 coordination between a party and a candidate,
23 and he points to the fact that there's no
24 such -- that that coordination is permitted in
25 28 states.

1 How do you address that?

2 MR. MARTINEZ: So I wasn't part of
3 developing the record in this case. I just
4 think two comments.

5 First of all, I think that -- that,
6 you know, when you see it's raining out and you
7 see there's a good reason to carry an umbrella,
8 that's a pretty good reason to take the
9 umbrella. And --

10 JUSTICE SOTOMAYOR: We're both
11 borrowing from my sister, Ruth Bader Ginsburg.

12 MR. MARTINEZ: Absolutely. And I
13 think the Watergate evidence was -- was
14 directly on point. You -- I think you raised
15 it earlier. The dairy industry evidence showed
16 that there was a very serious quid pro quo
17 corruption problem where donors were using
18 political parties to launder millions of
19 dollars to -- essentially, to candidates in
20 order to get bribes. So I think that's a --
21 that justifies the law. That, frankly, should
22 be enough.

23 Now the -- the implicit premise in my
24 friend's position is that once you have a law
25 that's been in place for a long time that's

1 doing good work, you have to kind of
2 continually re-evaluate it, and the way you
3 continually re-evaluate it is by looking to,
4 like, whether states need similar laws in their
5 states.

6 I just think that's a very bizarre way
7 to -- to think about the problem, and I think
8 the states' brief supporting us makes that
9 clear.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 Justice Gorsuch?

12 Justice Kavanaugh?

13 Justice Barrett?

14 Justice Jackson?

15 Thank you, counsel.

16 Mr. Elias.

17 ORAL ARGUMENT OF MARC E. ELIAS

18 ON BEHALF OF THE INTERVENORS

19 MR. ELIAS: Mr. Chief Justice, and may
20 it please the Court:

21 Over 50 years -- over the past 50
22 years, this Court has had opportunity to review
23 many campaign finance laws, and it has
24 appropriately treated many of them skeptically,
25 but it has never wavered on one foundational

1 pillar: Congress may limit contributions to
2 candidates.

3 And while the current system imposes
4 strict limits on nearly everyone else, my
5 clients and the NRSC and the NRCC are given a
6 special privilege to make millions of dollars
7 of in-kind contributions to candidates.

8 These limits on in-kind contributions
9 are called coordinated expenditures, but they
10 do not pose any meaningful burden on party
11 speech. In fact, the vast majority of them
12 hardly involve speech at all. The practical
13 effect of Petitioners' case would be to convert
14 the political parties into mere paymasters to
15 settle invoices from campaign vendors.

16 This Court has repeatedly recognized
17 that these are just contributions which provide
18 only a general expression of support for
19 candidates. Congress may regulate them.

20 I welcome your questions.

21 JUSTICE THOMAS: So, if you say it's
22 not speech at all, can it be totally regulated?
23 There are no limits?

24 MR. ELIAS: I -- under the Buckley
25 framework, there are still limits on regulation

1 of contributions. This Court's decision, for
2 example, in the Vermont limits case put in
3 play -- said that limits could be so low as --

4 JUSTICE THOMAS: No, I mean you just
5 said that there is no speech component to this,
6 that they can be regulated, that -- so what's
7 the protection if there's no speech component
8 to it?

9 MR. ELIAS: So there is a speech
10 component. What this Court said in Buckley is
11 that the speech component is -- is in showing
12 support, in other words, is in making a --
13 an -- a contribution is an act of speech. And
14 in the Sorrell case, this Court said that there
15 was a limit to how low party limits could be,
16 that you would effectively deprive that --
17 that -- being able to make that speech
18 component.

19 My point, Justice Thomas, is that I
20 think -- imagine in the ether is the sense that
21 what's going on is that the Republican Party
22 wants to run -- wants to create an ad on their
23 platform and they lament, if only they could
24 coordinate with a candidate, they would make
25 this ad on their platform more effective.

1 That would be an interesting
2 as-applied challenge. That isn't either their
3 facial challenge nor reality, nor even their
4 as-applied challenge. What the NRSC and the
5 NRCC wish to do is to simply pay the bills of
6 campaigns, bills that may not involve speech at
7 all. May involve, for example, flowers or may
8 involve hotel blocks, and in which the party
9 may not even know that the bill was incurred
10 until they receive the invoice and are told to
11 dutifully pay it. And that poses a very
12 different profile of the kind of speech
13 interest that is at stake here.

14 JUSTICE SOTOMAYOR: I'm sorry,
15 counsel, now I'm a little confused. I thought
16 that they are attacking coordinated
17 expenditures and saying that they should be
18 able to coordinate expenditures. I don't
19 think -- and Mr. Francisco when he gets up on
20 reply will make this clear or not -- they're
21 not saying that coordinated expenditures means
22 that a candidate can just give the bill to the
23 committee. They're saying the candidate can
24 say to the committee do this and do that and
25 the committee can do it.

1 MR. ELIAS: No, Your Honor.

2 Coordinated expenditures, whether they be for
3 paid public communications like television ads
4 or they are for hotel blocks or they are for
5 the electric bill, these are invoices incurred
6 by the campaign's vendors, payable, owed by the
7 campaign, that are simply handed off to the
8 party committee for payment.

9 And that is perfectly lawful. That
10 is -- that is how coordinated-party spending
11 works. If you look at -- in the record at the
12 Chabot ad or the Vance ad at JA 195 through 96
13 or 198 through 2000 -- I'm sorry -- through
14 205, you see that there is -- there are e-mail
15 chains in which the media vendor for the
16 campaigns are talking to the campaign itself
17 about the ad and talking about the changes they
18 have made to the ad at the direction of the
19 campaign.

20 And then, at the end of the chain, it
21 is: Here, party, pay this. Now it's maybe a
22 little more polite than that. Maybe it's:
23 Please pay this.

24 But, you know, one of the questions
25 that -- that came up about, you know, who this

1 benefits, and I'll -- I'll be happy to address
2 that now or -- or later, the NRSC's membership
3 are incumbent Senators, the NRCC's membership
4 are incumbent members of the House.
5 Interestingly, among all of the lawyers here,
6 none of them represent the Republican National
7 Committee. None of them represent a state
8 party.

9 Sure, the RNC nominates candidates.
10 The RNC has a platform. The NRSC does not
11 nominate candidates. No one runs on a ballot
12 as the NRSC's candidate. These are campaign
13 committees. They exist like super PACs solely
14 to elect candidates to office.

15 And so, when a -- when a incumbent
16 senator's campaign or a competitive senator's
17 campaign in, for example, in this case in Ohio,
18 sends a bill to the party, that's just a seat
19 that these incumbent senators want to add to
20 their tally or it's a colleague of theirs who
21 is a member of the committee whose bill they
22 want to pay.

23 JUSTICE BARRETT: Mr. Elias, can I --
24 can I ask you to maybe address Justice Alito's
25 question to Mr. Francisco a little more

1 directly?

2 Mr. Francisco said that the RNC and
3 the DNC had long been aligned on this question,
4 and, normally, regulated parties are happy to
5 get rid of regulation. And, obviously, this
6 ties the DNC's hands just as much as it ties
7 the RNC's hands. So I guess my questions are
8 two.

9 One is, if the parties had long been
10 aligned on this, why change the position? And,
11 two, if there isn't an imbalance in who this
12 benefits, why would the DNC be here? Like, why
13 would your client be here if it didn't perceive
14 this to be something that benefit -- would
15 benefit the RNC more than the DNC?

16 MR. ELIAS: Yeah, so I would correct
17 my -- my friend. I don't believe the parties
18 have been aligned on this interest. I think
19 the -- the issue -- I think that if you go
20 back -- in fact, I know since the very first
21 brief my name ever appeared on before this
22 Court was in 1995 in Colorado I and you look at
23 the position of the Democratic National
24 Committee and the Democratic Senate and
25 Congressional Campaign Committee, they -- they

1 did not say that the limits should be struck
2 down. Their brief said essentially that the
3 definition of coordination should be narrowed
4 but not that the limits entirely should be
5 struck down.

6 And we did not file a brief in support
7 of the -- of Colorado -- of the Republican
8 party in Colorado II. So I don't think that
9 it's correct to say that our position here has
10 been aligned.

11 And, certainly, our -- our
12 officeholders and our members in voting in
13 Congress and in their public statements and in
14 the platform of the Democratic Party have not
15 been aligned with striking down this limit.

16 To -- to answer the question directly,
17 I think that the -- the reason why there is a
18 difference here might stem from the fact that
19 the RNC is not in this case. I mean, the fact
20 is the Democratic National Committee spends an
21 enormous amount of money and energy on
22 party-building, on registering people to vote
23 in states like Indiana and Missouri when there
24 is no competitive Senate or House election in
25 Indiana or Missouri. And what this is going --

1 JUSTICE ALITO: Put aside the question
2 of -- of the -- of the RNC and why they're not
3 here. How is your client hurt by -- how would
4 your client be hurt if this provision were held
5 to be unconstitutional?

6 I assume you think so. So why?

7 MR. ELIAS: Right. So, Your -- Your
8 Honor, what I was starting to say is that the
9 par- -- the national -- the national committee
10 in particular, but all of the -- the -- the
11 national parties, but the national committee in
12 particular and state parties, they have to do
13 party-building day in, day out, year in, year
14 out. They have to build the next generation of
15 candidates. They have to register voters in
16 all 50 states.

17 There has been a lot of press about
18 the Democratic National Committee's 50-state
19 project and its expansion, and what that means
20 is that you are investing your hard money not
21 just in the next swing state election, not just
22 in the next competitive election, but in
23 building for the future.

24 What this will do is put -- is create
25 a -- a collective action problem that will

1 drive the parties inevitably to just being
2 bill-payers. They will not be able to do --
3 they will not be able to support activity that
4 is long term in nature because the -- there
5 will be an arms race that right now doesn't
6 exist. The coordinated-party spending limits
7 act as a buffer on how much money you can pump
8 into directly paying the bills of a House or
9 Senate campaign or a presidential campaign so
10 that you have funds to do these other
11 party-building functions.

12 JUSTICE JACKSON: So that's actually
13 quite interesting because it's a different view
14 of how these rules either help or hurt parties.

15 So what I think you're saying is that
16 if these limits are eliminated that it will
17 somehow make the party or the parties on both
18 sides into kind of glorified fundraisers for
19 the candidate as opposed to putting their money
20 and efforts into the kinds of party-building
21 activities that you would prefer to do.

22 MR. ELIAS: Yeah. Yes. And I think
23 it's no surprise that if you look at many of
24 the states that have no limits on
25 party-coordinated expenditures, they are among

1 the weakest parties in the country at the state
2 level.

3 JUSTICE JACKSON: So the rules don't
4 disadvantage parties in that sense.

5 MR. ELIAS: No. What -- look, if this
6 Court wants to -- to enact new rules that
7 benefit parties, I've got a long list.

8 (Laughter.)

9 MR. ELIAS: But -- but it would not
10 begin or even be on the list to strike down the
11 ban on -- or the limits on coordinated-party
12 expenditures.

13 I want to make a couple of other
14 points just to clarify.

15 JUSTICE KAVANAUGH: Both -- both
16 parties will be operating under the same rules,
17 and you're saying -- are you saying there would
18 be a differential impact on the two parties or
19 just the collective action problem and you
20 don't want to be part of that?

21 MR. ELIAS: It's the collective action
22 problem.

23 And I didn't mean to suggest, Justice
24 Alito, that there's anything untoward with the
25 RNC not being here. My point is just that the

1 national committees bear an extra burden with
2 respect to these party-building activities that
3 understandably the congressional committees and
4 an individual candidate, the individual
5 candidate just cares about the next election.
6 Senate -- Senate campaign and House campaign,
7 they just worry about the next -- winning the
8 majority in the next election.

9 The DNC and the RNC and state parties
10 bear -- have larger infrastructure purposes,
11 and that's why, in Colorado, it was the
12 Colorado Republican Party that was leading the
13 charge. That's why, in the Cao case in the
14 Fifth Circuit, it was the RNC and a candidate
15 leading the -- the -- the charge.

16 So I -- there are a couple of points,
17 though, that I'd like to clarify.

18 JUSTICE KAGAN: I want to let you do
19 that, but sometimes, when people talk about the
20 weakness of parties in the current day, what
21 they mean is the parties have no control over
22 individual candidates, senators, house members.

23 So how would this affect that if you
24 thought that? And, obviously, we're not in the
25 business of trying to figure out whether

1 parties need help and how best to provide it,
2 but I'm just wondering, if you think that the
3 real problem with the weakness of parties is
4 that there's not enough party control over
5 candidates, how does that play out?

6 MR. ELIAS: Right. So I -- I would --
7 I would answer that in two ways, the first with
8 respect to the -- the -- the actual plaintiffs
9 below, the -- the Petitioners in this case.

10 The membership of the NRSC is the
11 sitting caucus of the Republican senators. The
12 membership of the congressional committee are
13 members of the Republican conference. They are
14 part of leadership. They literally are listed
15 in the official directory. They are elected as
16 part of the official election of leadership in
17 the body. I promise you that is where their
18 power comes from. Their power comes from the
19 fact that they are a coalition of incumbent
20 members of the House and Senate.

21 It is not because of their ability to
22 paymaster more money to this candidate or that
23 candidate that gives them power in their -- in
24 their elections.

25 Can I make just a couple of points?

1 First, very small, you asked --
2 Mr. Martinez was asked if an advisory opinion
3 binds private parties. It does. It acts as
4 a complete shield against any liability,
5 criminal, civil, by -- by anyone.

6 The second question was -- or -- or
7 there was a lot of discussion about super PACs
8 and the relative power of super PACs versus the
9 party committees. The -- the key benefit that
10 the party committees have that seems to have
11 gone unmentioned is actually found in
12 McConnell, which is the member of Congress
13 can't solicit money for a super PAC in excess
14 of \$5,000.

15 So, when we talk about: Oh, well, you
16 know, they would much rather have the money go
17 to a super PAC, well, that may be what they
18 privately want as an elected member of Congress
19 or as a candidate, but candidates and
20 officeholders cannot solicit for these
21 super PACs.

22 So it's not just that they're
23 independent in their spending, they are
24 actually on their own, largely, with some
25 exceptions, which I'm happy to address, in

1 how that money is -- is -- is raised.

2 With respect to the earmarking rules,
3 there's been a lot of mention about the
4 earmarking rules but not a lot of discussion of
5 it. The reason why the earmarking rules are
6 not effective, and I think this is a bit of a
7 change since McCutcheon, frankly, are for two
8 reasons.

9 The first is because joint
10 fund-raising is essentially an exception to the
11 earmarking rules, right, because -- because,
12 after all, if you have a joint fund-raising
13 committee between a candidate and 50 state
14 parties, the candidate name is in the joint
15 fund-raising committee because they are a
16 participate. So it's not illegal earmarking
17 that someone is giving to the Trump victory
18 fund or the Hillary victory fund or the Biden
19 victory fund. It's required by the -- the
20 regulation because their committee is getting
21 the first money in that arrangement.

22 So I think that the -- that, first of
23 all, you have to understand that the earmarking
24 prophylactic just, like, doesn't have any
25 application in the joint fund-raising arena.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas?

4 JUSTICE THOMAS: Just so I'm clear, is
5 there any First Amendment interest in
6 coordinated expenditures?

7 MR. ELIAS: Your Honor, I think that
8 there is an interest, a -- a First Amendment
9 interest in coordinated expenditures in two
10 regards. Number one, there is an interest any
11 time any entity or person wishes to make a
12 contribution to a political committee. They
13 are making -- they are expressing First
14 Amendment speech. They are engaged in First
15 Amendment speech.

16 Buckley said that that is -- that that
17 is satisfied by allowing them to contribute, so
18 essentially the speech is in the first dollar.
19 It is in showing support for that -- for that
20 candidate. And that's why the contribution
21 limits could be \$3500 because the idea to
22 contribution-limit candidates because the donor
23 is -- is -- is -- is engaged in First Amendment
24 activity, engaged in First Amendment speech.
25 It is essentially symbolic speech. It's the

1 act of giving money. So that's number one.

2 Number two, I -- again, I think this
3 case would be a very different one if the
4 as-applied challenge -- first of all, if it was
5 an as-applied challenge. But, second, if it
6 was an as-applied challenge where what the
7 party wanted was its own speech and it wanted
8 to coordinate that speech with a candidate,
9 that would pose a very difficult case. And
10 there would be different considerations on how
11 that could be limited, which is why in 1996 the
12 brief of the Democratic Party went to what the
13 scope of coordination was, that there should be
14 less of a sweep of what is considered
15 coordinated.

16 But if you're saying is their First
17 Amendment speech with respect to paying the
18 bills of a campaign so that the campaign staff
19 stayed at a hotel, it is just in the act of
20 making the -- the donation. It's just in the
21 act of making the in-kind contribution.

22 JUSTICE THOMAS: I still don't
23 understand what you're saying. If the party
24 coordinates with the candidate and pays the
25 bill, is that speech or is -- does that have a

1 First Amendment protection or is it simply, as
2 you say, a bill-paying exercise?

3 MR. ELIAS: It is speech. It is
4 speech. And under Buckley, what it is treated
5 as is a contribution. And, therefore, though
6 it is speech, it is subject to limit by
7 Congress on how much can be spent in engaging
8 in that speech.

9 CHIEF JUSTICE ROBERTS: Justice Alito?

10 JUSTICE ALITO: If we look at all of
11 the limitations and the restrictions and the
12 variable limits, how can the provision satisfy
13 any sort of heightened scrutiny? And does that
14 cause reason for legitimate skepticism about
15 whether this is about circumvention at all as
16 opposed to other things like favoring
17 incumbents, favoring major parties, et cetera?

18 MR. ELIAS: So are you talking about,
19 for example, the 2014 new accounts?

20 JUSTICE ALITO: I'm talking about all
21 of the restrictions and limitations.

22 MR. ELIAS: So I think each one of
23 these restrictions and limitations has a
24 constitutional -- either a constitutional
25 reason or a constitutionally motivated reason.

1 So, for example, the 2014 accounts,
2 something I'm very familiar with. The reason
3 why the legal account was treated in this new
4 law was because prior to that, there was and
5 remains on the books today a regulation, 11
6 C.F.R. 100.9 and 100.15, that entirely exempt
7 recounts from the campaign finance laws,
8 entirely.

9 If you go back to the Bush/Gore
10 recount, none of that money was paid out of the
11 hard money accounts. What happened is that
12 after the McCain-Feingold law, after this
13 Court's decision in McConnell, there became a
14 genuine question whether because of the ban on
15 national parties and candidates raising,
16 spending, directing, or controlling --
17 apologize if I missed a -- missed a word there
18 -- soft money, whether that -- those
19 regulations were still in effect.

20 So Congress in 2014 passed -- they
21 clarified against a backdrop in which, by the
22 way, many Republican elected officials were
23 taking the position it is still unregulated,
24 unlimited.

25 JUSTICE ALITO: All right. Well, we

1 don't -- we don't want to take the time --

2 MR. ELIAS: Okay.

3 JUSTICE ALITO: -- to go through all
4 of these one by one. Just one more.

5 The difference in the limit for --
6 which was talked about, the limit in California
7 and the limit in Wyoming.

8 MR. ELIAS: Yeah.

9 JUSTICE ALITO: How is that -- how can
10 that be seen as based on preventing
11 circumvention?

12 MR. ELIAS: So, look -- and you see
13 this in states as well, in various state
14 campaign finance laws. Legislatures have one
15 of two choices or a combination. They can
16 either say we don't care whether you're running
17 for insurance commissioner, county council, or
18 governor, the contribution limit is \$1,000, you
19 know, or \$5,000, whatever it is. It's just --
20 it's just a flat limit. In some states, the
21 limits for governor are higher than the limits
22 for town council or higher for governor than
23 they are for legislature.

24 And it's never -- those have never
25 been viewed as constitutionally suspect. The

1 theory is that for some offices, it simply
2 costs a lot more money to -- to run a
3 comparative campaign and, therefore, they're
4 going to set different contribution limits from
5 different -- from donors because they are
6 reflecting the difference in the cost in
7 running campaigns.

8 JUSTICE ALITO: Well, I don't think
9 that helps you to say that, unless I'm --
10 unless I'm missing the point. Is there a
11 greater -- is the degree of risk of corruption
12 different in those two places?

13 MR. ELIAS: They -- they are because
14 the fact is people -- the fact is that it is
15 not that the good people of Wyoming are any
16 more likely to be corrupted than the -- than
17 folks in California. But the value of a
18 \$100,000 bill pay for a television ad in
19 Wyoming might be a week's worth of television.
20 In California, the -- the value of a week's
21 worth of bill pay for a television ad wouldn't
22 buy you a single spot in Sacramento.

23 JUSTICE ALITO: Okay. I understand.
24 Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 Justice Kagan?

3 JUSTICE KAGAN: Mr. Elias, I think
4 some of the skepticism when you approach limits
5 like this is, well, if we took them off, it
6 might be a better world, it might be a worse
7 world, who knows. But with respect to the
8 particular thing that we're supposed to be
9 concerned about, which is the prevention of
10 quid pro quo corruption, it would not be a
11 different world, that that's the kind of
12 skepticism, that with respect to that one
13 interest, this limit just doesn't have enough
14 connection to that interest and preventing quid
15 pro quo corruption or preventing people from
16 circumventing the -- the principal quid pro quo
17 rules, the contribution limits.

18 So how would you address that?

19 MR. ELIAS: I would address it very
20 straightforwardly. Congress passed limits that
21 right now say that an individual can give
22 \$3,500 per election to a candidate. In
23 reality, there are joint fund-raising
24 committees in which an individual can give over
25 \$1 million to a committee that bears that

1 candidate's name.

2 Now, we can debate whether or not that
3 creates actual corruption, actual quid pro quo
4 corruption. And I do think that it is being
5 undersold. The record there, I would -- I
6 would point you all to the Lindberg example in
7 the CREW brief at page 1718, where a -- a
8 insurance company, in fact, made a \$500,000
9 contribution to the North Carolina Republican
10 Party and then instructed the state party to
11 give \$250,000 of it directly to the candidate.
12 And that was prosecuted as quid pro quo bribery
13 because, in fact, that individual wanted
14 legislation. And that took place in 2020.

15 So I think -- I think we're
16 underselling the actual corruption. But,
17 honestly, if an individual giving a million
18 dollars when the base limit is \$3500, and at
19 the same time they have business before the
20 House or the Senate and that -- and that
21 individual may be a deciding or swing vote,
22 that is a world that McCutcheon didn't
23 envision. That is certainly a world that
24 Buckley didn't envision.

25 And if you take off, the only

1 prophylactic -- we've heard a lot about
2 prophylactics, prophylactics. The only
3 prophylactic that is in place on that is the
4 coordinated party spending limit. The only
5 thing that is preventing the connection between
6 that donation and the -- and the money being
7 used to pay bills that -- that the candidate
8 wants paid right now is the coordinated party
9 spending limit.

10 If you take that off, then, frankly,
11 I'm not sure other than the bribery law, I
12 don't think anything is left. The -- the
13 earmark regulation just won't apply. So you
14 can take that one off the table.

15 And I hear people say, well,
16 disclosure. I mean, honestly, I'm not even
17 sure I understand what that means. I mean, no
18 one in this courtroom spends more time on the
19 FEC's disclosure database than I do. And I
20 don't even know what it is I'm hypothetically
21 supposed to be looking at to figure out that
22 corruption. Sure, I see a lot of money going
23 in, and then I guess I follow what happens on
24 Capitol Hill, but other than that, what's that
25 database telling me?

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 Justice Kavanaugh?

5 Justice Barrett?

6 Justice Jackson?

7 Thank you, counsel.

8 MR. ELIAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Rebuttal,
10 Mr. Francisco?

11 REBUTTAL ARGUMENT OF NOEL J. FRANCISCO
12 ON BEHALF OF THE PETITIONERS

13 MR. FRANCISCO: Thank you, Mr. Chief
14 Justice. Three quick points.

15 We are -- first, we are fine with the
16 earmarking rule. I can't imagine we'd be here
17 challenging the earmarking rule.

18 Secondly, we began on jurisdiction
19 with Vice President Vance because it's frankly
20 indisputable that the Sixth Circuit had
21 jurisdiction in statutory authority over Vice
22 President Vance at the time that it ruled.

23 He was not yet elected to the vice
24 presidency. So he was still a sitting United
25 States Senator. Even under my friend's view,

1 that would be within the Article III
2 jurisdiction of the Sixth Circuit. And as a
3 voter, he had the authority to trigger 30110's
4 independent cause of action. So we satisfied
5 everything in the Sixth Circuit.

6 Now that we're before this Court,
7 30110, simply does not apply. It does not
8 apply in this Court. What matters in this
9 Court is that you have authority under the cert
10 statute. He's not claiming you don't. And
11 that you have Article III jurisdiction, which
12 you do with respect to Vice President Vance for
13 all of the reasons discussed. And what you --
14 what you also have with respect to the
15 committees.

16 His only argument there is that the
17 committee's authority arises from a 50-year-old
18 regulation. Well, this Court upheld that
19 regulation in 1981, in Loper you made clear
20 that that regulation survives as a matter of
21 statutory stare decisis.

22 And in 2014, Congress ratified that
23 regulation when it adopted exceptions to the
24 coordinated spending limits and explicitly
25 applied those exceptions to the congressional

1 committees. That makes no sense unless the
2 limits apply to the committees in the first
3 place.

4 My third point goes to the merits and
5 it goes to Justice Alito, your question.

6 The base limits here show almost to a
7 metaphysical certitude that the coordinated
8 spending limits have nothing to do with quid
9 pro quo bribery. The base limits are the same
10 everywhere, for every race. \$3500 for
11 individuals, \$500 for the party committees.

12 That shows that Congress thinks the
13 risk of bribery is the same everywhere, the
14 same in Wisconsin as it is in -- as it is in
15 California. Yet the coordinated spending
16 limits range from \$60,000 to \$4 million,
17 depending on the race and location. That makes
18 no sense if what you're concerned about is
19 bribery. Even a Senate candidate in California
20 could be bribed for \$4 million.

21 But it makes perfect sense if what
22 you're trying to do is limit the overall amount
23 of money in politics. That, however, is what
24 this Court has repeatedly said is verboten
25 under the First Amendment. The last people who

1 should be saying what should be spent in
2 elections are the people who are holding power
3 today.

4 With respect, this Court has
5 jurisdiction. This law is unconstitutional.
6 We ask that you invalidate it.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Martinez, this Court appointed you
10 to brief and argue this case as an amicus
11 curiae in support of the judgment below. You
12 have ably discharged that responsibility, for
13 which we are grateful.

14 The case is submitted.

15 (Whereupon, at 12:13 p.m., the case
16 was submitted.)

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<p>\$</p> <p>\$1 [1] 137:25 \$1,000 [1] 135:18 \$1.2 [1] 112:13 \$1.3 [1] 25:5 \$10 [1] 14:15 \$100,000 [1] 136:18 \$125,000 [1] 71:14 \$250,000 [1] 138:11 \$3,000 [1] 14:5 \$3,500 [1] 137:22 \$3.3 [1] 71:15 \$30 [1] 109:23 \$3300 [1] 30:3 \$3500 [3] 131:21 138:18 142:10 \$356,000 [1] 24:19 \$4 [4] 20:5 48:25 142:16,20 \$44,000 [9] 13:15,19 14:17 20:3 27:16,19 38:11 48:23 50:7 \$5,000 [5] 67:7 82:13 84:22 129:14 135:19 \$50,000 [8] 5:21 10:2 30:19,20 111:16 112:7,9,13 \$500 [1] 142:11 \$500,000 [2] 14:17 138:8 \$60,000 [3] 20:4 48:24 142:16 \$814,600 [1] 24:25 \$9 [1] 112:11</p> <p>1</p> <p>1 [2] 16:15 38:8 1,000 [1] 84:22 1.0 [1] 96:21 10 [4] 16:15 51:2 62:25 89:22 100.15 [1] 134:6 100.9 [1] 134:6 101 [3] 94:2,8 95:6 11 [2] 59:3 134:5 15 [1] 5:21 1718 [1] 138:7 18 [1] 5:22 195 [1] 120:12 1970s [1] 17:2 198 [1] 120:13 1981 [1] 141:19 1995 [1] 122:22 1996 [1] 132:11</p>	<p>2</p> <p>2 [2] 38:9 95:16 2.0 [1] 96:21 20 [1] 15:25 200 [1] 65:10 2000 [1] 120:13 2001 [1] 87:9 2002 [2] 8:12 90:1 2013 [1] 106:4 2014 [13] 19:20 48:16 49:11 63:12 67:13,20 73:12 74:18 75:4 133:19 134:1,20 141:22 2016 [2] 24:16 110:13 2018 [1] 8:6 2020 [1] 138:14 2024 [2] 24:21 109:22 2026 [1] 111:25 2028 [4] 5:18 86:24 105:9 112:12 205 [1] 120:14 28 [10] 5:9 19:16,19 48:11,15 49:10 64:5,8 85:22 114:25</p> <p>3</p> <p>3 [1] 13:23 30108 [1] 91:10 30110 [5] 6:18 7:18 8:23 89:4 141:7 30110's [1] 141:3 30125(b)(2)(b)(iv)(ii) [1] 8:14 32 [1] 24:18</p> <p>4</p> <p>40 [2] 13:23 24:23 44,000 [1] 28:1 456 [1] 59:3 460 [1] 59:7</p> <p>5</p> <p>50 [10] 25:4 86:12 90:1 98:8,10 101:16 116:21,21 124:16 130:13 50,000 [1] 30:19 500,000 [2] 27:21,25 50-state [1] 124:18 50-year-old [1] 141:17</p> <p>8</p> <p>80 [1] 110:15</p> <p>9</p> <p>90 [1] 110:17</p>	<p>96 [1] 120:12</p> <p>A</p> <p>abandoned [2] 5:17 9:21 ability [8] 19:17 23:2 48:12 68:19 88:23 99:23 100:20 128:21 able [7] 75:6 101:8 104:5 118:17 119:18 125:2,3 above [1] 84:14 absence [3] 25:14 46:20 88:3 absolutely [5] 19:24 23:19 88:21 111:2 115:12 abundantly [1] 55:19 accept [3] 47:7 57:2 63:13 acceptable [1] 66:12 accepted [2] 58:11 66:1 access [1] 47:6 accomplish [1] 37:12 account [1] 134:3 accounts [4] 14:2 133:19 134:1,11 acknowledge [1] 41:14 across [1] 66:11 act [6] 17:14 118:13 125:7 132:1,19,21 action [11] 7:19 12:5 16:6 17:3 27:15 91:21 94:3 124:25 126:19,21 141:4 actions [5] 81:11 91:23 92:1,3,8 active [4] 5:19,19 9:24,25 activities [2] 125:21 127:2 activity [3] 65:12 125:3 131:24 actors [6] 33:9 65:19 113:8 114:3,3,9 acts [1] 129:3 actual [5] 10:11 128:8 138:3,3,16 actually [34] 5:7 6:13 9:21 10:21 12:23 13:13 15:11 19:4,7,15 21:7,8,20 23:6 34:1 37:15 38:1 40:1 44:9,11 48:6 62:4 65:13 70:13 75:10 79:1,3</p>	<p>90:16 93:15 97:6 112:13 125:12 129:11,24 acute [1] 84:24 ad [9] 10:20 118:22,25 120:12,12,17,18 136:18,21 add [2] 93:13 121:19 added [1] 8:12 addition [5] 16:13 46:15 50:4 95:1,17 address [11] 17:15 85:24 88:19 89:21 96:5 115:1 121:1,24 129:25 137:18,19 addressed [4] 12:15 14:19 15:1 16:20 addressing [1] 6:18 adheres [1] 81:10 administration [4] 25:23 92:23 94:19 95:15 adopted [4] 7:22 32:7 34:6 141:23 ads [2] 66:9 120:3 advance [2] 22:15 85:17 advancements [1] 47:18 advancing [1] 85:20 advantage [3] 89:2 92:21 95:14 advertising [1] 84:3 advice [1] 90:22 advisory [7] 91:12 93:3,6,7,14 94:18 129:2 affect [1] 127:23 affluent [1] 59:9 afl-cio [6] 52:17,17,19,21 70:3,4 agency [1] 95:23 aggregate [7] 32:24 34:24 35:3 42:5 44:4 77:16 96:23 aggregation [1] 15:13 agree [5] 16:2 32:12 50:13 55:13 101:23 agreed [1] 60:24 agreement [2] 18:5 43:16 agrees [1] 16:4 ahead [3] 91:1 92:18 95:21 aimed [1] 37:23 aiming [2] 101:19,20 alf-cio's [1] 51:19 aligned [8] 22:23,24 70:2 122:3,10,18 123:10,15</p>	<p>alito [33] 20:12,13 22:11 23:23 26:20 27:4 70:9,10 72:21 102:17,20 103:5,17,22 104:15,19,24 105:14,18,21 107:8 111:8 124:1 126:24 133:9,10,20 134:25 135:3,9 136:8,23 142:5 alito's [1] 121:24 alive [1] 6:4 allow [6] 5:10 29:1 40:4 43:14 79:15 89:15 allowed [8] 24:18 56:25 70:20 89:2 94:1,24 95:9,24 allowing [1] 131:17 allows [3] 20:2 48:22 89:4 almost [3] 76:5 109:23 142:6 alone [5] 5:21 10:2 73:18 75:2 76:13 alongside [1] 44:16 already [4] 5:20 12:16 54:18 74:9 alternatives [1] 54:17 although [2] 97:22 100:13 amazon.com [1] 51:19 amendment [28] 5:25 19:20 35:23 48:16 49:12 66:5,21 79:8,16 80:4,14,24 81:5 82:24,24 83:20 84:13 89:25 90:3 131:5,8,14,15,23,24 132:17 133:1 142:25 amendments [5] 8:7,12 61:4 73:23 75:4 american [2] 16:10 28:21 amici [1] 37:5 amicus [3] 77:1,14 86:6 among [2] 121:5 125:25 amount [5] 70:19 71:7,20 123:21 142:22 amounts [3] 20:4 48:24 59:17 ample [1] 17:19 amplified [1] 14:6 amplifying [1] 24:5 analogous [2] 94:19 106:1</p>
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