No. 24-3051

In the United States Court of Appeals for the Sixth Circuit

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*,

Plaintiffs-Appellants

v.

FEDERAL ELECTION COMMISSION, *et al.*

Defendants-Appellees

On certification from the United States District Court for the Southern District of Ohio
Hon. Douglas R. Cole, District Judge
(Dist. Ct. No. 1:22-cv-639)

BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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DISCLOSURE STATEMENT

Counsel for *amicus curiae* Institute for Free Speech, Brett R. Nolan, certifies that the Institute is not a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation has a substantial interest in the outcome of this litigation.

/s/ Brett R. Nolan

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. It was founded by the Honorable Bradley A. Smith, who served as a Commissioner on the Federal Election Commission from 2000 through 2005, including serving as the Vice Chairman of the Commission in 2003 and Chairman in 2004. Along with scholarly and educational work, the Institute is involved in targeted litigation against unconstitutional laws restricting political speech at both the state and federal level. The Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* or its counsel, financially contribute to preparing or submitting this brief. All parties have consented to the Institute filing this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Debates over campaign finance regulation often "generate[] more heat than light, more assertions than evidence." David M. Primo & Jeffrey D. Milyo, *Campaign Finance & American Democracy*, 3 (2020). The Supreme Court requires the opposite. When the government restricts speech "to prevent an anticipated harm, it must do more than 'simply posit the existence of the disease sought to be cured.'" *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1653 (2022). The Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden," *id.* (quoting *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014)), and this Court should not do so here.

FECA's limits on coordinated party expenditures fight against a harm that either does not exist, or that is effectively managed by other more narrowly drawn rules.

For evidence of the former, just look at the states, where most allow unlimited party support for their statewide and legislative candidates. At least 17 states do so while limiting the amount that individual donors can contribute to those same candidates. If the government is worried that coordinated party expenditures will lead to donors

circumventing individual contribution limits, the evidence of that problem would exist in these states. But it doesn't. The FEC did not identify below "a single case of *quid pro quo* corruption" involving coordinated party expenditures under state law. *Cruz*, 142 S. Ct. at 1653. That lack of evidence should heighten the Court's "skepticism" that the government's anticorruption interest here is legitimate. *See id.* at 1652.

Furthermore, even if coordinated party expenditures would increase the risk of *quid pro quo* corruption in a vacuum, the earmarking laws eliminate such fears. Federal law prohibits individual donors from even implying that they would prefer that a donation to the party be used to support a particular candidate. When that happens, the donation must be treated as a contribution to the candidate—and subject to the ordinary contribution limits. Thus, federal law already prevents donors from using political parties to circumvent individual contribution limits—"disarm[ing]" the potential for *quid pro quo* corruption in this context. *McCutcheon*, 572 U.S. at 211.

ARGUMENT

I. STATE EXPERIENCE SHOWS THAT ANY ANTICIRCUMVENTION INTEREST IN LIMITING PARTY COORDINATION IS BASED ON SPECULATION ALONE.

One upside to federalism is that it produces valuable data points. States are free to "try novel social and economic experiments" that the rest of the country can learn from. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In the campaign-finance context, those experiments often reveal whether worries about corruption arise from real problems or "mere conjecture." *Cruz*, 142 S. Ct. at 1653. If corruption does not manifest in places where the government has not preemptively tried to stop it, that's a good sign that the "anticipated harm" is too speculative to justify restricting speech. *Id.*

That is why the Supreme Court often looks to the experience of the states as one metric for deciding whether a campaign-finance restriction is rooted in a legitimate anticorruption interest. *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 357 (2010); *McCutcheon*, 572 U.S. at 209 n.7). When "most States do not impose" a particular campaign-finance regulation, the "absence" of evidence showing "*quid pro quo* corruption" in those states is "significant." *Cruz*, 142. S. Ct. at 1653.

As the appellants here point out, more than half the states do not prevent political parties from coordinating with their candidates on expenditures. Appellants Br. at 34–35 & n.4. Many of those states cap the amount that individuals can donate to candidates while allowing parties to make unlimited contributions.[2] Other states allow parties to coordinate expressly[3] or through in-kind contributions[4] without restriction, even though they also limit individual donations to candidates. All told, at least 17 states that prevent individuals from making unlimited donations impose virtually no restriction on how parties financially coordinate with their own candidates.[5]

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

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

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

[5] Two more states—Maryland and Washington—restrict party support but at much higher levels than what the FEC allows, even though both states impose smaller contribution caps than the federal government for individual donors. *Compare* Md. State Bd. of Elections, *2026 Election*

Given this large number, one might expect to see some evidence in these states that candidates use party coordination to circumvent individual contribution limits as part of a *quid pro quo* corruption scheme—at least, if the government's anticorruption interest is more than "mere conjecture." *See Cruz*, 142. S. Ct. at 1653. But that's not the story the states' experiences tell.

Consider this circuit. The four states within this circuit split evenly on whether they limit party coordination—Kentucky and Ohio allow unlimited coordination, while Tennessee and Michigan restrict it. Yet the FEC produced no evidence here that either Kentucky or Ohio has been susceptible to *quid pro quo* corruption from maxed-out donors to candidates using parties as conduits to support particular campaigns. That's true even though both Ohio and Kentucky are among those

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Cycle Central Committee Coordinated Campaign Contribution Limits, available at https://perma.cc/VZ9K-CYX5 (approximately $2.7 million in coordinated spending), & Wash. Public Disclosure Commission, *Contribution Limits*, available at https://perma.cc/D2R6-L6KS (approximately $5.7 million in coordinated spending), *with* FEC, *Coordinated party expenditure limits*, available at https://perma.cc/D6AU-3PXU ($595,000 for Maryland and $761,900 for Washington); *compare* Md. Elec. Law Code Ann. § 13-226, Wash. Rev. Code. § 42.17A.405, & Wash. Admin. Code § 390-05-400, *with* FEC, *Contribution Limits*, available at https://perma.cc/QS5T-EHN6.

states that also limit individual contributions for statewide races. *See* Ky. Rev. Stat. § 121.150(6); Ohio Rev. Code § 3517.102(B)(1). Both states would, in theory, be fertile ground for unscrupulous donors to use parties to circumvent those individual contribution limits. And yet, as was the case in *Cruz*, "the Government is unable to identify a single case of *quid pro quo* corruption" involving coordinated party expenditures in either state. *See Cruz*, 142 S. Ct. at 1653; Appellants' Br. at 35 (citing La Raja Report, R.41-3, PageID#4156).

Kentucky is a great example. Kentucky's individual contribution limits for statewide elections are among the lowest in the nation. For gubernatorial elections, Kentucky ranks 43rd among its peers, capping individual contributions to candidates at $4,200 in an election cycle. *See* Ky. Rev. Stat. § 121.150(6); Alec Greven, *State Contribution Limits Report* (March 11, 2024), available at https://perma.cc/NQN9-T86A. Contribution limits to other statewide candidates also rank near the bottom. *See* Greven, *supra*. But Kentucky does not limit contributions from political parties. *See* Ky. Rev. §§ 121.150(6); 121.150.015(3). That would make Kentucky ideal for the kind of circumvention that the federal government worries about—donors could exceed the limits on

contributions to candidate campaigns by using parties as a pass-through for contributions to their preferred candidates. Yet the record lacks any evidence of that kind of *quid pro quo* corruption in Kentucky. Nor is *amicus* aware of any such examples. This is a "significant" sign that the coordinated expenditure limit for parties under federal law is not "necessary to prevent an anticipated harm." *Cruz*, 142 S. Ct. at 1653 (quotation omitted).

Ohio provides another useful piece of data. Ohio allows political parties to make unlimited "in-kind" contributions to their candidates, Ohio Rev. Code § 3517.102(B)(6), which include coordinated expenditures, *id.* § 3517.01(C)(16). Ohio also limits individual contributions to campaigns for state office. *See id.* § 3517.102(B)(1). So like Kentucky, Ohio would be exactly the kind of state that one might expect to find evidence of *quid pro corruption* through party coordination—if the risk were real. But again, no such "evidence" exists. *See Cruz*, 142 S. Ct. at 1653.

This is not for lack of trying. The FEC's expert witness identified several Ohio-based political scandals to bolster his view that parties are particularly likely to engage in corruption. Krasno Report, R.41-8,

PageID#4777–79. But in doing so, he admitted (as he had to) that "coordinated expenditures do not feature prominently in the examples of (quid pro quo) corruption" that he relied on. *Id.* at PageID#4779. No matter, the expert explained: the lack of evidence "should be taken as a triumph of the existing legal regime" because "[t]he fact that scandals specifically involving coordinated federal expenditures have not been more common suggests that the current regulations are working as intended." *Id.*

Perhaps. But what to make of the fact that Ohio does not limit coordinated expenditures from parties in state elections? If the lack of evidence of *quid pro corruption* involving coordinated party expenditures is "taken as a triumph of the existing legal regime" in Ohio (and elsewhere), then that triumph undermines any claim that restricting party coordination is "necessary." *See Cruz*, 142 S. Ct. at 1653. Ohio has not experienced *quid pro quo* corruption from its candidates using political parties to circumvent contribution limits. And that's true even without a law limiting coordinated party expenditures.

No discernible pattern of corruption exists outside this circuit, either. Four of the ten states with the lowest individual contribution limits also

allow party coordination. *See* Kan. Stat. Ann. § 25-4153(a); Ky. Rev. §§ 121.150(6); 121.150.015(3); 970 Mass. Code Regs. 1.04(12); Vt. Stat. tit. 17, § 2941(a); Greven, *supra* at 7. But the FEC has identified no evidence of *quid pro corruption* related to party coordination in these states. In fact, the FEC's expert could not identify one example in any state where a candidate used coordinated party expenditures to circumvent contribution limits and route more funds to his or her campaign. Krasno Depo., R.41-4, PageID#4335–36; Krasno Report, R.41-8, PageID#4779 (conceding his examples of corruption do not involve coordinated party expenditures). In New York, for example—a state that restricts individual donations but allows parties to make unlimited contributions to their candidates during a general election—the FEC's expert confirmed he is "not aware of" a situation where candidates engaged in "*quid pro quo* routing through a party." Krasno Depo., R.41-4, PageID# PageID#4337–38.

Nor could one say that restrictions on coordinated party expenditures decrease the "appearance" of *quid pro quo* corruption by bolstering citizen trust in government. To start, that alone could not sustain a First Amendment challenge to laws restricting campaign speech. *See*

Cruz, 142 S. Ct. at 1653. But campaign-finance restrictions do not measurably increase trust in state government anyway. Primo & Milyo, *supra* at 145. This fact "runs counter to the many prominent narratives about the deleterious effects of *Citizens United*," *id.*, and it undermines any claim that Congress might be justified in restricting coordinated party speech based on the perception that doing so might lower the appearance of corruption among the public.

This Court should "greet the assertion of an anticorruption interest here with a measure of skepticism" because the limit on coordinated party expenditures "is yet another in a long line of 'prophylaxis-upon-prophylaxis approach[es]' to regulating campaign finance." *Cruz*, 142 S. Ct. at 1652 (quoting *McCutcheon*, 572 U.S. at 221). When more than half the states manage to operate elections without restricting coordinated party expenditures and without giving rise to any relevant *quid pro quo*, it is hard to believe that the law is "necessary to prevent [the] anticipated harm." *Id.* at 1653. The states' experience in allowing political parties to support their own candidates without restriction leaves no doubt that the government's fear is nothing more than "mere conjecture." *Id.* (quoting *McCutcheon*, 572 U.S. at 210).

II. EARMARKING RULES TAKE CARE OF ANY RESIDUAL DOUBT ABOUT THE POTENTIAL FOR CIRCUMVENTION.

If the states' experience in allowing party coordination does not wholly undermine the federal government's interest here, the earmarking rules for party contributions remove any doubt.

Federal law prevents donors from circumventing contribution limits by giving to a third party and earmarking those funds for a specific campaign. 52 U.S.C. § 30116(a)(8). The earmarking rules apply whenever a donor gives to a political party and asks—or even hints—that the funds be used to support a particular candidate. 11 C.F.R. 110.6(b)(1). When that happens, the donation is treated as a direct contribution to the candidate, 11 C.F.R. 110.6(a), triggering complex reporting requirements for the transaction, 11 C.F.R. 110.6(c). Parties must identify who the funds came from and which candidate the donor wanted to support, among other information. *Id.* And the FEC has a long history of strictly enforcing these rules to prevent even the appearance of pass-through contributions. *See, e.g.*, Conciliation Agreement, *In the Matter of Democratic Senatorial Campaign Committee, et al.*, MUR No. 3620 (Aug. 16, 1995), available at p.15 of https://perma.cc/Q5DM-A799.

The Supreme Court has explained that earmarking rules like this "disarm" fears the government might have about donors using third-party conduits to circumvent contribution limits. *See McCutcheon*, 572 U.S. at 211. Once a donor contributes to the party, "[h]e cannot retain control of his contribution" or "direct his money 'in any way'" to his preferred candidate. *Id.* at 212. In fact, earmarking laws make it so that the donor cannot "*imply* that he would like his money to be recontributed to [a specific candidate]." *Id.* Even a wink or nod by the donor would require reporting the donation as a contribution to the candidate, instead of the party.

These rules undermine the government's justification for restricting coordinated expenditures. The government's interest in preventing *quid pro quo* corruption is limited to "the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder." *Id.* at 211. "[T]here is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *Id.* at 210–11. That's because an independent actor is more likely to allocate funds based on its own interests. And for political parties, that means

winning elections, not simply rewarding successful fundraisers. *See, e.g.*, William T. Bianco, *Party Campaign Committees and the Distribution of Tally Program Funds*, 24 Legis. Studies Q. 451, 465–66 (Aug. 1999). Parties are more interested in spending money based on who needs support than serving as a conduit for particular candidates, *see id.*, and the earmarking rules ensure that donors cannot require otherwise.

Thus, by ensuring that parties retain "independent" control over their expenditures, *McCutcheon*, 572 U.S. at 210–11, the earmarking rules guard against the "anticipated harm" that donors may circumvent contribution limits by giving to the parties. *Cruz*, 142 S. Ct. at 1653. So even if one "accept[s] the validity of" the government's "circumvention theory" of *quid pro quo* corruption, *McCutcheon*, 572 U.S. at 211, federal law already prevents that risk with a much narrower regulation that does not unnecessarily restrict the speech of political parties.

CONCLUSION

The Court should hold that the limit on coordinated party expenditures is facially unconstitutional because the government

cannot prove that it is narrowly tailored to prevent *quid pro quo* corruption or its appearance.

March 11, 2024

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5) because it contains 2,446 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced Serif typeface, Century Schoolbook, in 14-point font using Microsoft Word.

/s/ Brett R. Nolan

CERTIFICATE OF SERVICE

I certify that on March 11, 2024, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Brett R. Nolan