No. 00-191

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 99-1211

FEDERAL ELECTION COMMISSION,
PLAINTIFF-COUNTER-DEFENDANT-APPELLANT

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, DEFENDANT-COUNTER-PLAINTIFF-APPELLEE

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE; COMMON CAUSE; DEMOCRACY 21; THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, AMICI CURIAE

[Filed: May 5, 2000]

OPINION

Before SEYMOUR, Chief Judge, TACHA, and KELLY, Circuit Judges.

TACHA, Circuit Judge.

Section 441a(d)(3) of the Federal Election Campaign Act, 2 U.S.C. §§ 431-455, limits the amount of money a political party may spend in coordination with its

candidates for Congress. The Federal Election Commission (FEC) appeals the district court's ruling that this limitation violates the First Amendment. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

We analyze § 441a(d)(3) within its statutory context. The Federal Election Campaign Act (FECA or "Act"), as amended in 1974, limited the amount of money that individuals, corporations, banks, labor organizations, political committees, (*e.g.*, political action committees, or PACs), and political parties could contribute to candidates for federal office. *See* 18 U.S.C. §§ 608, 610 (1970 ed. Supp. IV). The Act also imposed limits on the amount these groups—and the candidates themselves—could spend in connection with a campaign for federal office. *Id.*

Shortly after Congress amended FECA, the Supreme Court struck down many of the Act's expenditure limits as unconstitutional under the First Amendment's free speech and association guarantees. *Buckley v. Valeo*, 424 U.S. 1, 39-59, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*) (invalidating FECA provisions limiting (1) individual expenditures independent of a candidate's campaign, (2) a candidate's expenditure of personal funds, and (3) overall campaign expenditures); *see also Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S. Ct. 1459, 84 L.Ed.2d 455 (1985) (*NCPAC*) (invalidating FECA provision limiting independent expenditures by political committees).

However, the Court generally has upheld FECA's contribution limits. *Buckley*, 424 U.S. at 28, 29, 35-36, 96 S. Ct. 612 (finding constitutional the Act's limits on the amount individuals and political committees can contribute to a candidate for federal office); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 193-99, 101 S. Ct. 2712, 69 L.Ed.2d 567 (1981) (upholding limits on the amount individuals may contribute to political committees). Furthermore, the Supreme Court has recognized that "coordinated expenditures" qualify as contributions under FECA and, therefore, are subject to FECA's contribution limits. *Buckley*, 424 U.S. at 46-47, 96 S. Ct. 612; *NCPAC*, 470 U.S. at 492, 105 S. Ct. 1459. Thus, FECA's contribution limits apply not only when an individual or group contributes money directly to a campaign, but also when an individual or group contributes money indirectly by making expenditures coordinated with the campaign. *See* 2 U.S.C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert with . . . a candidate . . . shall be considered to be a contribution to such candidate.").

As presently codified, the Act sets the following contribution limits: A "person" is entitled to contribute $1000 to a candidate "with respect to any election for Federal office;" $5000 in any calendar year to a political committee that is not established and maintained by a national political party; and $20,000 in any calendar year to the political committees of a national political party. 2 U.S.C. § 441a(a)(1). However, no person may make contributions totaling more than $25,000 in any year. *Id.* § 441a(a)(3). A "multicandidate political committee" (or PAC) may contribute $5000 to a candidate with respect to any federal election; $5000 in any

calendar year to any other political committee that is not established and maintained by a national political party; and $15,000 in any calendar year to the political committees of a national political party. *Id.* § 441a(a)(2).

National and state political parties meet FECA's definition of "multicandidate political committees." *See id.* § 441a(a)(4) (defining a "multicandidate political committee" as "a political committee . . . which has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal office"). Thus, political parties ordinarily would be subject to the above dollar limits. However, Congress recognized that parties are different than PACs. Consequently, Congress exempted political parties from the Act's general contribution limits and imposed substitute limits upon them. *Id.* § 441a(d)(1), (3). Section 441a(d)(3), known as the Party Expenditure Provision, provides that political parties "may not make any expenditure in connection with the general election campaign of a candidate for Federal office" which exceeds the greater of $20,000 or 2 cents multiplied by the voting age population of the state.[1] *Id.* § 441a(d)(3).

II.

The prior proceedings in this case have narrowed the issues we must decide. In January 1986, Timothy Wirth, then a Democratic Congressman from Colorado, announced that he would seek Colorado's open Senate

[1] A separate provision, § 441a(d)(2), limits party expenditures in connection with Presidential campaigns. Our analysis and holding apply only to party spending in connection with congressional races.

seat in November. Several months later, before the Democratic primary or the Republican convention, the Colorado Republican Federal Campaign Committee ("Colorado Party" or "Party") developed and aired a radio advertisement criticizing Wirth's voting record. In its quarterly report to the FEC, the Party classified the advertisement outlay as an operating expense instead of a § 441a(d)(3) expenditure. The Colorado Democratic Party filed an administrative complaint with the FEC, alleging that the Party's purchase of radio time was an expenditure in connection with the Senate campaign and exceeded § 441a(d)(3)'s spending limit. The FEC agreed with the Democratic Party and filed suit in district court against the Colorado Party.

On motion for summary judgment, the Party argued that the outlay did not fall within the Party Expenditure Provision because the Colorado Party did not develop the advertisement "in connection with" the campaign of any federal candidate. The Party also asserted a counterclaim, alleging that the Party Expenditure Provision violated its First Amendment rights of free speech and association. The district court narrowly interpreted § 441a(d)(3) as limiting only those expenditures that use "'express words of advocacy of election or defeat.'" *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1455 (D. Colo. 1993) (quoting *Buckley*, 424 U.S. at 44 n. 52, 96 S. Ct. 612). Under this statutory construction, the district court found that the provision did not cover the Wirth advertisement and entered summary judgement in favor of the Party. *Id.* at 1456-57. Because the court resolved the dispute on statutory grounds, it did not reach the Party's constitutional challenge. *Id.* at 1457.

On appeal, the FEC argued for a broader interpretation of the provision as limiting "expenditures depicting a clearly identified candidate and conveying an electioneering message." *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1022 (10th Cir. 1995). We agreed with the FEC and thus concluded that the advertisement was subject to the limits of the Party Expenditure Provision. *Id.* at 1023. We also reached the constitutional challenge and held that § 441a(d)(3) did not impermissibly burden the Party's First Amendment rights. *Id.*

The Supreme Court granted certiorari "primarily to consider the Colorado Party's argument that the Party Expenditure Provision violates the First Amendment either facially or as applied." *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 613, 116 S. Ct. 2309, 135 L.Ed.2d 795 (1996) (internal quotation marks and citation omitted) ("*Colorado I*"). Three members of the Court found the provision unconstitutional as applied to the expenditure at issue, and four other Justices joined in this judgment. *Id.* at 608, 116 S. Ct. 2309.[2]

Based on the summary judgment record before it, the plurality noted that the Colorado Party had developed

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[2] The four Justices who concurred in the judgment also dissented in part, urging the Court to resolve the Party's facial challenge to § 441a(d)(3). *Colorado I*, 518 U.S. at 626, 116 S. Ct. 2309 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 631, 116 S. Ct. 2309 (Thomas, J., concurring in the judgment and dissenting in part). Chief Justice Rehnquist and Justice Scalia joined Justice Kennedy's opinion in full and Justice Thomas's opinion in part.

and approved the advertisement script independent of any candidate for Federal office. *Id.* at 613-14, 116 S. Ct. 2309. In fact, at the time the advertisement was placed, the Party had not yet selected a senatorial nominee. *Id.* Thus, the plurality concluded that the advertisement in question was an "independent expenditure," not a "coordinated expenditure" subject to the limits of § 441a(d)(3). *Id.* at 613, 116 S. Ct. 2309. As such, the expenditure was entitled to full First Amendment protection under controlling precedent. *Id.* at 614-15, 116 S. Ct. 2309 (citing *NCPAC*, 470 U.S. at 497, 105 S. Ct. 1459; *Buckley*, 424 U.S. at 19- 21, 96 S. Ct. 612).

Having found the provision unconstitutional as applied to this particular independent expenditure, the plurality declined to reach the broader question of whether the First Amendment forbids limits on coordinated expenditures by political parties. *Id.* at 623, 116 S. Ct. 2309. Instead, the Court remanded the case to the district court for further proceedings, noting that "to our knowledge, this is the first case in the 20-year history of the Party Expenditure Provision to suggest that in-fact coordinated expenditures by political parties are protected from congressional regulation by the First Amendment." *Id.* at 624, 116 S. Ct. 2309.

On remand, the parties compiled an extensive record, focusing exclusively on the novel constitutional question highlighted in *Colorado I*. On cross motions for summary judgment, the district court concluded that the FEC had "failed to offer evidence which demonstrates the compelling need for limits on political party coordinated expenditures." *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 41 F.

Supp. 2d 1197, 1213 (D. Colo. 1999).[3] The court therefore declared the Party Expenditure Provision unconstitutional and entered summary judgment in favor of the Party. *Id.* at 1213-14. This appeal followed.

III.

We review a decision granting summary judgment *de novo*, applying the same legal standard used by the district court. *Mesa v. White*, 197 F.3d 1041, 1043 (10th Cir. 1999). In First Amendment cases, "the *de novo* standard is appropriate . . . for the further reason that . . . an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* (internal quotation marks and citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

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[3] The plurality in *Colorado I* noted that neither the parties nor the lower courts had "considered whether Congress would have wanted the Party Expenditure Provision's limitations to stand were they to apply only to coordinated, and not to independent, expenditures." 518 U.S. at 625, 116 S. Ct. 2309. Thus, the plurality directed the parties on remand to brief this "nonconstitutional ground for exempting party coordinated expenditures from FECA limitations." *Id.* at 625-26, 116 S. Ct. 2309. On remand, the Colorado Party argued that FECA's unconstitutional limit on a party's independent expenditures could not be severed from its limit on a party's coordinated spending. Thus, the Party insisted that § 441a(d)(3) must fail as a matter of statutory construction. The district court disagreed and found that the Party Expenditure Provision, as it applies to coordinated expenditures, remained in effect after *Colorado I*. 41 F. Supp.2d at 1207. On appeal, the parties raise only the constitutional question.

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Determining the standard of scrutiny appropriate for the constitutional analysis is more complicated than determining our standard of review. In *Buckley*, the Supreme Court referred generally to "the exacting scrutiny required by the First Amendment," 424 U.S. at 16, 96 S. Ct. 612, and added specifically "that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office," *id.* at 15, 96 S. Ct. 612 (internal quotation marks and citation omitted). In *Colorado I*, the plurality concluded that the government must demonstrate a "compelling" interest to restrict the First Amendment freedoms of candidates and their supporters. 518 U.S. at 609, 116 S. Ct. 2309. Such language suggests "strict scrutiny" of campaign finance regulation in general.

However, the Supreme Court most recently revisited the standard of scrutiny as to campaign contribution limits in particular. *See Nixon v. Shrink Mo. Gov't PAC*, —— U.S. ——, 120 S. Ct. 897, 145 L.Ed.2d 886 (2000). In *Shrink Missouri*, the Court construed a state statute that limited each person to a contribution of $1000, adjusted for inflation, in support of candidates for various statewide offices. *Id.* at 901-02. The Court upheld the statute against a First Amendment challenge. In doing so, the Court recognized that the *Buckley* distinction between (permissible) restrictions on contributions and (impermissible) restrictions on expenditures implies that different types of FECA limits require different levels of justification. *Id.* at

903-04. Prior to *Shrink Missouri*, the Court had made this implied distinction explicit in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60, 107 S. Ct. 616, 93 L.Ed.2d 539 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."). The *Shrink Missouri* court thus restated the standard of scrutiny for contribution limits as follows:

> [U]nder *Buckley*'s standard of scrutiny, a contribution limit involving "significant interference" with associational rights could survive if the Government demonstrated that contribution regulation was "closely drawn" to match a "sufficiently important interest," though the dollar amount of the limit need not be "fine tun[ed]."

120 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 25, 30, 96 S. Ct. 612).[4]

In this case, we must determine whether the FEC can justify § 441a(d)(1)'s limit on coordinated expenditures by political parties. Since FECA treats coordinated expenditures as "contributions," 2 U.S.C. § 441a(a)(7)(B)(i), and the Court has recognized this statutory classification, *NCPAC*, 470 U.S. at 492, 105 S.

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[4] We note that the Court appears internally divided over the appropriate level of scrutiny. *Compare Shrink Mo.*, 120 S. Ct. at 917 (Thomas, J., dissenting) (criticizing "the majority's refusal to apply strict scrutiny to contribution limits"), with *id.* at 911 (Breyer, J., concurring) (concluding that, in this case, "there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny'").

Ct. 1459, we apply the foregoing standard to our review of the Party Expenditure Provision.

However, we admit some difficulty in applying this standard to this particular contribution limit. As noted in *Shrink Missouri*, the Supreme Court has found in general that contribution limits bear "more heavily on the associational right than on freedom to speak." *Shrink Mo.*, 120 S. Ct. at 904. This finding rested in part upon the recognition that contribution limits ordinarily "entail[ ] only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20, 96 S. Ct. 612. In the case of political parties, though, a limit upon the amount a party can spend in coordination with its candidates certainly entails more than a "marginal restriction" upon the party's free speech. Indeed, in the context of an election, a party speaks in large part through its identified candidates; candidates, in significant measure, speak for their political parties.[5] We therefore question whether the contribution/expenditure dichotomy which underlies the *Shrink Missouri* standard applies with equal force in this case. However, we need not resolve this question definitively because the Party Expenditure Provision fails even under the more deferential standard reformulated in *Shrink Missouri*.

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[5] Notwithstanding the dissent's charge, we do not conclude that parties and their candidates share an identity of interest. We, like the plurality in *Colorado I*, will not assume any "metaphysical identity" between party and candidate. We simply make the common sense observation that limiting a party's speech through its identified candidates imposes more than a marginal restriction upon that party's First Amendment freedoms.

IV.

The *Buckley* court recognized the "prevention of corruption and the appearance of corruption" as "constitutionally sufficient justification[s]" for the regulation of campaign contributions. 424 U.S. at 25, 26, 96 S. Ct. 612. "[I]mproper influence" and "opportunities for abuse" go beyond bribery and "extend[ ] to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink Mo.*, 120 S. Ct. at 905.

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . [In enacting contribution limits] Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

Id. at 26-27, 96 S. Ct. 612 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565, 93 S. Ct. 2880, 37 L.Ed.2d 796 (1973)).

Since *Buckley*, the Court has stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97, 105 S. Ct. 1459. While corruption or the appearance thereof are constitutionally

sufficient justifications, the FEC in this case must show that political parties through their spending authority corrupt or appear to corrupt the electoral process. The opportunity for corruption or its appearance is greatest when the political spending is motivated by economic gain. As discussed below, political parties are diverse entities, one step removed from the candidate, and they exist for noneconomic reasons. Much like an advocacy group, a party functions "to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *See Massachusetts Citizens for Life*, 479 U.S. at 259, 107 S. Ct. 616. Political parties have played a vital role in the American system of government.

> [A]stute observers[ ] all agree that the political party is—or should be—central to the American political system. Parties are—or should be—integral parts of all political life, from structuring the reasoning and choice of the electorate, through all facets of campaigns and seemingly all facets of the government, to the very possibility of effective governance in a democracy.

John H. Aldrich, *Why Parties: The Origin and Transformation of Political Parties in America* 18 (1995). From the birth of this republic into the 21st century, political parties have provided the principal forum for political speech and the principal means of political association. *See, e.g.*, Clinton Rossiter, *Parties and Politics in America* 1 (1960) (declaring that there is "[n]o America without democracy, no democracy without politics, and no politics without parties. . . ."). Political speech and association, unfettered by unneces-

sary government interference, are the lifeblood of a free and independent republic. We need only look to the struggling new republics of our time to confirm this principle.

In its FECA enactments, Congress certainly recognized the importance of parties. *See* H.R. Conf. Rep. No. 94-1057, at 58 (1976), 1976 U.S.C.C.A.N. 946, at 973 (acknowledging that political parties fulfill a "unique role in the political process"), S. Rep. No. 93-689, at 3, 7 (1974), 1974 U.S.C.C.A.N. 5587, at 5589, 5593 (declaring that political parties "serve as a legitimate pooling mechanism for private contributions to candidates in general elections" and concluding that "a vigorous party system is vital to American politics").

The Supreme Court likewise has acknowledged the role of the party. *See*, *e.g.*, *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-25, 109 S. Ct. 1013, 103 L.Ed.2d 271 (1989), [*sic*] *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15, 107 S. Ct. 544, 93 L.Ed.2d 514 (1986); *see also Davis v. Bandemer*, 478 U.S. 109, 144-45, 106 S. Ct. 2797, 92 L.Ed.2d 85 (1986) (O'Connor, J., concurring in the judgment) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change."). Indeed, all three branches of government, to an important extent, rely on the speech and associational functions of parties to assure the

orderly conduct of elections, appointments and governance in general.

In *Colorado I*, the plurality acknowledged that they "are not aware of any special dangers of corruption associated with political parties" in the context of independent spending. 518 U.S. at 616, 116 S. Ct. 2309. Remand has only confirmed that conclusion for this court in the context of coordinated spending. We are convinced that *Shrink Missouri*, decided during the pendency of this appeal, does not alter this conclusion. As we discuss later, *infra* note 9, *Shrink Missouri* involved a straightforward application of *Buckley* to uphold counterpart state contribution limits. The Court did not confront the more difficult issue of whether limits on coordinated spending by political parties are consistent with the First Amendment.

The FEC submits essentially three theories on how coordinated spending by political parties corrupts, or creates the appearance of corrupting, our electoral system. Were any of these theories valid, one would have to question why Congress permits any coordinated expenditures by political parties, let alone removes them from the Act's more restrictive limits. At a minimum, Congress has signaled that political parties are different than individuals and other organizations.

A.

The FEC first argues that contributors to a political party—individuals or PACs—can corrupt (or appear to corrupt) the political process through their influence over a party. Under this theory, a contributor gives so much money to a party that the party grows beholden

to the donor. The party then exercises its coordinated expenditure authority to either support or neglect those candidates who endorse or eschew the interests of the large contributor. By limiting the spending authority of a political party, the Party Expenditure Provision limits the financial leverage a party can exert on behalf of a generous donor.

To support this theory, the FEC submitted the declaration of former Senator Paul Simon and other evidence concerning meetings between party donors and federal officeholders. In his declaration, Simon describes a meeting of the Democratic Caucus where members discussed an amendment to a bill that was already before the House-Senate Conference Committee. Simon opposed the amendment because it had not passed through the typical committee hearing process. The amendment clearly benefitted one particular corporation, and Simon referenced published reports that this corporation had contributed $1.4 million in the last election cycle to incumbent members of Congress. One of Simon's senior colleagues spoke out in favor of the amendment, saying: "I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread." R. at 466.

This anecdote, along with the FEC's other evidence, might say something about corporate influence over the legislative process. But this evidence does not demonstrate that parties undermine the integrity of the electoral process. Corporate giving may indeed influence legislators, and Congress recognized this danger in enacting FECA. *See, e.g.*, *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 209-10, 103 S. Ct. 552, 74 L.Ed.2d 364 (1982) ("[FECA] reflects

a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."). Consequently, corporations may not make contributions or expenditures in connection with any federal election, 2 U.S.C. § 441b(a), and PACs organized by such corporations are subject to strict dollar limits, *id.* § 441a(a)(2).

The FEC may find these limits inadequate to eliminate all corporate sway over members of Congress. If so, this argument should be addressed to Congress, not to this court in this case. We will not validate limits on the protected speech of a political party as a back-door means of stemming corporate involvement in the legislative process. *See Massachusetts Citizens for Life*, 479 U.S. at 265, 107 S. Ct. 616 ("Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.").

To overcome a constitutional challenge, the FEC must demonstrate that a restriction on coordinated expenditures by political parties is "closely drawn" to match important government interests. *Shrink Mo.*, 120 S. Ct. at 904 (internal quotation marks and citation omitted). However, many of the interests identified by the FEC are hardly vindicated by this restriction. For example, the party may become an independent power source, seek contributions from interest groups and attempt to influence members' votes regardless of any limitation on coordinated expenditures. After all, *Colorado I* confirms that a party may make unlimited expenditures independent of its candidates. Moreover, as the district court observed, many of the activities the

FEC wishes to curtail are consistent with our model of representative democracy. *Colorado Republican Fed. Campaign Comm.*, 41 F. Supp.2d at 1210-13.

The FEC insists that we must also consider the corrupting influence of corporate, bank and union money contributed to political parties outside of FECA's limits, so-called "soft money" contributions. In the parlance of campaign finance, FECA regulates only "hard money." Hard money is the common term for the limited and disclosed funds parties raise from individuals and PACs in conformity with the FECA limits outlined in the opening section. Parties may use only hard money to expressly advocate the election or defeat of federal candidates, and corporations, national banks and labor organizations cannot make hard money contributions to political parties. 2 U.S.C. § 441b(a).

FECA does not regulate so-called "soft money" contributions. An individual or group may contribute unlimited amounts of soft money to a political party. However, the party may use soft money only for limited activities, such as electing candidates for state office, *see id.* § 431(8)(A)(i), or for voter registration and "get-out-the-vote" drives, *see id.* § 431(8)(B)(xii). Thus, unregulated soft money contributions may not be used to influence a federal campaign, except through the limited party-building activities specifically designated in the statute.

The FEC contends that large soft money donors purchase influence over a political party, and the Party Expenditure Provision must be maintained to ensure that a party does not pressure its candidates to heed this influence. We appreciate the FEC's concern over soft money, but this proceeding does not present the

opportunity for soft money reform. In this case, we address only the constitutionality of § 441a(d)(3)'s limit on hard money coordinated expenditures. The FEC has presented no evidence to suggest that parties have illegally utilized soft money for hard money spending. Absent such a showing, we will not allow the appearance of soft money excess to justify a limit on hard money expenditures.[6]

B.

The FEC next contends that unscrupulous party officials can utilize the party's coordinated spending authority to further their personal interests or those of an unrepresentative party faction. Under this theory, the cap on coordinated expenditures limits the party

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[6] As part of its evidence below, the FEC submitted newspaper articles and editorials concerning soft and hard money. The district court did not make an evidentiary ruling on any individual article, but it did make general comments concerning the admissibility and weight of the articles. *See, e.g.*, *Colorado Republican Fed. Campaign Comm.*, 41 F. Supp.2d at 1200 ("The FEC makes numerous factual assertions, for example, based on reports in newspaper articles. Except as otherwise noted, the discussion which follows simply ignores the mass of irrelevant and/or inadmissible evidence in the record. . . ."). It appears to us that the district court considered all the submitted evidence, while acknowledging evidentiary weaknesses therein. Thus, we also consider the full record before us. We note, however, that media accounts documenting a vague (though visceral) public cynicism about campaign finance prove too little. We should not allow generic public dissatisfaction to support the restriction of political speech. *See NCPAC*, 470 U.S. at 499-500, 105 S. Ct. 1459 (concluding that "newspaper articles and polls purportedly showing a public perception of corruption" fall "far short" of the required evidence to justify a limitation on the independent expenditures of PACs).

elite from corrupting (or appearing to corrupt) the electoral process through improper pressure upon its own candidates. The FEC submits evidence that a small group of incumbent officeholders controls coordinated spending decisions, and certain incumbents have utilized this power to support candidates in their home states.

This theory, unlike the first, has the appeal of directly targeting the source of alleged corruption. If party elites corrupt the electoral process, then a limit on coordinated spending directly curtails one means of this alleged corruption. However, the premise of this theory, namely that political parties can corrupt the electoral system by influencing their candidates' positions, gravely misunderstands the role of political parties in our democracy.[7]

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[7] The dissent mischaracterizes the object of our criticism. According to the dissent, we accuse Congress of undervaluing the role of the party. This is simply not true. As we noted earlier, *supra* Part IV, Congress has recognized the party's unique role in the political process. The plurality in *Colorado I* found that the legislative history of FECA "rather than indicating a special fear of the corruptive influence of political parties . . . demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." 518 U.S. at 618, 116 S. Ct. 2309.

The object of our criticism is the FEC. Defying this clear congressional intent, the FEC argued before this court that Congress limited a party's coordinated expenditures out of a fear of corruption. The Supreme Court in this case has suggested otherwise. "[T]his Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." *Id.*

> To state the matter with utmost simplicity: political parties, with all their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually—or organizationally— powerful.

Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* 133 (1970). Political parties today represent a broad-based coalition of interests, and there is nothing pernicious about this coalition shaping the views of its candidates. Parties are simply too large and too diverse to be corrupted by any one faction. Evidence in the record demonstrates that the parties' hard money comes from individual donors who give, on average, less than $40. As *amici* recognized in *Colorado I*, the old rule of sanitary engineers applies here: the solution to pollution is dilution. *Amicus Curiae Br. of the Committee for Party Renewal*, *Colorado I*, 518 U.S. 604, 116 S. Ct. 2309, 135 L.Ed.2d 795 (1996) (No. 95-489).

We therefore do not take issue with Congress on this point but rather reject the FEC's *post hoc* rationalization for this particular provision.

Nevertheless, in construing an enactment of Congress, we must necessarily review some judgments made by the legislative body. But that, of course, is our fundamental duty. *See Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). We are mindful of the need for deference to Congress in this particular arena and appreciate the dissent's repeated reminders on this count. However, such deference must ultimately give way to our constitutional obligation.

Even if, as the FEC contends, party leaders subvert the greater will of the rank-and-file membership, we trust the members to replace their leaders. It is true that political parties have been involved in wrongdoing, dating back to the Tammany Hall machine. However, the electoral and litigation processes have always managed to right these wrongs. Given the importance of political parties to the survival of this democracy, we reject the notion that a party's influence over the positions of its candidates constitutes "a subversion of the political process." *NCPAC*, 470 U.S. at 497, 105 S. Ct. 1459.

C.

Finally, the FEC contends that the Party Expenditure Provision must be upheld to prevent evasion of the Act's other contribution limits. For example, an individual may contribute only $1000 directly to a candidate for federal office, 2 U.S.C. § 441a(a)(1)(A), but may contribute up to $20,000 of hard money to a national political party, *id.* § 441a(a)(1)(B). The FEC claims that if the coordinated expenditure limit is struck down, individuals will circumvent the $1000 limit by contributing $20,000 to a political party with the expectation that this money be used to support a particular candidate.

The Supreme Court has recognized that certain contribution limits serve to protect the integrity of others. *CMA*, 453 U.S. at 198-99, 101 S. Ct. 2712; *Buckley*, 424 U.S. at 38, 96 S. Ct. 612. We agree with the FEC that if an individual used the party as a conduit to channel money to specified candidates, this would certainly threaten the integrity of the individual contribution limit. However, Congress evidently fore-

saw this avenue of abuse and foreclosed it. The Act provides that individual "contributions which are in any way earmarked or otherwise directed through an intermediary or conduit" to a particular candidate shall be treated as contributions from the original source to the candidate. 2 U.S.C. § 441a(a)(8); *see* 11 C.F.R. § 110.6(b)(1) (2000) (defining "earmarked" as any "designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution being made to . . . a clearly identified candidate").

Under this provision and its expansive agency interpretation, the FEC certainly has the authority to ensure that individuals do not use political parties to circumvent the Act's other contribution limits. Vigilant enforcement of § 441a(a)(8), rather than a severe abridgement of party speech, is a more appropriate and direct means to safeguard the integrity of the individual contribution limits.[8]

V.

We recognize that the Supreme Court typically has upheld limits upon political contributions and that FECA treats coordinated expenditures by a political

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[8] We profess some confusion at the dissent's analysis on this point. The dissent maintains that § 441a(a)(8) operates only as a disclosure provision, and that disclosure alone is a partial measure that may be supplemented with valid contribution ceilings. We agree that disclosure is only a partial measure, but § 441a(a)(8) does not stop at disclosure. All earmarked contributions must be disclosed, and such contributions are then subject to the strict contribution ceilings under the Act. Thus, while § 441a(a)(8) does provide for disclosure, this disclosure then triggers enforcement of the concomitant individual contribution limit upheld in *Buckley*.

party as contributions. However, in this case, a simple cubbyholing of constitutional values under the labels "contribution" and "expenditure" cheapens the currency. *See, e.g., National Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 429, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963) (stating that the government "cannot foreclose the existence of constitutional rights by mere labels"). We also recognize that the *Buckley* court was concerned about the "real or imagined coercive influence of large financial contributions on candidates' positions." *Id.* at 25, 96 S. Ct. 612. But the *Buckley* court so defined corruption for the purpose of reviewing limits upon giving and spending by individuals, PACs and candidates. Because the *Buckley* litigants did not challenge the Party Expenditure Provision on First Amendment grounds, the Court said nothing about the First Amendment implications of restricting party speech on behalf of its candidates. *Id.* at 58 n. 66, 96 S. Ct. 612. To encompass political parties within the *Buckley* language on corruption would require a real extension of this precedent. Such an extension is not warranted by the Court's post-*Buckley* FECA jurisprudence and would betray the historic importance of political parties. *See Colorado I*, 518 U.S. at 629, 116 S. Ct. 2309 (Kennedy, J., concurring in the judgment and dissenting in part) ("In my view, we should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving FECA's restrictions on political party spending.").

In sum, we conclude that the Party Expenditure Provision constitutes a "significant interference" with the First Amendment rights of political parties. *Buckley*, 424 U.S. at 25, 96 S. Ct. 612 (internal quotation

marks and citation omitted). This interference effects more than a "marginal restriction upon the [parties'] ability to engage in free communication." *Id.* at 20, 96 S. Ct. 612. The FEC has not demonstrated on remand that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process.[9] Therefore, § 441a(d)(3)'s limit on party spend-

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[9] The dissent contends that we betray the evidentiary threshold applied in *Shrink Missouri.* As the dissent accurately recounts, the *Shrink Missouri* court did caution against too rigorous an evidentiary standard in the context of campaign finance. However, those words of caution must be read in light of the particular challenge before the Court in that case. The state provision before the Court in *Shrink Missouri* limited each person to a contribution of $1000, adjusted for inflation, in support of candidates for various statewide offices. The Court found that this provision bore a "striking resemblance to the limitations sustained in *Buckley*." *Shrink Mo.*, 120 S. Ct. at 908. As a consequence, the Court ultimately concluded that "[t]here is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case." *Id.* at 910. Since the case "d[id] not present a close call," the Court declined any "further definition" of the government's evidentiary obligation. *Id.* at 907. However, the Court did indicate that there might be "need for a more extensive evidentiary documentation if petitioners had made any showing of their own to cast doubt on the apparent implications of *Buckley*'s evidence." *Id.* at 908. In our judgment, the Colorado Party has amply demonstrated that the evidence before the *Buckley* court is largely inapposite to the constitutionality of this provision. As noted earlier, the *Buckley* litigants did not challenge the Party Expenditure Provision on First Amendment grounds. Therefore, the Court said nothing about the First Amendment implications of restricting party speech through its candidates.

The *Shrink Missouri* court essentially incorporated by reference the *Buckley* evidence, because the disposition amounted to a routine application of the *Buckley* precedent. As we have demonstrated, this case does not involve a routine application of

ing is not "closely drawn" to the recognized governmental interest but instead constitutes an "unnecessary abridgment" of First Amendment freedoms.[10] *Id.* at 25, 96 S. Ct. 612.

AFFIRMED.

SEYMOUR, Chief Judge, dissenting.

The majority opinion is fundamentally flawed in several aspects. First, the discussion and analysis are permeated with and skewed by the majority's determination to substitute its judgment for that of Congress on quintessentially political matters the Supreme Court has cautioned courts to leave to the legislative process. In so doing, the majority creates a special category for political parties based on its view of their place in American politics, a view at odds with history and with legislation drafted by politicians. The majority

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Buckley. Therefore, it was incumbent upon the FEC to make a more extensive evidentiary showing, which they failed to do.

[10] In *Colorado I*, the plurality indicated that the more restrictive limits upon coordinated spending by a "multicandidate political committee," *see* § 441a(a)(2), would apply to political parties if the entire Party Expenditure Provision were struck down. 518 U.S. at 625, 116 S. Ct. 2309. Heeding this signal from the Court, the Party on remand challenged all FECA limits to the extent they restrict coordinated spending by political parties. The district court did not strike § 441a(a)(2) as applied to political parties, and we decline to do so as well. The record contains no evidence of a credible threat by the FEC to enforce this provision against political parties. Therefore, this particular issue is not ripe for our resolution. *See Renne v. Geary*, 501 U.S. 312, 321-22, 111 S. Ct. 2331, 115 L.Ed.2d 288 (1991) (finding no justiciable controversy in a First Amendment political speech case where there was "no factual record of an actual or imminent application" of the challenged provision).

supports its decision to accord political parties an exemption from contribution limits Congress believed necessary to protect the integrity of the democratic political process by discounting the type of evidence the Supreme Court has recently held sufficient to substantiate congressional concerns, and by relying instead on evidence the Court has expressly discounted. Accordingly, I respectfully dissent.

I

As originally enacted, the Federal Election Campaign Act (FECA or the Act), 2 U.S.C. §§ 431-455, placed limits on both political contributions and expenditures. The primary interest to be served by these limitations was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976). In *Buckley*, the Supreme Court was faced with First Amendment challenges to several sections of FECA and drew a distinction for purposes of First Amendment analysis between expenditures and contributions. The Court viewed limits on expenditures as a direct restraint on political speech but characterized contribution limits as entailing only a marginal restriction. Accordingly, the Court upheld the $1000 limit on contributions by individuals and groups to a particular candidate or authorized campaign committee for any single election, *id.* at 23-35, 96 S. Ct. 612,

the $5000 limit on contributions by a political committee to a single candidate, *id.* at 35-36, 96 S. Ct. 612, and the $25,000 limit on total annual contributions by an individual, *id.* at 38, 96 S. Ct. 612.

The Court reached a different result with respect to limits on expenditures and held unconstitutional the $1000 limit on independent expenditures for communications advocating the election or defeat of an identified candidate. *Id.* at 39-51, 96 S. Ct. 612. The Court also struck down the ceiling on a candidate's personal expenditures as unsupported by the governmental interest in preventing actual and apparent corruption, *id.* at 51-54, 96 S. Ct. 612, and invalidated that section of the Act limiting overall campaign expenditures by candidates for federal office, *id.* at 54-58, 96 S. Ct. 612.

As indicated by *Buckley*, FECA regulates two types of expenditures: those that are coordinated with a candidate and those that are made independently. Coordinated expenditures are considered contributions under section 441a(a)(7)(B)(i) and therefore may be subject to limits not permissible with respect to independent expenditures. Prior to the Supreme Court ruling in this case, *see Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 116 S. Ct. 2309, 135 L.Ed.2d 795 (1996), the FEC had construed FECA as requiring that all party expenditures be deemed coordinated.

The instant appeal concerns section 441a(d)(3),[11] a provision of the Act not at issue in *Buckley*, which limits the amount a committee for a political party can spend in connection with the general election campaign of a candidate for federal office. The expenditure at issue was made by the Colorado Republican Federal Campaign Committee for a radio advertisement criticizing an announced Democratic candidate that aired before either party had actually nominated senatorial candidates. In line with the FEC's position, the district court in its original opinion held that the expenditure was coordinated even though no Republican candidate had been nominated at the time. Nonetheless the court ruled that the expenditure did not violate the Act, holding that because it did not constitute express advocacy, it was not made "in connection

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[11] That section provides:

> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds-
>
> (A) in the case of a candidate for election to the office of Senator or of Representative from a State which is entitled to only one Representative, the greater of-
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

2 U.S.C. § 441a(d)(3).

with" the Republican candidate within the meaning of section 441a(d)(3). *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448 (D. Colo. 1993).

On appeal, this court disagreed and held that section 441a(d)(3) applied to coordinated spending that involved a clearly identified candidate and an electioneering message without regard to whether the message constitutes express advocacy. *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015 (10th Cir. 1995). We further held that the limit imposed by the section on coordinated expenditures did not violate the First Amendment.

In a fractured opinion, the Supreme Court vacated and remanded. *See Colorado Republican Fed. Campaign Comm.*, 518 U.S. 604, 116 S. Ct. 2309, 135 L.Ed.2d 795. The plurality opinion of Justice Breyer, joined by Justices O'Connor and Souter, rejected the FEC's argument that all expenditures by political parties must be deemed coordinated, and held that the expenditure here was in fact independent and that a limit on independent expenditures by political parties was unconstitutional under *Buckley*. In so doing, the plurality emphasized "the fundamental constitutional difference" between independent expenditures and contributions to a candidate to be spent on his campaign. *Id.* at 614-15, 116 S. Ct. 2309. The plurality held that the government's interest in preventing corruption and the appearance of corruption was not sufficient to justify the restriction on independent spending, observing that while the danger of a political *quid pro quo* was not eliminated, that danger was alleviated by the absence of prearrangement and coordination. The

plurality did not reach the issue of whether FECA's limit on coordinated expenditures by political parties is facially invalid under the First Amendment, pointing out that the issue had not been adequately developed in the lower courts.

Justices Kennedy, Rehnquist, Scalia, and Thomas agreed with the plurality but would have gone further to hold the spending limit invalid as applied to all expenditures, independent and coordinated. Justice Thomas, standing alone, also advocated the abandonment of the analysis in *Buckley* altogether. Justices Stevens and Ginsburg dissented on the ground that all money spent by a political party should be deemed a contribution to the campaign and that FECA's limits on spending by political parties are constitutional.

On remand, this court determined that factual evidence might be relevant to the issues yet to be determined and sent the case back to the district court for further proceedings. *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 96 F.3d 471 (10th Cir. 1996). The district court held the Act's limits on all spending by political parties facially invalid. *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 41 F. Supp.2d 1197 (D. Colo. 1999). In so doing, the court referred to the material supplied by the FEC in support of the constitutionality of section 441a(d)(3) as lacking "any attention to elementary evidentiary requirements, such as authentication (Fed. R. Evid. 901), or evidentiary limitations, such as the rule against hearsay (Fed. R. Evid. 801)." *Id.* at 1200. Accordingly, the court "simply ignore[d] the mass of irrelevant and/or inadmissible evidence in the record and recite[d] facts which [it]

regard[ed] as having some significance to the questions before the court." *Id.* at 1200-01. The court held that under the standard established by the Supreme Court, the FEC must demonstrate that the limit serves a compelling interest and is narrowly tailored. *Id.* at 1208. The court further held that the FEC had failed the test because it had offered no evidence of *quid pro quo* corruption, stating that mere access does not constitute corruption.

II

While the appeal of this district court ruling was pending, the Supreme Court decided a case addressing contribution limits at the state level that were based on the "proposition that large contributions raise suspicions of influence peddling tending to undermine citizens' confidence 'in the integrity of . . . government.'" *Nixon v. Shrink Missouri Gov't PAC*, —— U.S. ——, ——, 120 S. Ct. 897, 902, 145 L.Ed.2d 886 (2000) (quoting *Shrink Missouri Gov't PAC v. Adams*, 5 F. Supp.2d 734, 738 (E.D. Mo. 1998)). In upholding the contribution limits at issue, the Court addressed several issues relevant to the instant appeal. The Court's analysis thus requires more than the perfunctory nod given it by the majority.

In *Shrink Missouri* the Court addressed the standard applicable to a claim that a contribution limit violates the First Amendment and reiterated the line it had drawn in *Buckley* between limits on expenditures and limits on contributions as they impact speech rights. *Shrink Missouri*, 120 S. Ct. at 903. Significantly, as the majority grudgingly acknowledges, the Court reaffirmed and expanded on *Buckley*'s distinction

> between expenditure and contribution limitations *in their impacts on the association right.* While an expenditure limit "precludes most associations from effectively amplifying the voice of their adherents," (thus interfering with the freedom of the adherents as well as the association) the contribution limits "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates."

Id. at 903-04 (citations omitted) (emphasis added). The Court reiterated and expressly applied to associational rights its holdings that "'restrictions on contributions require less compelling justification than restrictions on independent spending,'" *id.* at 904, and that "a contribution limit involving 'significant interference' with associational rights could survive if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest,'" *id.* (citations omitted).

The Court in *Shrink Missouri* also addressed the governmental interest furthered by contribution limits. The Court reiterated its prior cases holding that preventing corruption and the appearance of corruption are constitutionally sufficient to justify the abridgement of the associational right, pointing out that "[c]orruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves *or infusions of money into their campaigns*." *Shrink Missouri*, 120 S. Ct. at 905 (quoting *Federal Election Comm'n v. National Right to Work*

Comm., 459 U.S. 197, 208, 103 S. Ct. 552, 74 L.Ed.2d 364 (1982)) (emphasis added).

> In speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money to "influence government action" in ways less "blatant and specific" than bribery.

Id. (quoting *Buckley*, 424 U.S. at 28, 96 S. Ct. 612). The Court observed that there is "no serious question" about the legitimacy of the governmental interest in preventing corruption and its appearance. *Id.*

The Court then addressed and rejected the lower court's conclusion that the state had "fail[ed] to justify the invocation of those interests with empirical evidence of actually corrupt practices or of a perception among Missouri voters that unrestricted contributions must have been exerting a covertly corrosive influence." *Id.* at 906. The Court's discussion of the requisite evidentiary showing is directly relevant here in view of the majority's conclusion that the FEC has failed to meet its burden with respect to the contribution limit before us. The Court began its analysis by pointing out:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates

> that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible. The opinion noted that "the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem [of corruption] is not an illusory one."

Id. (quoting *Buckley*, 424 U.S. at 27 & n. 28, 96 S. Ct. 612). The Court also rejected the argument that the evidentiary showing held sufficient in *Buckley* had subsequently been supplemented by a new requirement that the government "demonstrate that the recited harms are real, not merely conjectural." *Id.* at 907. In so doing, the Court distinguished between independent expenditure limits and contribution limits, implying that because limits on contributions are directly related to preventing corruption they may be assumed to be necessary absent convincing evidence to the contrary. *Id.*

The Court then set out the evidence supporting the contribution limit in that case, which did "not present a close call" requiring further definition of the state's evidentiary obligation. *Id.* This evidence consisted of an affidavit from a state lawmaker stating that "large contributions have the real potential to buy votes," *id.* (internal quotation omitted), newspaper reports of large contributions, and anecdotal evidence, as well as a statewide vote indicating a public perception that limits were necessary. *Id.* at 907-08. The Court acknowledged that more extensive documentation might be needed if the state had made a showing

> to cast doubt on the apparent implications of *Buckley*'s evidence and the record here, but the closest respondents come to challenging these

> conclusions is their invocation of academic studies said to indicate that large contributions to public officials or candidates do not actually result in changes in candidates' positions. . . . Given the conflict among these publications, and the absence of any reason to think that public perception has been influenced by the studies cited by respondents, there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.

Id. at 908.

III

An evaluation of the majority's analysis in light of *Shrink Missouri* reveals that the majority opinion is replete with instances in which Congressional assessments and priorities are criticized and disregarded based on the majority's view of the role political parties should play in the American political process and how best to promote that role. The majority accepts, as it must, that the prevention of both corruption and the appearance of corruption is a legitimate justification for impinging on First Amendment rights. Nonetheless the majority essentially eviscerates that interest by reweighing the balance struck by Congress in order to elevate what the majority believes to be the paramount interest political parties have in making unlimited coordinated contributions.

In my judgment, the majority has crossed the line between assessing the legal merits of a First Amendment challenge and imposing its own political judg-

ments. A court owes "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized." *Shrink Missouri*, 120 S. Ct. at 906 n. 5. "Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments. . . ." *Id.* at 912 (Breyer, J., concurring). "[T]he legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we. We should defer to its political judgment that unlimited spending threatens the integrity of the electoral process." *Id.* at 913.

Rather than deferring, the majority substitutes its view for that of Congress and levels a broad-based attack on the contribution limit at issue. It concludes that the FEC has failed to provide adequate evidentiary support for the limit, that in imposing the limit Congress "gravely misunderst[ood] the role of political parties in our democracy," maj. op. at 1231, that the provision cannot be supported as a necessary component in the overall regulatory scheme, and that the same result can be obtained by the less intrusive reporting requirements of section 441a(a)(8). In so doing, the majority requires an improperly demanding level of proof from the FEC to support a contribution limit the Supreme Court has told us is presumably justified. The majority disregards evidentiary material expressly cited by the Court as sufficient to justify a contribution limit, yet relies on disputed academic articles of the type the Court expressly held insufficient to cast doubt on the validity of the justification. Finally, by immunizing political parties from contribution limits designed to prevent corruption, the majority ignores the Court's

directive that courts not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Shrink Missouri*, 120 S. Ct. at 906 n. 5.

The premise for the majority's result is its view of the "vital role" that political parties have played in the American system of government. Maj. op. at 1227-28. While there is no doubt that parties play an important role in American politics, there is also ample support for the legislative determination that if left unchecked, parties can exert a corrupting influence on democratic processes or, equally importantly, appear to do so.[12]

In formulating contribution limits, Congress did in fact recognize the role political parties play in American politics and accorded them special treatment by permitting them to make coordinated expenditures on behalf of their federal candidates far in excess of the limits imposed on others, *see* 2 U.S.C. § 441a(d)(1), and by permitting adjustment for inflation, *see id.* § 441a(c). Indeed, the majority cites the legislative history accompanying these provisions as evidence of Congressional recognition that parties play a unique role in the political process. *See* H.R. CONF. REP. NO. 94-1057, at 58-59 (1976), *reprinted in* 1976 U.S.C.C.A.N. 946, 973-74. However, other legislative material reveals that Congress wanted to ensure that "party assistance [would] actually represent[ ] the involvement of many voters and not merely the influence of a wealthy few." S. Rep. No. 93-689 (1974), *reprinted in* 1974

[12] Significantly, the majority offers no evidence to the contrary beyond passages from law review articles which contain platitudes about the abstract value of parties in the American political process.

U.S.C.C.A.N. 5587, 5594. The FECA amendments of 1974 were intended to "prevent[ ] evasion of the individual contribution limits by persons funneling large gifts through party committees; each person's donation to party funds used to assist federal candidates under this special provision must not exceed the maximum amount he could give directly to a candidate." *Id.*

Significantly, these Congressional remarks appear in a discussion of legislation intended to strengthen political parties by promoting the pooling of resources from many small contributors, building coalitions of voters, keeping candidates responsible to the electorate, and increasing party resources for important party operations between elections. *See id.* at 5593-94. Indeed, *Amici* Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee argue persuasively that during the past twenty years political parties have recovered dramatically from a prolonged period of decline due in large part to the FECA provisions limiting contributions and expenditures, which in turn encourage parties to deploy their resources in other party-building functions that ultimately enhance their role in the political process. Whether one accepts this argument or not, it clearly illuminates the fact that determining which measures suitably balance the nurture of political parties and the prevention of their use as tools of corruption is a matter for the legislative rather than the judicial process.

The majority prefaces its analysis with a discussion voicing reservations on whether the standard set out in *Shrink Missouri* for assessing contribution limits should apply to political parties. *See* maj. op. at 12-13.

Under that test, a contribution limit survives a First Amendment challenge if the Government demonstrates that it was closely drawn to match a sufficiently important interest. *Shrink Missouri*, 120 S. Ct. at 904. As an initial matter, the majority is simply mistaken in asserting that the Court in either *Buckley* or *Shrink Missouri* analyzed contribution limits more closely when they affected associational rights than when they affected speech rights. To the contrary, as discussed above, after setting out the *Buckley* analysis in the context of restraints on speech, the Court in *Shrink Missouri* expressly stated that it had "flagged a similar difference between expenditure and contribution limitations in their impacts on the association right." *Id.* While recognizing that contribution limits have a greater impact on associational rights than on speech rights, the Court nonetheless reiterated its past holdings that expenditure and contribution limits are governed by differing standards even when they affect associational rights. *Id.* It is beyond quibble that the Court has drawn a distinction for purposes of First Amendment scrutiny between expenditures and contributions, rather than between associational and speech rights.

Moreover, there is no support in the Constitution, this legislation, or Supreme Court authority for the majority's notion that political parties are entitled to favored treatment when assessing a contribution limit that impacts their associational rights. The majority supports its position by stating that "a party speaks in

large part through its identified candidates."[13] Maj. op. at 1227. The same can be said, however, of any entity seeking to associate itself with a political candidate. That fact therefore does not serve to set political parties apart from others subject to contribution limits. More importantly, the Supreme Court has expressly rejected the argument that a party and its candidate are identical: "We cannot assume . . . that this is so. Congress chose to treat candidates and their parties quite differently under the Act, for example, by regulating contributions from one to the other." *Colorado Republican Comm.*, 518 U.S. at 623-24, 116 S. Ct. 2309 (citation omitted). The Supreme Court and Congress have thus foreclosed the very assumption made by the majority here.

In holding the contribution limit at issue unconstitutional, the majority requires the FEC to provide evidence in support of Congress' determination that political parties corrupt or appear to corrupt the political process through unlimited contributions.[14] The Supreme Court addressed the quantum of evidence required to support this interest in *Shrink Missouri*,

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[13] In focusing on the speech a party can allegedly only make through its candidate, the majority blurs the very line it wishes to draw between limits on speech and limits on associational rights.

[14] In addition, the majority requires that Congress' determination be analyzed in light of the vital role political parties play in that process. As I have discussed in text, Congress was clearly aware of the role parties play in the political process, and it enacted measures aimed at promoting that role as well as strengthening parties in general. The majority thus "double counts" the importance of protecting political parties and improperly substitutes its balancing of the competing values at issue here for that of Congress.

and its discussion there cannot be squared with the majority's treatment of the matter here. The Court pointed out that the necessary evidentiary showing "will vary up or down with the novelty and plausibility of the justification raised," and that "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Shrink Missouri*, 120 S. Ct. at 906. Because the legitimacy of the interest is thus so critical to the evidence required, the relevant inquiry is whether the Court's discussion in *Shrink Missouri* of the well-recognized dangers of large contributions applies when those contributions are from political parties rather than from other donors.

In *Shrink Missouri*, the lower court accepted the argument that the State had not justified the invocation of this interest with empirical evidence of actually corrupt practices or the public perception of a corrupting influence. The Supreme Court disagreed and expanded on the dangers flowing from large contributions generally.

> In speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

Shrink Missouri, 120 S. Ct. at 905 (quoting *Buckley*, 424 U.S. at 28, 96 S. Ct. 612). The Court pointed out:

> Even without the authority of *Buckley*, there would be no serious question about the legitimacy of the interests claimed, which, after all, underlie bribery and anti-gratuity statutes. While neither law nor morals equate all political contributions, without more, with bribes, we spoke in *Buckley* of the perception of corruption "inherent in a regime of large individual financial contributions" to candidates for public office, as a source of concern "almost equal" to *quid pro quo* improbity. The public interest in countering that perception was, indeed, the entire answer to the overbreadth claim raised in the *Buckley* case. This made perfect sense. Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."

Id. at 905-06 (citations omitted).

The FEC contends that these concerns apply equally to large contributions from political parties, arguing that parties can use their ability to funnel large amounts into the campaigns of particular candidates in response to large donations by outside interests, to assist in the evasion of contribution limits placed on individual and political committee contributions, and to

promote the personal interests of party leaders, their friends, and party factions. The FEC's position voices long-standing Congressional concerns that have animated the history of efforts to reform federal election financing, many of which were addressed to the evils arising from large contributions to political parties that put the parties in political debt to the donors, debts which were often paid by the parties' candidates. In *United States v. International Union UAW-CIO*, 352 U.S. 567, 77 S. Ct. 529, 1 L.Ed.2d 563 (1957), for example, the Supreme Court addressed the circumstances giving rise to the Corrupt Practices Act, 18 U.S.C. § 610, which prohibited corporations and labor unions from making contributions or expenditures in connection with federal elections. The Court found the following legislative history indicative of Congressional intent to "protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power," *id.* at 582, 77 S. Ct. 529:

> We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.

Id. at 576-77, 77 S. Ct. 529 (quoting remarks by "Senator Robinson, one of the leaders of the Senate"). "We all know that money is the chief source of corruption. We all know that large contributions to political campaigns . . . put the political party under obligation to the large contributors, who demand pay in the way of legislation. . . ." *Id.* at 577-78, 77 S. Ct. 529 (quoting Senator Bankhead offering 1940 amendments to the Hatch Act restricting contributions to federal elections).

> One of the matters upon which I sensed that the public was taking a stand opposite to that of labor leaders was the question of the handling of funds of labor organizations. The public was aroused by many rumors of . . . political contributions to parties and candidates which later were held as clubs over the head of high Federal officials.

Id. at 579, 77 S. Ct. 529 (quoting Congressman Landis, author of 1943 measure extending sections of Corrupt Practices Act to labor unions). These remarks, all of which were made by federal legislators during the efforts to pass earlier campaign finance reform, establish that the dangers from large contributions by political parties are no more novel or implausible than those from large contributions generally.

The Court's analysis of the quantum of evidence presented in *Shrink Missouri* governs the inquiry here. In concluding that the evidentiary showing in that case was sufficient to justify the contribution limits challenged there, the Court cited an affidavit from a state legislator stating generally that large contributions have the potential to buy votes, and "newspaper accounts of large contributions supporting inferences of

impropriety." *Shrink Missouri*, 120 S. Ct. at 907. Although the majority largely ignores the record before us, it likewise contains affidavits and depositions from those who have been active in federal fund raising activities, both as candidates and as party activists. These materials state that large donors to political parties give with an eye toward obtaining favorable consideration of legislation they deem important or obtaining access to a legislator in order to urge favorable action. *See*, *e.g.*, Decl. of Robert Hickmott (DNC fundraiser), jt. app. at 452-53; Aff. of Robert Razen (staff person for Senator George Mitchell), *id.* at 462; Aff. of Former Senator Paul Simon, *id.* at 466; Decl. of Former Senator Timothy Wirth, *id.* at 545-46; Dep. of Paul Simon, *id.* at 636; Dep. of Timothy Wirth, *id.* at 649, 661. *See also* Fax from National Republican Senatorial Comm., *id.* at 626. The record also reveals that although earmarking funds for a particular candidate is illegal, this prohibition is circumvented through "understandings" regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote. *See*, *e.g.*, Decl. of Leon G. Billings (former Exec. Dir. of Dem. Sen. Campaign Comm.), *id.* at 382; Decl. of Robert Hickmott (DNC fundraiser), *id.* at 446-48; Aff. of Paul Simon, *id.* at 465; Decl. of Timothy Wirth, *id.* at 543; Dep. of Timothy Wirth, *id.* at 644-45.

Senators are expected to encourage their major donors, who have maximized their contribution to the candidate, to make contributions to the state or national party, which in turn gives the candidates money for their campaigns. *See, e.g.*, Decl. of Leon G. Billings, *id.* at 382-83; Decl. of Robert Hickmott, *id.* at 446-47; Aff.

of R. William Johnstone (staff person for Senator Wysche Fowler, Jr.), *id.* at 457; Decl. of Timothy Wirth, *id.* at 543; Dep. of Paul Simon, *id.* at 635. *See also* Letter from Congressman Wayne Allred, *id.* at 191. Former Senator Simon candidly admitted, "I have found the process to be corruptive for everyone and, even those of us who go out of our way to make sure money does not influence our decision, we are affected by it." *Id.* at 630; *see also id.* at 640 (noting one colleague saying bluntly, "We have to pay attention to who is buttering our bread.").

In addition, the record contains numerous media articles and interviews reporting on episodes in which the inference can be drawn that donations to a party brought about access to that party's candidates and legislators, which in turn furthered the donor's business interests.[15] *See generally id.* at 250-89. Given the

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[15] Despite the Court's explicit reliance on newspaper articles in *Shrink Missouri*, the majority here refuses to accord them any weight in addressing the Congressional goal of preventing public perception of corruption. The majority states that "media accounts documenting a vague (though visceral) public cynicism about campaign finance prove too little. We should not allow generic public dissatisfaction to support the restriction of political speech." Maj. op. at 1230 n. 6. In so doing, the majority mischaracterizes and then ignores the significance of the media material here, and fails to accord any weight to the public interest in countering the perception of impropriety, which the Supreme Court has described "as a source of concern 'almost equal' to *quid pro quo* improbity." *Shrink Missouri*, 120 S. Ct. at 905-06 (quoting *Buckley*, 424 U.S. at 30, 96 S. Ct. 612). Significantly, the Supreme Court authority upon which the majority relies was directed to evaluating limits on independent expenditures, which the Court has emphatically distinguished from coordinated expenditures.

Supreme Court's reliance on this very type of evidence in *Shrink Missouri*, I believe that we are required to credit it here and to hold that the FEC has indeed carried its evidentiary burden to support the legislative judgment that party contribution limits are necessary to prevent corruption and the appearance of corruption.

The majority opinion's several responses to the evidence offered by the FEC all run afoul of Supreme Court authority. First, the majority begins on the wrong foot in relying on a statement by the plurality opinion in *Colorado Republican Fed. Campaign Comm.* that it was "'not aware of any special dangers of corruption associated with political parties.'" Maj. op. at 1228 (quoting *Colorado Republican Fed. Campaign Comm.*, 518 U.S. at 616, 116 S. Ct. 2309). This remark was not directed to contribution limits on party donations. Rather, it referred to limits on a party's inde-

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> [T]he constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure. This fact prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.

Colorado Republican Campaign Comm., 518 U.S. at 617-18, 116 S. Ct. 2309 (citing *Buckley*, 424 U.S. at 45-46, 96 S. Ct. 612; *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 498, 105 S. Ct. 1459, 84 L.Ed.2d 455 (1985)). When, as here, this constitutionally significant fact is missing and the expenditure is instead coordinated, the Court has clearly indicated that a substantial danger of corruption may be assumed absent convincing evidence to the contrary. The majority thus errs in placing the burden on the FEC rather than on the Colorado Republican Party, which certainly has not shouldered that burden in this case.

pendent expenditures which, unlike contributions, are not deemed to be coordinated and therefore pass constitutional muster due to the absence of prearrangement and coordination. *Id.* This statement is simply inapposite to coordinated party contributions. Cf., *Shrink Missouri*, 120 S. Ct. at 907 (making same point about *Colorado Republican Fed. Campaign Comm.* with respect to government's evidentiary burden).

Next the majority takes issue with Congress' decision to limit party contributions as a means of addressing the ability of corporations and other big donors to influence the legislative process. Here, too, the majority acts contrary to the admonition in *Shrink Missouri* that courts are not to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." 120 S. Ct. at 906 n. 5. "Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments . . ." *Id.* at 912 (Breyer, J., concurring). Given the legitimacy of the goal of preventing corruption and the undeniable fact that parties funnel funds from donors to candidates when they coordinate expenditures, the Supreme Court has made clear that we are not at liberty to replace Congress' judgment on an effective means for furthering its interest. *See Buckley*, 424 U.S. at 30, 96 S. Ct. 612 (court "has no scalpel" to probe Congressional choice of means to accomplish necessary end).

The majority also rejects the FEC's argument that limits on party contributions are necessary to prevent unscrupulous party officials from furthering their pet interests, thereby corrupting or appearing to corrupt

the legislative process. The majority posits that in adopting this theory, Congress "gravely misunderstands the role of political parties in our democracy." Maj. op. at 1231. *As a matter of common sense, it is difficult to credit the bald assertion that politicians do not understand the role political parties play in American politics.*[6] Moreover, the majority is not at liberty to substitute its judgment for that of Congress on how best to balance the need to promote the role of political parties and to combat its potential for corruption. The majority also views the electoral and litigation processes as the proper means for righting the wrongs perpetrated by corrupt party leaders, again displacing the judgment of Congress on matters uniquely within its province.

Finally, the majority rejects the argument that limits on party expenditures are necessary to prevent evasion of the Act's other contribution limits. The majority

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[6] The majority apparently concedes the problem in accusing Congress of failing to understand the political process, and attempts to shift the focus of its criticism from Congress to the FEC, asserting that the FEC misunderstands Congressional intent in defending limits on coordinated party spending as a means of combating corruption. *See* Maj. Op. at 1231 n. 7. The Supreme Court language in *Colorado Republican Campaign Comm.*, upon which the majority relies, however, is found in its discussion of limits on independent party expenditures. *See* 518 U.S. at 616-18, 116 S. Ct. 2309. As I have previously pointed out, *see supra* at 1227 n. 5, the Court in that discussion specifically distinguished independent party spending from coordinated spending on the basis of the "constitutionally significant" "lack of coordination." 518 U.S. at 617, 116 S. Ct. 2309. The majority relies on selective quotations and simply ignores the fact that the Supreme Court analyses in which these quotes occur is grounded on the very distinction that renders the majority's reliance invalid.

believes that enforcement of the disclosure requirements in section 441a(a)(8) is adequate to protect against this problem. To the contrary, the Supreme Court has made it unmistakably clear that the existence of disclosure requirements is not a ground for invalidating contribution limits.

> We specifically rejected this notion in *Buckley*, where we said . . . that "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed." We understood contribution limits, on the other hand, to "focu[s] precisely on the problem of large campaign contributions-the narrow aspect of political association where the actuality and potential for corruption have been identified-while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." There is no reason to view contribution limits any differently today.

Shrink Missouri, 120 S. Ct. at 908 n. 7.

In sum, the majority has substituted a paean to its view of the role of political parties for a properly deferential assessment of the constitutionality of limits on coordinated party contributions under applicable Supreme Court authority. The result the majority

reaches simply cannot be reconciled with that authority.

In my view, section 441a(d) is unquestionably valid under the analysis in *Shrink Missouri* and prior Supreme Court authority. The FEC has amply supported its argument that limits on coordinated expenditures by political parties serve the public interest in preventing both corruption and the appearance of corruption by limiting the leverage parties possess to pay off the political debts owed to large contributors. The FEC has offered evidence that the access purchased by large donations translates into power which distorts the democratic process. Both common sense and experience dictate that the public justifiably views the access obtained by large donations as the unfair opportunity to gain a candidate's support on the basis of financial considerations rather than on policy or belief. The FEC has also supported its contention that the limits at issue are an integral part of FECA's regulatory scheme because they prevent donors from evading the limits on contributions to a candidate by contributing to political parties with the understanding, tacit or otherwise, that the funds will be used for that candidate. Finally, the majority's conclusion that the limit here is not narrowly drawn rings hollow in light of the Court's earlier holding in this case that parties may make *independent* expenditures on behalf of a candidate.

I see no merit to the assertion that the political atmosphere has changed to the extent that the limits at issue are no longer needed. This evaluation, like so many of the others made by the majority in this case, is to be made by Congress through the legislative process

and not by us through judicial fiat. Neither the majority nor the Committee has made a persuasive argument that human nature has changed in the twenty years that have passed since FECA was enacted. To the extent that the political process has in fact improved, FECA has played a major role in the curtailment of abuses. Eliminating an integral part of the Act would allow those abuses to flourish once again. The fact that FECA has accomplished what it was meant to do is hardly a justification for doing away with it. In holding to the contrary, the majority makes a grave error by turning a deaf ear to the voices of history that advise us to learn from our mistakes lest we repeat them.

Accordingly, I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. CIV.A.89 N 1159

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE, DEFENDANT

[Filed: Feb. 18, 1999]

MEMORANDUM OPINION AND ORDER

NOTTINGHAM, District Judge.

This case has come back to the court on remand from the United States Supreme Court and the United States Court of Appeals for the Tenth Circuit. The only claim to have survived the gauntlet is a counterclaim asserted by Defendant Colorado Republican Federal Campaign Committee [hereinafter "Colorado Party"]. This counterclaim asserts a constitutional challenge to a provision of the Federal Election Campaign Act of 1971 [hereinafter "FECA"], *codified, as amended, at* 2 U.S.C.A. §§ 431-456 (West 1997 & Supp. 1998). The provision at issue, which the Supreme Court labeled for convenient reference as "the Party Expenditure Pro-

vision," [16] places limits on the amount of money which committees of political parties may expend "in connection with the general election campaign of candidates for Federal office." *See* 2 U.S.C.A. § 441a(d). The matter is now before the court on cross-motions for summary judgment. Jurisdiction is based on 28 U.S.C.A. § 1345 (West 1993).

FACTS

a. Procedural History

Plaintiff Federal Election Commission [hereinafter "FEC"] originally brought this action against the Colorado Party, asking the court to declare: (1) that the disbursement of money which the Colorado Party had made for certain political advertising should have been reported as an "expenditure," as FECA defines that term; and (2) that, had the disbursement been so reported, it would have violated the spending limitations set forth in the Party Expenditure Provision. In 1986, before the Colorado Republican Party had selected its candidate for the senatorial election to take place in the fall of 1986, the Colorado Party bought and aired campaign advertisements attacking Timothy Wirth, the putative candidate of the Democratic Party. The state Democratic Party complained to the FEC. The FEC agreed with the Democratic Party and brought this case.

Relying on previous Supreme Court language and interpretations by the FEC which, to the eye, suggested that political parties were by their nature

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[16] *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 611, 116 S. Ct. 2309, 2313, 135 L.Ed.2d 795 (1996).

incapable of making "independent" expenditures on behalf of candidates, this court found, as a matter of law, that the Colorado Party had made a "coordinated"[17] expenditure. *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F.Supp. 1448, 1452-53 (D.Colo.1993) (relying on *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28 n. 1, 102 S. Ct. 38, 40 n. 1, 70 L.Ed.2d 23 [1981] [hereinafter "*DSCC*"]; FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide [CCH] ¶ 5819 [July 18, 1985]; FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide [CCH] ¶ 5766 [Aug. 16, 1984]). The court then recognized that even a coordinated expenditure is only subject to the limitations of section 441a(d)(3) if it is made "in connection with" a general election campaign. In accordance with Supreme Court and federal circuits' previous interpretations, the court construed the phrase "in connection with" narrowly, as requiring "express advocacy." Thus, the court concluded that the advertisement aired by the Colorado Party did not constitute express advocacy, was not made "in connection with" a general election campaign, and did not run afoul of section 441a(d)(3). *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1455-57.

The Tenth Circuit reversed. *FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015 (10th Cir. 1995). The court adopted a definition of the phrase "in connection with" broader than the one used by this court. The Tenth Circuit's definition focused on whether the advertisement contained an "electioneer-

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[17] The distinction between "independent" and "coordinated" expenditures is discussed beginning *infra* at 5.

ing message" and targeted a clearly identifiable candidate. *Id.* at 1023. The Colorado Party's advertisement, according to the Tenth Circuit, contained such a message and identified Timothy Wirth as its focus. *Id.*

The Supreme Court vacated the Tenth Circuit's opinion and remanded the case. The Court rejected the assumption made by both courts below—that political parties were, by definition, only able to make coordinated expenditures—and found, as matter of fact, that the expenditure in this case was an independent one. The Court then considered FECA's limitations on independent expenditures by political parties and deemed the limits unconstitutional. *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. at 617-20, 116 S. Ct. 2309, 2317-18, 135 L.Ed.2d 795 (1996) [hereinafter "*Colorado I*"]. The Court did not resolve the Colorado Party's counterclaim—a facial challenge to the FECA limits on *coordinated* as well as *independent* expenditures. *Id.* at 623-24, 116 S. Ct. at 2319-20.

b. Legal and Factual Background

The provision at issue is section 441a(d), in particular as it applies to congressional elections. The statute provides as follows:

> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations

> contained in paragraphs (2) and (3) of this subsection.
>
> . . . . .
>
> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
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> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
>
> (I) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

2 U.S.C.A. § 441a(d).[18] As I noted earlier, this provision establishes limitations on expenditures made "in con-

[18] Section 441a(d) specifies that it applies to the national committee of a political party, state committees of a political party, and subcommittees of state parties. Throughout this Memorandum Opinion and Order, the court refers generically and interchangeably to political parties, parties, and party committees because the Colorado Party and the FEC have not suggested any relevant distinction between these entities, and none is apparent to the court.

nection with the general election campaign of candidates for Federal office."

Expenditures are divided into two categories: independent and coordinated. Coordinated expenditures are those which are made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C.A. § 441a(a)(7)(B)(I) (West 1997). Party committees work closely with candidates and campaigns in making coordinated expenditures.[19] (*See* FEC Facts ¶ 38; *admitted at* Colorado Party's Resp. to FEC Facts ¶ 38.)

All other expenditures are independent. In order to make an independent expenditure, a party must be sufficiently distant from a candidate's campaign and a candidate's campaign strategies that it is able to skirt FECA's definition of a "coordinated" expenditure. *See*

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[19] In 1996, the parties made coordinated expenditures as follows: $19,254,219 by the Republican Party committees (national, state, and local) and $15,843,754 by the Democratic Party committees (national, state, and local). (Federal Election Commission's Statement of Material Facts Not in Genuine Dispute, Submitted Under Seal ¶ 8 [filed Jan. 23, 1998] [hereinafter "FEC Facts"]; *admitted in pertinent part at* Def. Colorado Republican Federal Campaign Committee's Resp. to the FEC's Statement of Material Facts Not in Genuine Dispute, Submitted Under Seal ¶ 8 [filed Feb. 17, 1998] [hereinafter "Colorado Party's Resp. to FEC Facts"].) The three national Republican Party committees are the Republican National Committee ("RNC"), the National Republican Senatorial Committee ("NRSC"), and the National Republican Congressional Committee ("NRCC"). The three national Democratic Party Committees are the Democratic National Committee ("DNC"), the Democratic Senatorial Campaign Committee ("DSCC"), and the Democratic Congressional Campaign Committee ("DCCC").

Colorado I, 518 U.S. at 614-15, 116 S. Ct. at 2315. Following *Colorado I*, political parties may engage in unlimited independent expenditures on behalf of congressional candidates. *Id.* at 615, 116 S. Ct. at 2315.

The *Colorado I* Court declined, for "prudential" reasons, to consider whether coordinated party expenditures could constitutionally be limited by application of the Party Expenditure Provision. The Court therefore remanded the case for further factual and legal development. *Id.* at 623-25, 116 S. Ct. at 2319-20. The litigants have seized this opportunity to lard the summary judgment record with voluminous documentation and disputation concerning the admissibility and significance of that documentation. The FEC has been especially prone to supply material without any attention to elementary evidentiary requirements, such as authentication (Fed.R.Evid.901), or evidentiary limitations, such as the rule against hearsay (Fed. R. Evid. 801). The FEC makes numerous factual assertions, for example, based on reports in newspaper articles. Except as otherwise noted, the discussion which follows simply ignores the mass of irrelevant and/or inadmissible evidence in the record and recites facts which the court regards as having some significance to the questions before the court.

The money which flows to political parties is a crucial aspect of the dispute before the court. The term "hard" money or "federal" money means that money which may be raised in accordance with FECA limits, and is the only money which parties may spend on behalf of candidates for federal election. Parties may accept hard money only in limited amounts and from limited sources. The aggregate amounts which individuals may

give to federal candidates, and federal and state parties, may not exceed $25,000 per year to permissible recipients. 2 U.S.C.A. § 441a(a)(3). "Multicandidate political committees," most commonly referred to as political action committees or PACs, may give up to $15,000 per year to a national party and $5,000 per year to a state party, and such entities are not subject to an aggregate limit. 2 U.S.C.A. § 441a(a)(2). Except through their PACs, corporations and unions may not contribute money to be used in connection with federal elections. 2 U.S.C.A. § 441b(a).

In contrast to the limitations on the money which may be used in connection with federal elections, "soft" money is a term commonly applied to contributions to political parties which FECA does not regulate as to source or amount. "Soft" money may not be spent in connection with federal elections. It may, however, be used for non-federal-election activity, such as "get out the vote" campaigns, issue advocacy, and elections for state office.

In the labyrinth of federal election regulation, both types of money, hard and soft, may flow in all directions. Soft money and hard money may be exchanged. Various state parties have traded soft dollars for hard dollars, and state parties have made similar trades with national party committees.[20] In addition, national party

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[20] The FEC asserts that the exchanges were typically not dollar-for-dollar exchanges but, rather, reflected a premium for the higher value of hard dollars. (FEC Facts ¶¶ 43-48.) The Colorado Party admits only one exchange: the Texas Republican Party, needing federal (i.e., hard) funds late in the 1996 campaign swapped $35,000 in federal funds for non- federal funds (i.e., soft)

committees transfer hard monies to state and local party committees in accordance with 11 C.F.R. § 110.3(c)(1) (1997).[21] (*See* FEC Facts ¶ 19; *admitted at* Colorado Party's Resp. to FEC Facts ¶ 19.) National parties may also transfer their own soft money to state parties. The national parties (the RNC, for example) report such activities to the FEC; the Colorado Party reports its non-federal money activity to the Colorado Secretary of State. (*See* FEC Facts ¶ 20; *admitted in pertinent part at* Colorado Party's Resp. to FEC Facts ¶ 20.)

In addition to the transfer of money, party committees are permitted to—and do—share or transfer

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with the Colorado Republican Party. (FEC Facts ¶ 43; *admitted at* Colorado Party's Resp. to FEC Facts ¶ 43.)

With respect to all of the FEC's other money exchange allegations—including those regarding premiums paid for hard money—the Colorado Party admits that such exchanges have been reported but disputes the truth of the matter reported and objects to the consideration of such evidence as "unreliable hearsay." (Colorado Party's Resp. to FEC Facts ¶¶ 44-48.) The FEC claims to be offering the assertions only for the fact that they were reported and not for the truth of the reported material. I do not understand how the mere reporting that a premium was paid for hard dollars is relevant in this case, and I therefore treat such assertions as inadmissible hearsay.

[21] For example, in the 1996 senate elections, the RNC transferred $166,068 to the Colorado Party. The Colorado Party used that money as an expenditure coordinated with the campaign of Wayne Allard. The parties dispute whether the Colorado Party would have made this expenditure without such a transfer. (FEC Facts ¶ 31; Colorado Party's Resp. to FEC Facts ¶ 31.) The coordinated expenditure limit for Colorado senate candidates in the 1996 election was almost $171,000. (FEC Facts ¶¶ 29-30; *admitted in pertinent part at* Colorado Party's Resp. to FEC Facts ¶¶ 29-30.)

agency authority to other party entities. The transfer of such authority appears to have the same practical effect as the exchange of hard dollars for soft dollars. The transferee committee is then responsible for making expenditures under section 441a(d). (FEC Facts ¶¶ 21-22, 24-27, 34-37; *admitted in pertinent part at* Colorado Party's Resp. to FEC Facts ¶¶ 21-22, 24-27, 34-37.)

The various party committees keep track of all this by maintaining separate accounts according to the use for which money may be expended. For example, the NRSC has a federal (i.e., hard money) account which it uses to support federal candidates and two non-federal (i.e., soft money) accounts which it uses for party-building activities. In particular, the NRSC focused in 1995 and 1996 on states with active senate races where party-building money would be of assistance. (FEC Facts ¶ 18; *admitted in pertinent part at* Colorado Party's Resp. to FEC Facts ¶ 18.)

Because political parties do not have money of their own, they must raise funds from contributors. Money to be used for party expenditures on behalf of candidates is "generated through ongoing fund-raising operations that include direct-mail solicitations, telemarketing efforts, party fund raisers, an annual congressional dinner, and the solicitation of individual donors." (Statement of Undisputed Facts and Supporting Exs. ¶ 23, Ex. B [Corrado Report at 20] [filed Jan. 23, 1998] [hereinafter "Colorado Party Facts"]; *admitted at* Federal Election Commission's Resp. to the Colorado Party's Statement of Undisputed Facts and Supporting Exs. ¶ 23 [filed Feb. 17, 1998] [hereinafter "FEC's Resp. to Colorado Party Facts"].) According to

the Colorado Party, the "vast majority of the monies used for coordinated expenditures are generated through contributions of relatively small amounts from individual donors." (Colorado Party Facts ¶ 23, Ex. B [Corrado Report at 20].) The FEC refuses to admit that the "vast" majority of such funds are raised in the manner described. The evidence in the record, however—particularly the testimony of Haley Barbour, RNC Chairman from 1993 to 1997, former Congressman Tony Coehlo, DCCC Chairman from 1981 to 1986, and Jon Heubusch, Executive Director of the NRSC during the 1995-1996 election cycle—demonstrates that at least the majority of hard money received by the parties is in the form of small (i.e., less than $100) contributions from individual contributors. (*See* Joint Ex. Vols. II, Ex. G [Barbour Dep. at 23 ("[I]n the first couple of years I was Chairman I believe more than 70 percent of all our revenue came in contributions of $100 or less.")], Ex. J [Coehlo Dep. at 24, 36 (recognizing the value of direct mail which became the "major revenue source" based on contributions averaging $35)], Ex. M [Heubusch Dep. at 99] [filed Jan. 23, 1998].) These hard-money contributions overwhelmingly result from direct-mail solicitations at the national level, and from direct-mail and telephone solicitations at the state party level. (Colorado Party Facts ¶ 24; *admitted at* FEC's Resp. to Colorado Party Facts ¶ 24.)

The FEC offers almost forty factual allegations regarding candidate fund raising for parties. (FEC Facts ¶¶ 95-132.) Some of them are undisputed. With specific reference to the Colorado Party, the parties agree that Republican federal candidates and officeholders are asked to assist in fund raising. This assistance includes their attendance at fund-raising events

as a "draw" to other potential attendees, permission to identify the candidates and/or officeholders as co-hosts of fund raisers at which hard and soft money are raised, and signing a direct-mail fund-raising letter. (FEC Facts ¶ 122; *admitted at* Colorado Party's Resp. to FEC Facts ¶ 122.)

In general, the evidence offered by the FEC indicates that candidates and officeholders raise funds for their parties in disparate ways. Members of Congress are encouraged by their party to transfer excess campaign funds to the party or a committee thereof and to help raise money for the party. (FEC Facts ¶¶ 96-100.) Further, the FEC highlights what is known as a "tally" system, whereby party committees keep track of the Member of Congress who is responsible for contributions to the campaign committees. Some candidates willingly raise money for the party and party committees; others are less committed to the parties' common pursuits, at least with respect to finances. (*See, e.g.*, FEC Facts ¶¶ 96, 97.) Some raise money for the party even when they are not themselves in an election, or when they otherwise have no expectation of receiving funds from the party in return for their efforts. (*See* FEC Facts ¶¶ 104, 120.) Other Members of Congress raise money for their party and, in turn, request that they receive assistance in the form of coordinated expenditures. (*See* FEC Facts ¶¶ 125, 126, 130, 131.) Many, although not all, Members of Congress raise money on behalf of the party from contributors who have already given the maximum permissible amount to the individual candidate's campaign. (FEC Facts ¶¶ 133-43.) Where fund raising is done in conjunction with a candidate, and the potential contributor has already contributed the maximum

amount directly to the candidate, the contributor is made aware that, although any contribution to the party would not go directly to the candidate, it would indirectly assist the candidate by assisting his or her party. (FEC Facts ¶¶ 103, 115, 132.) Parties also cultivate giving from PACs and encourage giving from PACs based on the performance of competing PACs. (*See* FEC Facts ¶¶ 83-86, 88-91, 93.)

The evidence offered by the FEC suggests that the parties take into consideration the fund-raising efforts of candidates in deciding allocations of campaign funds. (*See* FEC Facts ¶¶ 99, 101-03, 116, 118.) The evidence also indicates, however, that the primary consideration in allocating funds is which races are marginal—that is, which races are ones where party money could be the difference between winning and losing, (*see* FEC Facts ¶¶ 106, 109), assuming that a candidate is competent, exercises common sense, and acts professionally, (FEC Facts ¶ 7; *admitted at* Colorado Party's Resp. to FEC Facts ¶ 7; *see also* FEC Facts ¶ 9). Maintaining party control over seats is paramount to the parties' pursuits. (*See*, *e.g.*, FEC Facts ¶¶ 222-223, 225.) Candidates in need of funding do request assistance and attempt to lobby those with control over allocations. (FEC Facts ¶ 106; *admitted in pertinent part at* Colorado Party's Resp. to FEC Facts ¶ 106.)

The FEC makes numerous factual claims regarding where contributors to the political parties choose to make their donations and what they allegedly gain in return. In particular, the FEC highlights the various party-donor programs and the benefits and access to Members of Congress which a contributor gains by giving at various levels. (FEC Facts ¶¶ 50-65, 68-78,

161-210.) The FEC also suggests that, in exchange for financial support, contributors to party committees expect that party committees will intercede with candidates and officeholders on behalf of large contributors.[22] (FEC Facts ¶¶ 242- 81.) The evidence offered also addresses the fund-raising practices by which Members of Congress solicit money and existing donors are recruited to bring others into the donating fold. In some cases, contributors give money directly to a party committee instead of giving to a candidate if, for example, the contributor is a PAC and the candidate does not accept PAC contributions. (FEC Facts ¶ 144.) There is evidence that one reason contributors give to party committees after having given directly to a candidate is to help their candidate indirectly. (FEC Facts ¶¶ 135-37, 139.)

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[22] Of those allegations, fewer than ten even mention the name of a specific Member of Congress or Members of Congress in general. (FEC Facts ¶¶ 242-45, 247-48, 269.) The remainder involve party committee interactions with the White House or other parts of the executive branch. Further, many involve soft-money contributions. As with many other allegations by the FEC, these allegations are simply not relevant to the dispute before the court. Suggesting or arranging for meetings between party contributors and the President or Vice President or any other administration officials has no bearing on the constitutionality of limits on coordinated party expenditures. Even the FEC's allegations which do involve Members of Congress fail to even suggest that coordinated party expenditures result in quid pro quo corruption or the appearance thereof. Further, the fact that Senator Wirth, for example, was asked to meet with large donors to the party with whom he had not previously met, (*see* FEC Fact ¶ 243), offers no support for the FEC's position. If anything, the evidence suggests that party committees who attempted to arrange meetings for donors with legislators were kept from doing so by staff, where such a meeting would be "inappropriate." (FEC Facts ¶ 242.)

The FEC contends that party committees exert influence over candidates.[23] (FEC Facts ¶¶ 211-41.) The FEC's evidence includes newspaper articles alleging that party leaders have suggested withholding campaign funds from candidates if they refuse to adopt a particular policy position. *See* FEC Facts ¶¶ 234, 238-39; Federal Election Commission's Supplemental Statement of Material Facts Not in Genuine Dispute ¶ 307 [filed Feb. 17, 1998] [hereinafter "FEC Supplemental Facts"].) As with the other instances where the FEC attempts to rely on newspaper reports in support of its factual assertions, however, the court will not accept such evidence as establishing the facts reported therein.

Resting on hundreds of factual allegations and thousands of pages of documentation, the Colorado Party and the FEC filed cross motions for summary judgment. (Mot. for Summ. J. [filed Jan. 23, 1998]; Def./Counter-Pl.'s Mot. for Summ. J. [filed Jan. 23, 1998].) The FEC contends that the Colorado Party has failed to present a justiciable controversy and seeks summary judgment on the grounds of standing and

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[23] The FEC also makes allegations regarding activities by "party leaders" in assisting in state elections. (FEC Facts ¶¶ 283-91.) Those allegations do not, however, involve any Members of Congress. The allegation regarding the use of non-federal money by Republican Party leaders to assist in state elections involves soft money and does not suggest corruption or the appearance thereof. (FEC Facts ¶ 282.) What it does suggest is that parties are not just concerned at electoral success at the federal level, and that furthering parties' agendas at the state level is also an important aspect of parties' goals. The connection between these alleged activities and the corruption which the FEC claims will follow from unlimited party coordinated expenditures is not apparent to the court.

ripeness. (Federal Election Commission's Mem. in Supp. of Its Mot. for Summ. J., Submitted Under Seal at 17-20 [filed Jan. 23, 1998] [hereinafter "FEC's Summ. J. Br."].) At the heart of its argument on the merits, the FEC maintains that the Party Expenditure Provision serves a compelling Government interest and is narrowly tailored to achieve that interest. (*Id.* at 21-36.) It also maintains that the Party Expenditure Provision is not unconstitutionally vague. (*Id.* at 36-38.) The Colorado Party maintains that the Party Expenditure Provision severely restricts core First Amendment rights and that the FEC cannot carry its burden of establishing that the limits contained in the provision serve compelling governmental interests. (Mem. in Supp. of the Colorado Party's Mot. for Summ. J. [filed Jan. 23, 1998] [hereinafter "Colorado Party's Summ. J. Br."].)

ANALYSIS

1. Justiciability

a. Standing

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992), the Supreme Court held that "the irreducible constitutional minimum of standing" contains the following three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the chal-

> lenged action of the defendant[s], and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61, 112 S. Ct. at 2136 (citations omitted); *accord Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 447 (10th Cir. 1996). Plaintiff bears the burden of proving standing. *Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136; *Gilbert v. Shalala*, 45 F.3d 1391, 1394 (10th Cir. 1995). Where a challenge to standing is before the court on a motion for summary judgment, "standing must be supported by specific evidentiary facts and not by mere allegations." *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997) (citing *Lujan*, 504 U.S. at 562, 112 S. Ct. at 2137). Here, the FEC questions whether the Colorado Party meets the injury- in-fact element of standing under *Lujan*.

It is a constitutional certainty that elections will continue to occur. U.S. Const. Art. I, 2, cl. 1; U.S. Const. amend XVII. It is almost as certain that the Colorado Party will have candidates in those elections whom it will want to support by way of coordinated expenditures. Indeed, during the 1996 federal election year, the Colorado Party made a single, large coordinated expenditure on behalf of its successful senatorial candidate, Wayne Allard. This expenditure alone came to within $4,000 of the limit which section 441a(d) imposed on the Colorado Party's coordinated expenditures for the senate race. (FEC Facts ¶ 30; *admitted in part and denied in part at* Colorado Party's Resp. to FEC Facts ¶ 30.) Donald K. Bain, erstwhile

chairman of the Colorado Party, testified that the Colorado Party "was, is, and for the foreseeable future will be ready, willing, and able to spend more [on coordinated expenditures than FECA permits]." (Colorado Party Exs. Vol. III, Ex. P [Bain Aff. ¶ 3] [filed Jan. 23, 1998] [hereinafter "Colo. Exs. Vol. III"].) Bain further testified that, in the 1996 campaign, the Colorado Party considered a coordinated expenditure in excess of the FECA limits, but ultimately refrained from making the expenditure because of the concern that the FEC would challenge such an expenditure. (*Id.*, Ex. P [Bain Aff. ¶ 4].) The Colorado Party's supposition that the FEC would challenge any coordinated expenditure exceeding the FECA statutory limit is not fanciful, for this case began as an FEC enforcement proceeding under the very section which is at issue now.

In these circumstances, I conclude that the Colorado Party has made a sufficient showing of injury-in-fact. It possesses the intent and the ability to make coordinated expenditures which exceed statutory limitations, and it would confront FEC enforcement action if it did so. Contrary to the FEC's apparent argument, the fact that the Colorado Party receives some money from the RNC or other national party committees for coordinated expenditures does not logically require the conclusion that the Colorado Party is impermissibly attempting to assert standing on behalf of the RNC. *See* FEC's Summ. J. Br. at 19.) The source of funds which a political party expends for a candidate is simply irrelevant to the question of whether the coordinated expenditure limitation constrains and chills the speech of the party on behalf of its candidates. Similarly, the fact that the Colorado Party may, from time to time, lack hard money which would permit it to exceed the

expenditure limitations does not defeat its standing. It may still receive hard funds from national or state party committees, and receipt of such funds would permit it to make expenditures which would exceed the limitations. Accordingly, I conclude that the Colorado Party has standing to challenge the coordinated expenditure limits.

b. Ripeness

Ripeness has been described as "providing a time-bound perspective [ ] on the injury inquiry of standing." *DKT Mem'l Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 298 (D.C. Cir. 1989) (quoting 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531, at 350 [2d ed. 1990]). The inquiry involves two elements: (1) the fitness of the issues for judicial decision; and (2) the hardship from withholding court consideration. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). Ripeness includes both constitutional elements and prudential elements. Because, however, this case involves First Amendment rights, the prudential elements on standing are lessened. *Phelps*, 122 F.3d at 1326 (citing *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956, 104 S. Ct. 2839, 2847, 81 L.Ed.2d 786 [1984]; *ACORN v. City of Tulsa, Okla.*, 835 F.2d 735, 738 [10th Cir. 1987]).

The FEC contends that the Colorado Party has failed to demonstrate the existence of a live dispute regarding the actual or threatened application of section 441a(d). (FEC's Summ. J. Br. at 20.) The FEC's position, in light of the history of this case and the Colorado Party's allegations and evidence regarding its campaign practices, limitations, and intentions, is unpersuasive.

As noted, this case began as an enforcement action under section 441a(d) for the Colorado Party's exceeding the coordinated expenditure limits imposed thereunder. The Supreme Court ultimately determined that the expenditure at issue was independent and not coordinated, but the reality facing the Colorado Party is that (1) what was believed to be a coordinated expenditure in excess of the limits was challenged in the past, and (2) the Colorado Party can expect to face and FEC challenge in the next election cycle if it makes a coordinated expenditure in contravention of section 441a(d). The Colorado Party need not wait for that to occur before a court considers its challenge to the coordinated expenditure limit. *See Secretary of State of Md.*, 467 U.S. at 956-57, 104 S. Ct. at 2847.

Indeed, the Court in *Colorado I* noted only that the case may be moot if in fact the Colorado Party wanted to make only independent expenditures. *Colorado I*, 518 U.S. at 624, 116 S. Ct. at 2320. The Colorado Party has clearly indicated that it is not content with unlimited independent expenditures, has curtailed coordinated expenditures in the past to avoid the specter of an FEC enforcement action, and wants to make coordinated expenditures which exceed what it contends is an impermissible limit on such expenditures. Accordingly, I conclude that the issue is fit for judicial consideration. Further, the Colorado Party would incur substantial hardship if this court were to refuse to hear its challenge until it actually violated the statute and found itself on the other side of an FEC action like the one that began this present judicial odyssey. *Cf. Buckley*, 424 U.S. at 117-18, 96 S. Ct. at 681-82 (permitting challenge to method of appointing FEC members in anticipation of future rulings and deter-

minations by the FEC). Accordingly, I conclude that the case is ripe for determination.

2. Severability

The Supreme Court directed that, on remand, the lower courts consider whether Congress would have wanted the Party Expenditure Provision to stand were the limits contained therein to apply only to coordinated, and not to independent, expenditures. *Colorado I*, 518 U.S. at 625-26, 116 S. Ct. at 2320-21. A conclusion that the limits on coordinated party expenditures cannot be severed from the unconstitutional limits on independent party expenditures would permit the court to resolve the Colorado Party's challenge to section 441a(d) as a matter of statutory construction, without reaching the constitutional issue of whether the First Amendment permits legislative limits on coordinated expenditures. *See United States v. Locke*, 471 U.S. 84, 92 & n. 9, 105 S. Ct. 1785, 1791 & n. 9, 85 L.Ed.2d 64 (1985). The Colorado Party contends that, the congressional attempt to limit a political party's independent expenditures having been found unconstitutional, Congress would never have intended to regulate only a political party's coordinated expenditures. The Colorado Party would thus have the court conclude that the limitation on coordinated expenditures must fall under the weight of the Court's decision in *Colorado I* concerning independent expenditures.

FECA contains a strong severability provision: "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such

provision to other persons and circumstances shall not be affected thereby." 2 U.S.C.A. § 454. Such a clause "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality." *Califano v. Westcott*, 443 U.S. 76, 90, 99 S. Ct. 2655, 2664, 61 L.Ed.2d 382 (1979) (construing an identically worded severability clause in the Social Security Act). The inclusion of such a clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686, 107 S. Ct. 1476, 1481, 94 L.Ed.2d 661 (1987) (citations omitted). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108-09, 96 S. Ct. 612, 677, 46 L.Ed.2d 659 (1976) (internal citation and quotation marks omitted). "'[A] court should refrain from invalidating more of the statute than is necessary.'" *Alaska Airlines, Inc.*, 480 U.S. at 684, 107 S. Ct. at 1479 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S. Ct. 3262, 3268, 82 L.Ed.2d 487 [1984] [plurality opinion] [internal citation and quotations marks omitted]).

There is no evidence that Congress would have rejected the Party Expenditure Provision as it applies to coordinated expenditures in the absence of a limit on independent expenditures. Nothing necessarily and inherently links limits on independent expenditures with limits on coordinated expenditures. Section 441a(d) can operate to limit the latter without any regulation of the former. Because there is no evidence to the contrary, the presumption created by FECA's

strong severability clause compels the conclusion that the Party Expenditure Provision, as it applies to coordinated expenditures, remains in effect. The Colorado Party's motion is denied insofar as the Colorado Party seeks summary judgment on the ground that the unconstitutional independent expenditure limitation cannot be severed from the remainder of the Party Expenditure Provision.

3. The Merits of the Case: Constitutional Challenge to Section 441a(d)

a. Legislative History

The Colorado Party contends that, because the Party Expenditure Provision was enacted for the constitutionally infirm purpose of curtailing what Congress saw as excessive and wasteful campaign spending, it should be held unconstitutional. (Colorado Party's Summ. J. Br. at 19-21.) The Party Expenditure Provision, currently codified as 2 U.S.C.A. § 441a(d), had its origins in the Congress' 1974 federal election legislation. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 92-225, 86 Stat. 3 (then codified as 18 U.S.C.A. § 608[f]). *Buckley* recognized that the primary effect of the expenditure limitations, such as those embodied in what was then 18 U.S.C.A. § 608(f), was to limit the quantity of political speech. *Buckley*, 424 U.S. at 39, 96 S.Ct. at 644. In the aftermath of *Buckley*, Congress repealed 18 U.S.C.A. § 608. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 496. At the same time, Congress enacted a new section, codified as 2 U.S.C.A. § 441a, which incorporated and augmented the Party Expenditure Provision, as it been enacted in 1974. *See* Federal Election Campaign Act Amendments

of 1976, Pub. L. No. 94-283, 90 Stat. 489. The Court has since recognized that "Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." *Colorado I*, 518 U.S. at 618, 116 S.Ct. at 2317 (citing *Buckley*, 424 U.S. at 57, 96 S. Ct. at 653). Congress, however, reenacted the Party Expenditure Provision in light of the principles established in *Buckley*. Further, *Buckley* (and the Supreme Court precedents established therefrom) indicates that the primary purpose of FECA is to prevent corruption and the appearance thereof. *See Buckley*, 424 U.S. at 25-27, 96 S. Ct. at 637-39. Thus, although the origins of the Party Expenditure Provision included a constitutionally impermissible purpose, FECA also sought to control quid pro quo corruption or the appearance thereof. That FECA combined impermissible motives with permissible ones does not compel the conclusion that the Party Expenditure Provision is unconstitutional. Rather, the court must consider coordinated expenditures in light of the constitutional standards for regulating political speech.

b. Coordinated Expenditures by Political Parties

The FEC suggests at the outset that it need only meet an intermediate standard of scrutiny with respect to limits on coordinated party expenditures. In *Colorado I*, the Supreme Court reviewed previous cases which challenged provisions of FECA on First Amendment grounds. The Court determined that the analysis it had engaged in was "essentially weigh[ing] the First Amendment interest in permitting candidates

(and their supporters) to spend money to advance their political views, against a 'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." *Colorado I*, 518 U.S. at 609, 116 S. Ct. at 2313 (citing *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256-63, 107 S. Ct. 616, 626-30, 93 L.Ed.2d 539 [1986]; *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 493-501, 105 S. Ct. 1459, 1466-71, 84 L.Ed.2d 455 [1985] [hereinafter "NCPAC "]; *California Med. Ass'n v. FEC*, 453 U.S. 182, 193-99, 101 S. Ct. 2712, 2720-23, 69 L.Ed.2d 567 [1981]; *Buckley*, 424 U.S. at 14-23, 96 S.Ct. at 632-37, 46 L.Ed.2d 659). In accordance with the standard established by the Supreme Court, and contrary to the FEC's suggestion, the FEC must demonstrate that the Party Expenditure Provision serves a compelling Government interest and is narrowly tailored. FEC carries a heavy burden of proof.

Section 441a(a) places dollar limits on contributions by persons and by multicandidate political committees. As noted earlier, coordinated expenditures are considered contributions. *See* 2 U.S.C.A. § 441a(a)(7)(B)(I). The FEC suggests that because coordinated expenditures are considered contributions, and contributions have been permissibly limited by the Supreme Court, this court's inquiry is at an end. (Br. by Counter-Def. Federal Election Commission in Opp'n to Mot. for Summ. J. at 5-9 [filed Feb. 17, 1998].) While it is true that the Court has permitted regulation of contributions, and that coordinated expenditures have been considered, in other circumstances, to be contributions, that does not end this court's inquiry. First, the court is not bound by the Government-selected labels or

characterizations, particularly in the context of a First Amendment challenge. *Colorado I*, 518 U.S. at 627, 116 S. Ct. at 2321 (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S. Ct. 1535, 1544, 56 L.Ed.2d 1 [1978] ["Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."]). Second, the Court has permitted regulation of contributions in the past because the regulations imposed only a "marginal restriction" on the contributor's First Amendment rights. *See Colorado I*, 518 U.S. at 627, 116 S. Ct. at 2321 (citing *Buckley*, 424 U.S. at 20, 96 S. Ct. at 635.) Thus, the question before the court is whether limits on coordinated party expenditures minimally restrict parties in engaging in protected First Amendment freedoms and serve a compelling Government interest. The case cannot be resolved solely by convenient reference to established categories.

The only permissible purpose for limitations on campaign expenditures is to prevent corruption or the appearance thereof. "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." *NCPAC*, 470 U.S. at 497, 105 S. Ct. at 1468. The FEC's attempt to broaden the definition of corruption to include mere access is unsupported by precedent. In *Buckley*, the Court recognized that campaign finance reporting requirements serve the purpose of (1) identifying "[t]he sources of a candidate's financial support," and (2) deterring actual corruption and avoiding the appearance of corruption because "[a] public armed

with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Buckley*, 424 U.S. at 67, 96 S. Ct. at 658; *cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 n. 20, 115 S. Ct. 1511, 1523 n. 20, 131 L.Ed.2d 426 (1995) (recognizing that in *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L.Ed. 989 [1954], the Court upheld limited disclosure requirements for lobbyists and stating that "[t]he activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption."). *Buckley* thus recognized that money, in many cases, may grant access to a candidate. It did not, however, conclude that such access is akin to corruption or the appearance of corruption.

The FEC seeks to broaden the definition of corruption to the point that it intersects with the very framework of representative government. Corruption cannot be defined so broadly. Nor can corruption be defined to include whatever it is that political parties and candidates do which the FEC does not like. In order to carry its heavy burden, the FEC must establish that limiting party coordinated expenditures is necessary to avoid corruption or the appearance thereof.

"The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 1020, 103 L.Ed.2d 271 (1989). Political parties, and the central activities in which they engage, are a paradigm of the right to freedom of association as guaranteed by the First Amendment. *Id.*, 489 U.S. at

224, 109 S. Ct. at 1020-21. FECA specifically defines a political party as "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C.A. § 431(16). FECA makes special provisions for political parties, 2 U.S.C.A. § 441a(d), and establishes a special position for them in the statutory framework out of the recognition that "a vigorous party system [is] vital to American politics." S. Rep. 93-689 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5593. A political party is an entity which (1) allows the individual voter to associate with others who share similar political beliefs, (2) identifies people who constitute the party, and (3) "select[s] a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu*, 489 U.S. at 224, 109 S. Ct. at 1020-21 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214, 107 S. Ct. 544, 548, 93 L.Ed.2d 514 [1986] [internal citations and quotations omitted] and quoting *Ripon Soc., Inc. v. National Republican Party*, 525 F.2d 567, 601 [1975]). Political parties "can give effect to their views only by selecting and supporting candidates." *Colorado I*, 518 U.S. at 629, 116 S. Ct. at 2322 (Kennedy, J. concurring in judgment and dissenting in part). Thus, political parties must have a continuing sense of their purpose and existence to succeed. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 821, 103 S. Ct. 1564, 1586-87, 75 L.Ed.2d 547 (1983) (Rehnquist, J., dissenting) ("Political parties have, or at least hope to have, a continuing existence, representing particular philosophies. Each party has an interest in finding the best candidate to advance its philosophy in each election.").

Political parties, like PACs, "act in the political arena, . . . seek to elect candidates of their choice, . . . spend money, [and] want some policy outcome." (Colorado Party Facts ¶ 44, Ex. A [Alexander Report] at 17.) According to the Colorado Party, however, parties differ in at least one salient way from PACs. "While the various interest groups (and their PACs) usually have one specific goal or concern, political parties represent an amalgam or coalition of interests and goals; moreover, the purpose of parties is to gain control of government, rather than to pursue single goals, as PACs do." (Colorado Party Facts ¶ 44, Ex. A [Alexander Report at 17]; *see also id.* ¶ 33, Ex. A [Alexander Report at 24] [discussing the parties' need to be focused on longterm], Ex. E [Alexander Dep. at 111-12, 115] ["The party can't afford to get in a situation that is corrupt or corrupting because the party has to be held accountable, and the party is held accountable through the ballot."].) Parties help to build broad-based coalitions, both in terms of issues and in terms of geography, and parties are held accountable at the ballot box by the voters. (*See* Colorado Party Facts ¶¶ 45-48.) There is an identity cultivated by the law and borne out in fact between a political party and a candidate who represents that he or she is of that party. Political parties function, in large part, to elect persons who represent the shared political beliefs of their members. Thus, First Amendment rights—the freedom of speech and the freedom of association—are critical to attaining that goal. *See Colorado I*, 518 U.S. at 629, 116 S. Ct. at 2321 (Kennedy, J., concurring in judgment and dissenting in part).

The Colorado Party describes independent expenditures as "unnatural" because such expenditures

"create an artificial separation of the party and its candidate." The need to be independent of a candidate and his or her campaign so as not to run afoul of the requirements for independent expenditures and fall within the regulations on coordinated expenditures dampens the ability to engage in the party's normal functions and imposes additional costs and burdens to promote the party message. (Colorado Party Facts ¶¶ 31-32, Ex. A [Alexander Report at 25], Ex. B [Corrado Report at 35-37], Ex. C [Sorauf/Krasno Report at 44, 46], Ex. F [Bain Dep. at 46-47], Ex. K [Corrado Dep. at 54-56].) For example, independent expenditures do not qualify for the lowest rates on the purchase of broadcasting time, as coordinated expenditures would. (Colorado Party Facts ¶ 32, *admitted in pertinent part at* FEC's Resp. to Colorado Party Facts ¶ 32.) Because independent expenditures are perceived as often inefficient and counterproductive, it is suggested that the Colorado Party and other entities will not engage in them or will do so with extreme caution. (Colorado Party Facts ¶¶ 36-37, Ex. F [Bain Dep. at 47], Ex. M [Heubusch Dep. at 102, 106]; *see also id.* ¶ 38, Ex. A [Alexander Report at 24-25].) Coordinated expenditures, on the other hand, provide the candidate and the party the optimum opportunity to communicate their message. (Colorado Party Facts ¶¶ 40-41, 43.) Thus, unlike contributions, communications via coordinated party expenditures implicate core First Amendment rights. The message of the party and the message of the candidate are unified, and the party's dollars cannot be characterized as simply speech by proxy.

The FEC's argument is relatively simple: a powerful party hierarchy, made so because of its ability to grant or withhold funding for unlimited coordinated expen-

ditures, has the ability to exact a quid pro quo from a candidate who needs assistance from the party during his or her campaign. The FEC contends that "the record contains ample evidence . . . that large coordinated expenditures create the opportunity for [quid pro quo] arrangements." (FEC Summ. J. Br. at 24.) The FEC's claim fails. To support its argument, the FEC offers hundreds of factual allegations detailing party fund-raising practices, donor expectations of access, and party control over candidates. The facts which FEC contends support its position, however, do not establish that the limit on party coordinated expenditures is necessary to prevent corruption or the appearance thereof. The FEC must do more than show "the opportunity" for corruption. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 114 S. Ct. 2445, 2470, 129 L.Ed.2d 497 (1994) ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.") (citation and internal quotation marks omitted); *NCPAC*, 470 U.S. at 498, 105 S. Ct. at 1469.

The FEC appears to identify two types of "corruption" which are addressed by the Party Expenditure Provision. First, the FEC suggests that contributors to the party committees—individuals and PACs—are so powerful that they could force the party committee to compel a candidate to take a particular position. Second, parties themselves have agendas which they wish to pursue and will support only those candidates who agree to follow that agenda.

With respect to the former type of "corruption," the Colorado Party contends that the FEC can offer no

evidence of any quid pro quo corruption where a Member of Congress took an official action in exchange for any contribution to a political party. (Colorado Party Facts ¶ 58.) The FEC denies this assertion, offering what it claims are seven examples of such conduct. (FEC Facts ¶¶ 94, 179, 205, 250, 251, 262, 263.) The Colorado Party objects to all of these examples on various grounds. The FEC's factual assertions suffer numerous flaws. The evidentiary objections are all good ones. In addition, even if the proffered evidence were admissible, it does not support the FEC's position that limiting coordinated party expenditures serves the compelling Government interest of preventing corruption or the appearance thereof. The alleged facts either (1) involve claims of access, which, as the court has stated above, does not constitute corruption, or (2) involve soft money, which may not be used for coordinated expenditures anyway. None of the FEC's examples involve coordinated expenditures. The FEC cannot maintain the constitutionality of the coordinated expenditure provision by pointing to examples of money in the political process which are unrelated to party coordinated expenditures.[24]

Moreover, because of the limits on hard-money contributions, which are the only funds permissibly used for coordinated party expenditures, I regard contributor-to-party-to-candidate pressure as an unlikely

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[24] Moreover, if the skirting of contribution limits is the issue with which the FEC is concerned (*see* FEC Summ. J. Br. at 28-32), there are more tailored means of addressing such a concern than limiting the coordinated expenditure limits. *See Colorado I*, 518 U.S. at 616-17, 116 S. Ct. at 2316.

avenue of corruption, based on the facts in the record.[25] The FEC attempts to cloud the evidentiary picture before the court by including evidence of soft-money contributions. While soft money may be received in unlimited amounts and from a multitude of sources, there is no suggestion in the evidence that such money is also used for coordinated expenditures. To the extent that the FEC suggests that the court should consider the cumulative impact of hard and soft money contributions from one entity, I reject the suggestion. This case is not about the entirety of the campaign finance system.

Further, that candidates are made aware of who contributes to their campaigns and to the parties, despite the FEC's attempt to cast a sinister pall over such activity, is not, by itself, evidence of corruption or the appearance of corruption. The FECA reporting requirements which indicate the sources and amounts of contributions are designed to insure that campaign finance can be scrutinized. *Buckley*, 424 U.S. at 60-83, 96 S. Ct. at 654-66. Nothing in the record suggests that this type of fund raising and reporting begets corruption or the appearance of corruption.

With respect to the other type of "corruption" identified by the FEC—party pressure over candidates—despite the FEC's attempts to cast it otherwise, it is

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[25] If Congress is concerned about how much hard money parties may receive, it may curtail such limits and do so directly and constitutionally. *Cf. Colorado I*, 518 U.S. at 617, 116 S. Ct. at 2316 (recognizing, in considering limits on independent party expenditures, that Congress could directly regulate contribution limits rather than indirectly prevent their circumvention by limiting independent expenditures).

not corruption. As *Buckley* reiterated again and again, the concern with corruption is related to "large individual financial contributions." *Buckley*, 424 U.S. at 26, 27, 96 S. Ct. at 638-39. Party-coordinated expenditures are not large individual contributions. As required by law and demonstrated by the evidence, the hard-money contributions are not from one or a few individuals. They come from many small contributors. Even the largest contributors are statutorily limited in the amounts they may give. I cannot conclude that party contributions are akin to large individual contributions. The relationship between a party and a Member of Congress who represents that party is wholly different from the relationship between a private individual or corporation and a Member of Congress. Parties exist because of their success in electing representatives of their philosophy to legislative bodies.

The FEC contends that parties exert influence over candidates.[26] (FEC Facts ¶¶ 211-41.) The FEC's facts do suggest that the parties and their committees are involved with the candidates and their policy positions. That, however, is the nature of the party-candidate relationship and, again, highlights the paramount First Amendment concerns with respect to limiting coordinated speech.

As discussed above, a political party functions to promote political ideas and policy objectives over time and through elected officials. Given the purpose of political parties in our electoral system, a political

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[26] The FEC, in the factual allegations regarding this subject, combines factual assertions with argument and engages in speculation as to what could occur. Although this appears throughout the FEC's asserted facts, it is particularly acute in this section.

party's decision to support a candidate who adheres to the parties' beliefs is not corruption. Conversely, a party's refusal to provide a candidate with electoral funds because the candidate's views are at odds with party positions is not an attempt to exert improper influence. A candidate who does not wish to toe the party line is not excluded from participation in the political process or even in the party process. The FEC offers factual allegations which suggest that one party or the other withheld, or attempted to withhold, campaign funds from a candidate who expressed viewpoints or campaign tactics contrary to those thought preferable by the party. (*See*, *e.g.*, FEC Facts ¶ 224.) The court regards those as instances of the party and the candidate exercising their First Amendment rights. A party that refuses to fund a candidate who engages in what the party deems as undesirable campaign tactics is not reflecting corruption or the appearance of corruption. Indeed, the evidence offered by the parties suggests that the parties direct their coordinated expenditure dollars to candidates who are most in need, that is, candidates for whom the money could be the difference between winning or losing.

Unable to produce admissible evidence which convinces the court that party expenditures must be limited to prevent corruption, the FEC relies on the "appearance of corruption" to discharge its burden. Specifically, the FEC attempts to rely on the apparent public perception (or, perhaps, misperception) regarding the role of money in politics to establish that unlimited coordinated party expenditures cause the "appearance of corruption." (FEC Facts ¶¶ 292-302.) But, as the evidence reveals, (*see* Colorado Party Facts ¶¶ 49-53), the public is unaware of the nuances of

campaign financing, particularly the role of hard money in coordinated campaign expenditures. If the FEC's position is correct and the public cannot distinguish hard money from soft money and the role that each plays in the system, the proper course of action is not to limit speech by permitting unnecessary and unconstitutional limitations on parties' and candidate's freedoms of speech and association but, rather, to engage in more speech to educate the public. *See Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97, 97 S. Ct. 1614, 1620, 52 L.Ed.2d 155 (1977) (citing *Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 649, 71 L.Ed. 1095 [1927] [Brandeis, J. concurring]). The FEC cannot rely on general public dissatisfaction with parties and politicians and the amount of money in the political process, particularly money which cannot even be used for the expenditures at issue in this case, to support its claim that the party coordinated expenditure limit serves a compelling purpose and is narrowly tailored to accomplish that purpose.

In short, the FEC has failed to offer evidence which demonstrates the compelling need for limits on political party coordinated expenditures. Only by attempting to divert the focus of the case from hard money to soft money and by seeking to broaden the definition of corruption beyond recognizable bounds does the FEC even approach the requisite showing. As Justice Kennedy said in *Colorado I*:

> The problem is not just the absence of a basis in our First Amendment cases for treating the party's spending as contributions. The greater difficulty posed by the statute is its stifling effect on the ability of the party to do what it exists to do. It is

fanciful to suppose that limiting party spending of the type at issue here "does not in any way infringe the contributor's freedom to discuss candidates and issues," [*Buckley*, 424 U.S. at 21, 96 S. Ct. at 635], since it would be impractical and imprudent, to say the least, for a party to support its own candidates without some form of "cooperation" or "consultation." The party's speech, legitimate on its own behalf, cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals. The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the restrictions imposed here. *See* [*NCPAC*, 470 U.S. at 494- 495, 105 S. Ct. at 1467-68.]

We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of interests between the two entities during an election. Party spending "in cooperation, consultation, or concert with" a candidate therefore is indistinguishable in substance from expenditures by the candidate or his campaign committee. We held in *Buckley* that the First Amendment does not permit regulation of the latter, *see* 424 U.S. at 54-59, 96 S. Ct. at 651-54, and it should not permit this regulation of the former. Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in *Buckley*, but that type of regulation is not at issue here.

Colorado I, 518 U.S. at 630, 116 S. Ct. 2309, at 2322-23, 135 L.Ed.2d 795 (Kennedy, J. concurring in judgment and dissenting in part). Because the FEC has failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof, I conclude that summary judgment is warranted. Accordingly, the FEC's motion for summary judgment is denied, and the Colorado Party's motion for summary judgment is granted with respect to its constitutional challenge to the Party Expenditure Provision. I therefore do not address the parties' arguments regarding vagueness.

4. Conclusion

Upon the foregoing findings and conclusions, it is therefore

ORDERED as follows:

1. The FEC's motion for summary judgment and to dismiss the amended counterclaim with prejudice is DENIED.

2. The Colorado Party's motion for summary judgment is GRANTED.

3. The parties' joint motion to correct the transcript is GRANTED.

4. The clerk shall forthwith enter judgment declaring that the Party Expenditure Provision, 2 U.S.C.A. § 441a(d) (West 1997), is unconstitutional and cannot be enforced against defendant.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 95-489

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE ET AL., PETITIONERS,

v.

FEDERAL ELECTION COMMISSION

[Argued: April 15, 1996
Decided: June 26, 1996]

Justice BREYER announced the judgment of the Court and delivered an opinion, in which Justice O'CONNOR and Justice SOUTER join.

In April 1986, before the Colorado Republican Party had selected its senatorial candidate for the fall's election, that Party's Federal Campaign Committee bought radio advertisements attacking Timothy Wirth, the Democratic Party's likely candidate. The Federal Election Commission (FEC) charged that this "expenditure" exceeded the dollar limits that a provision of the Federal Election Campaign Act of 1971 (FECA or Act) imposes upon political party "expenditure[s] in connection with" a "general election campaign" for congressional office. 90 Stat. 486, as amended, 2 U.S.C. § 441a(d)(3). This case focuses upon the constitutional-

ity of those limits as applied to this case. We conclude that the First Amendment prohibits the application of this provision to the kind of expenditure at issue here—an expenditure that the political party has made independently, without coordination with any candidate.

I

To understand the issues and our holding, one must begin with FECA as it emerged from Congress in 1974. That Act sought both to remedy the appearance of a "corrupt" political process (one in which large contributions seem to buy legislative votes) and to level the electoral playing field by reducing campaign costs. See *Buckley v. Valeo*, 424 U.S. 1, 25-27 (1976) (*per curiam*). It consequently imposed limits upon the amounts that individuals, corporations, "political committees" (such as political action committees, or PAC's), and political parties could *contribute* to candidates for federal office, and it also imposed limits upon the amounts that candidates, corporations, labor unions, political committees, and political parties could *spend*, even on their own, to help a candidate win election. See 18 U.S.C. §§ 608, 610 (1970 ed., Supp. IV).

This Court subsequently examined several of the Act's provisions in light of the First Amendment's free speech and association protections. See *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985) (*NCPAC*); *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182 (1981); *Buckley*, *supra*. In these cases, the Court essentially

weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a "compelling" governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption. See *Massachusetts Citizens for Life*, *supra*, at 256-263; *NCPAC*, *supra*, at 493-501; *California Medical Assn.*, *supra*, at 193-199; *Buckley*, 424 U.S., at 14-23. After doing so, the Court found that the First Amendment prohibited some of FECA's provisions, but permitted others.

Most of the provisions this Court found unconstitutional imposed *expenditure* limits. Those provisions limited candidates' rights to spend their own money, *id.*, at 51-54, limited a candidate's campaign expenditures, *id.*, at 54-58, limited the right of individuals to make "independent" expenditures (not coordinated with the candidate or candidate's campaign), *id.*, at 39-51, and similarly limited the right of political committees to make "independent" expenditures, *NCPAC*, *supra*, at 497. The provisions that the Court found constitutional mostly imposed *contribution* limits—limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate, § 441a(a)(7)(B)(i). See *Buckley*, *supra*, at 23-36. See also 424 U.S., at 46-48; *California Medical Assn.*, *supra*, at 193-199 (limits on contributions to political committees). Consequently, for present purposes, the Act now prohibits individuals and political committees from making direct, or indirect, contributions that exceed the following limits:

(a) For any "person": $1,000 to a candidate "with respect to any election"; $5,000 to any political committee in any year; $20,000 to the national committees of a political party in any year; but all within an overall limit (for any individual in any year) of $25,000. 2 U.S.C. §§ 441a(a)(1), (3).

(b) For any "multicandidate political committee": $5,000 to a candidate "with respect to any election"; $5,000 to any political committee in any year; and $15,000 to the national committees of a political party in any year. § 441a(a)(2).

FECA also has a special provision, directly at issue in this case, that governs contributions and expenditures by political parties. § 441a(d). This special provision creates, in part, an *exception* to the above contribution limits. That is, without special treatment, political parties ordinarily would be subject to the general limitation on contributions by a "multicandidate political committee" just described. See § 441a(a)(4). That provision, as we said in subsection (b) above, limits annual contributions by a "multicandidate political committee" to no more than $5,000 to any candidate. And as also mentioned above, this contribution limit governs not only direct contributions but also indirect contributions that take the form of coordinated expenditures, defined as "expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." § 441a(a)(7)(B)(i). Thus, ordinarily, a party's coordinated expenditures would be subject to the $5,000 limitation.

However, FECA's special provision, which we shall call the "Party Expenditure Provision," creates a

general exception from this contribution limitation, and from any other limitation on expenditures. It says:

> "Notwithstanding any other provision of law with respect to *limitations on expenditures or limitations on contributions*, . . . political party [committees] . . . may make *expenditures* in connection with the general election campaign of candidates for Federal office . . . ." § 441a(d)(1) (emphasis added).

After exempting political parties from the general contribution and expenditure limitations of the statute, the Party Expenditure Provision then imposes a *substitute limitation* upon party "expenditures" in a senatorial campaign equal to the greater of $20,000 or "2 cents multiplied by the voting age population of the State," § 441a(d)(3)(A)(i), adjusted for inflation since 1974, § 441a(c). The provision permitted a political party in Colorado in 1986 to spend about $103,000 in connection with the general election campaign of a candidate for the United States Senate. See FEC Record, vol. 12, no. 4, p. 1 (Apr.1986). (A different provision, not at issue in this case, § 441a(d)(2), limits party expenditures in connection with Presidential campaigns. Since this case involves only the provision concerning congressional races, we do not address issues that might grow out of the public funding of Presidential campaigns.)

In January 1986, Timothy Wirth, then a Democratic Congressman, announced that he would run for an open Senate seat in November. In April, before either the Democratic primary or the Republican convention, the Colorado Republican Federal Campaign Committee (Colorado Party or Party), a petitioner here, bought

radio advertisements attacking Congressman Wirth. The State Democratic Party complained to the FEC. It pointed out that the Colorado Party had previously assigned its $103,000 general election allotment to the National Republican Senatorial Committee, leaving it without any permissible spending balance. See *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) (state party may appoint national senatorial campaign committee as agent to spend its Party Expenditure Provision allotment). It argued that the purchase of radio time was an "expenditure in connection with the general election campaign of a candidate for Federal office," § 441a(d)(3), which, consequently, exceeded the Party Expenditure Provision limits.

The FEC agreed with the Democratic Party. It brought a complaint against the Colorado Party, charging a violation. The Colorado Party defended in part by claiming that the Party Expenditure Provision's expenditure limitations violated the First Amendment—a charge that it repeated in a counterclaim that said the Colorado Party intended to make other "expenditures directly in connection with" senatorial elections, App. 68, ¶ 48, and attacked the constitutionality of the entire Party Expenditure Provision. The Federal District Court interpreted the provision's words " 'in connection with' the general election campaign of a candidate" narrowly, as meaning only expenditures for advertising using "'express words of advocacy of election or defeat.'" 839 F. Supp. 1448, 1455 (D. Colo. 1993) (quoting *Buckley*, 424 U.S., at 46, n. 52). See also *Massachusetts Citizens for Life*, 479 U.S., at 249. As so interpreted, the court held, the provision did not cover the expenditures here. The

court entered summary judgment for the Colorado Party and dismissed its counterclaim as moot.

Both sides appealed. The Government, for the FEC, argued for a somewhat broader interpretation of the statute—applying the limits to advertisements containing an "electioneering message" about a "clearly identified candidate," FEC Advisory Op.1985-14, 2 CCH Fed. Election Camp. Fin. Guide ¶ 5819, p. 11,185 (May 30, 1985) which, it said, both covered the expenditure and satisfied the Constitution. The Court of Appeals agreed. It found the Party Expenditure Provision applicable, held it constitutional, and ordered judgment in the FEC's favor. 59 F.3d 1015, 1023-1024 (CA 10 1995).

We granted certiorari primarily to consider the Colorado Party's argument that the Party Expenditure Provision violates the First Amendment "either facially or as applied." Pet. for Cert. i. For reasons we shall discuss in Part IV, *infra*, we consider only the latter question—whether the Party Expenditure Provision as applied here violates the First Amendment. We conclude that it does.

II

The summary judgment record indicates that the expenditure in question is what this Court in *Buckley* called an "independent" expenditure, not a "coordinated" expenditure that other provisions of FECA treat as a kind of campaign "contribution." See *Buckley, supra*, at 36-37, 46-47, 78; *NCPAC*, 470 U.S., at 498. The record describes how the expenditure was

made. In a deposition, the Colorado Party's Chairman, Howard Callaway, pointed out that, at the time of the expenditure, the Party had not yet selected a senatorial nominee from among the three individuals vying for the nomination. App. 195-196. He added that he arranged for the development of the script at his own initiative, *id.*, at 200, that he, and no one else, approved it, *id.*, at 199, that the only other politically relevant individuals who might have read it were the Party's executive director and political director, *ibid.*, and that all relevant discussions took place at meetings attended only by Party staff, *id.*, at 204.

Notwithstanding the above testimony, the Government argued in District Court—and reiterates in passing in its brief to this Court, Brief for Respondent 27, n. 20—that the deposition showed that the Party had coordinated the advertisement with its candidates. It pointed to Callaway's statement that it was the practice of the Party to "coordinat[e] with the candidate" "campaign strategy," App. 195, and for Callaway to be "as involved as [he] could be" with the individuals seeking the Republican nomination, *ibid.*, by making available to them "all of the assets of the party," *id.*, at 195-196. These latter statements, however, are general descriptions of Party practice. They do not refer to the advertising campaign at issue here or to its preparation. Nor do they conflict with, or cast significant doubt upon, the uncontroverted direct evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate. We can find no "genuine" issue of fact in this respect. Fed. Rule Civ. Proc. 56(e); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986).

And we therefore treat the expenditure, for constitutional purposes, as an "independent" expenditure, not an indirect campaign contribution.

So treated, the expenditure falls within the scope of the Court's precedents that extend First Amendment protection to independent expenditures. Beginning with *Buckley*, the Court's cases have found a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *NCPAC*, *supra*, at 497. This difference has been grounded in the observation that restrictions on contributions impose "only a marginal restriction upon the contributor's ability to engage in free communication," *Buckley*, *supra*, at 20-21, because the symbolic communicative value of a contribution bears little relation to its size, 424 U.S., at 21, and because such limits leave "persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources," *id.*, at 28. At the same time, reasonable contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors. *Id.*, at 26-27.

In contrast, the Court has said that restrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and "represent substantial . . . restraints on the quantity and diversity of political speech." *Id.*, at 19. And at the same time, the Court

has concluded that limitations on independent expenditures are less directly related to preventing corruption, since "[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.*, at 47.

Given these established principles, we do not see how a provision that limits a political party's independent expenditures can escape their controlling effect. A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is "core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees. See, *e.g.*, *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989).

We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction. When this Court considered, and held unconstitutional, limits that FECA had set on certain independent expenditures by PAC's, it reiterated *Buckley*'s observation that "the absence of prearrangement and coordination" does not eliminate, but it does help to "alleviate," any "danger" that a candidate will understand the ex-

penditure as an effort to obtain a "*quid pro quo*." See *NCPAC*, 470 U.S., at 498. The same is true of independent party expenditures.

We recognize that FECA permits individuals to contribute more money ($20,000) to a party than to a candidate ($1,000) or to other political committees ($5,000). 2 U.S.C. § 441a(a). We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities, such as electing candidates for state office, see § 431(8)(A)(i), or for voter registration and "get out the vote" drives, see § 431(8)(B)(xii). But the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated. Unregulated "soft money" contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute. See § 431(8)(B). Any contribution to a party that is earmarked for a particular campaign is considered a contribution to the candidate and is subject to the contribution limitations. § 441a(a)(8). A party may not simply channel unlimited amounts of even undesignated contributions to a candidate, since such direct transfers are also considered contributions and are subject to the contribution limits on a "multicandidate political committee." § 441a(a)(2). The greatest danger of corruption, therefore, appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate. We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties. Cf. *California*

Medical Assn., 453 U.S., at 197-199 (plurality opinion) (danger of evasion of limits on contribution to candidates justified prophylactic limitation on *contributions* to PAC's). But we do not believe that the risk of corruption present here could justify the "markedly greater burden on basic freedoms caused by" the statute's limitations on *expenditures*. *Buckley*, 424 U.S., at 44. See also *id.*, at 46-47, 51; *NCPAC*, *supra*, at 498. Contributors seeking to avoid the effect of the $1,000 contribution limit indirectly by donations to the national party could spend that same amount of money (or more) themselves more directly by making their own independent expenditures promoting the candidate. See *Buckley*, *supra*, at 44-48 (risk of corruption by individuals' independent expenditures is insufficient to justify limits on such spending). If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor. In any case, the constitutionally significant fact, present equally in both instances, is the lack of coordination between the candidate and the source of the expenditure. See *Buckley*, *supra*, at 45-46; *NCPAC*, *supra*, at 498. This fact prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.

The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S.

622, 664 (1994) ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured" (citation and internal quotation marks omitted)); *NCPAC*, *supra*, at 498. To the contrary, this Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending. See *Buckley*, *supra*, at 57. In fact, rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections. See *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S., at 41 (Party Expenditure Provision was intended to "assur[e] that political parties will continue to have an important role in federal elections"); S. Rep. No. 93-689, p. 7 (1974) ("[A] vigorous party system is vital to American politics. . . . [P]ooling resources from many small contributors is a legitimate function and an integral part of party politics"); *id.*, at 7-8, 15.

We therefore believe that this Court's prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties. Having concluded this, we need not consider the Party's further claim that the statute's "in connection with" language, and the FEC's

interpretation of that language, are unconstitutionally vague. *Cf. Buckley*, *supra*, at 40- 44.

III

The Government does not deny the force of the precedent we have discussed. Rather, it argued below, and the lower courts accepted, that the expenditure in this case should be treated under those precedents, not as an "independent expenditure," but rather as a "coordinated expenditure," which those cases have treated as "contributions," and which those cases have held Congress may constitutionally regulate. See, *e.g.*, *Buckley*, *supra*, at 23-38.

While the District Court found that the expenditure in this case was "coordinated," 839 F. Supp., at 1453, it did not do so based on any factual finding that the Party had consulted with any candidate in the making or planning of the advertising campaign in question. Instead, the District Court accepted the Government's argument that all party expenditures should be treated as if they had been coordinated *as a matter of law*, "[b]ased on Supreme Court precedent and the Commission's interpretation of the statute," *ibid.* The Court of Appeals agreed with this legal conclusion. 59 F.3d, at 1024. Thus, the lower courts' "finding" of coordination does not conflict with our conclusion, *supra*, at 613-614, that the summary judgment record shows no actual coordination as a matter of fact. The question, instead, is whether the Court of Appeals erred as a legal matter in accepting the Government's conclusive presumption that all party expenditures are "coordinated." We believe it did.

In support of its argument, the Government points to a set of legal materials, based on FEC interpretations, that seem to say or imply that *all* party expenditures are "coordinated." These include: (1) an FEC regulation that forbids political parties to make any "independent expenditures . . . in connection with" a "general election campaign," 11 CFR § 110.7(b)(4) (1995); (2) FEC Advisory Opinions that use the word "coordinated" to describe the Party Expenditure Provisions' limitations, see, *e.g.*, FEC Advisory Op.1984-15, 1 CCH Fed. Election Camp. Fin. Guide ¶ 5766, p. 11,069 (May 31, 1984) (AO 1984-15); FEC Advisory Op.1988-22, 2 CCH Fed. Election Camp. Fin. Guide ¶ 5932, p. 11,471, n.4 (July 5, 1988) (AO 1988-22); (3) one FEC Advisory Opinion that says explicitly in a footnote that "coordination with candidates is presumed and 'independence' precluded," *ibid.*; and (4) a statement by this Court that "[p]arty committees are considered incapable of making 'independent' expenditures," *Democratic Senatorial Campaign Comm.*, *supra*, at 28-29, n.1.

The Government argues, on the basis of these materials, that the FEC has made an "empirical judgment that party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election." Brief for Respondent 27. The FEC materials, however, do not make this empirical judgment. For the most part those materials use the word "coordinated" as a description that does not necessarily deny the possibility that a party could *also* make independent expenditures. See, *e.g.*, AO 1984-15, ¶ 5766, at 11,069. We concede that one Advisory Opinion says, in a footnote, that "coordination with candidates is pre-

sumed." AO 1988-22, ¶ 5932, at 11,471, n.4. But this statement, like the others, appears without any internal or external evidence that the FEC means it to embody an *empirical* judgment (say, that parties, in fact, hardly ever spend money independently) or to represent the outcome of an empirical investigation. Indeed, the statute does not require any such investigation, for it applies *both* to coordinated and to independent expenditures alike. See § 441a(d)(3) (a "political party . . . may not make *any* expenditure" in excess of the limits (emphasis added)). In any event, language in other FEC Advisory Opinions suggests the opposite, namely, that sometimes, in fact, parties do make independent expenditures. See, *e.g.*, AO 1984-15, ¶ 5766, at 11,069 ("Although consultation or coordination with the candidate is permissible, it is not required"). In these circumstances, we cannot take the cited materials as an empirical, or experience-based, determination that, as a factual matter, all party expenditures are coordinated with a candidate. That being so, we need not hold, on the basis of these materials, that the expenditures here were "coordinated."

The Government does not advance any other legal reason that would require us to accept the FEC's characterization. The FEC has not claimed, for example, that, administratively speaking, it is more difficult to separate a political party's "independent," from its "coordinated," expenditures than, say, those of a PAC. Cf. 11 CFR § 109.1 (1995) (distinguishing between independent and coordinated expenditures by other political groups). Nor can the FEC draw significant legal support from the footnote in *Democratic Senatorial Campaign Comm.*, 454 U.S., at 28-29, n. 1, given that this statement was dicta that purported to describe the

regulatory regime as the FEC had described it in a brief.

Nor does the fact that the Party Expenditure Provision fails to distinguish between coordinated and independent expenditures indicate a congressional judgment that such a distinction is impossible or untenable in the context of political party spending. Instead, the use of the unmodified term "expenditure" is explained by Congress' desire to limit *all* party expenditures when it passed the 1974 amendments, just as it had limited all expenditures by individuals, corporations, and other political groups. See 18 U.S.C. §§ 608(e), 610 (1970 ed., Supp. IV); *Buckley*, 424 U.S., at 39.

Finally, we recognize that the FEC may have characterized the expenditures as "coordinated" in light of this Court's constitutional decisions prohibiting regulation of most independent expenditures. But, if so, the characterization cannot help the Government prove its case. An agency's simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one. See, *e.g.*, *NAACP v. Button*, 371 U.S. 415, 429 (1963) (the government "cannot foreclose the exercise of constitutional rights by mere labels"); *Edwards v. South Carolina*, 372 U.S. 229, 235-238 (1963) (State may not avoid First Amendment's strictures by applying the label "breach of the peace" to peaceful demonstrations).

The Government also argues that the Colorado Party has conceded that the expenditures are "coordinated." But there is no such concession in respect to the underlying facts. To the contrary, the Party's "Ques-

tions Presented" in its petition for certiorari describes the expenditure as one "the party has not coordinated with its candidate." See Pet. for Cert. i. In the lower courts the Party did accept the FEC's terminology, but it did so in the context of legal arguments that did not focus upon the constitutional distinction that we now consider. See Reply Brief for Petitioners 9-10, n.8 (denying that the FEC's labels can control constitutional analysis). The Government has not referred us to any place where the Party conceded away or abandoned its legal claim that Congress may not limit the uncoordinated expenditure at issue here. And, in any event, we are not bound to decide a matter of constitutional law based on a concession by the particular party before the Court as to the proper legal characterization of the facts. Cf. *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 447 (1993); *Massachusetts v. United States*, 333 U.S. 611, 623-628 (1948); *Young v. United States*, 315 U.S. 257, 259 (1942) (recognizing that "our judgments are precedents" and that the proper understanding of matters of law "cannot be left merely to the stipulation of parties").

Finally, the Government and supporting *amici* argue that the expenditure is "coordinated" because a party and its candidate are identical, *i.e.*, the party, in a sense, "is" its candidates. We cannot assume, however, that this is so. See, *e.g.*, W. Keefe, Parties, Politics, and Public Policy in America 59-74 (5th ed. 1988) (describing parties as "coalitions" of differing interests). Congress chose to treat candidates and their parties quite differently under the Act, for example, by regulating contributions from one to the other. See § 441a(a)(2)(B). See also 11 CFR §§ 110.2, 110.3(b)

(1995). And we are not certain whether a metaphysical identity would help the Government, for in that case one might argue that the absolute identity of views and interests eliminates any potential for corruption, as would seem to be the case in the relationship between candidates and their campaign committees. Cf. *Buckley*, *supra*, at 54-59 (Congress may not limit expenditures by candidate/campaign committee); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (where there is no risk of "corruption" of a candidate, the Government may not limit even contributions).

IV

The Colorado Party and supporting *amici* have argued a broader question than we have decided, for they have claimed that, in the special case of political parties, the First Amendment forbids congressional efforts to limit coordinated expenditures as well as independent expenditures. Because the expenditure before us is an independent expenditure we have not reached this broader question in deciding the Party's "as applied" challenge.

We recognize that the Party filed a counterclaim in which it sought to raise a facial challenge to the Party Expenditure Provision as a whole. But that counterclaim did not focus specifically upon coordinated expenditures. See App. 68-69. Nor did its summary judgment affidavits specifically allege that the Party intended to make coordinated expenditures exceeding the statute's limits. See *id.*, at 159, ¶ 4. While this lack of focus does not deprive this Court of jurisdiction to consider a facial challenge to the Party Expenditure Provision as overbroad or as unconstitutional in all

applications, it does provide a prudential reason for this Court not to decide the broader question, especially since it may not be necessary to resolve the entire current dispute. If, in fact, the Party wants to make only independent expenditures like those before us, its counterclaim is mooted by our resolution of its "as applied" challenge. Cf. *Renne v. Geary*, 501 U.S. 312, 323-324 (1991) (facial challenge should generally not be entertained when an "as-applied" challenge could resolve the case); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-504 (1985).

More importantly, the opinions of the lower courts, and the parties' briefs in this case, did not squarely isolate, and address, party expenditures that *in fact* are coordinated, nor did they examine, in that context, relevant similarities or differences with similar expenditures made by individuals or other political groups. Indeed, to our knowledge, this is the first case in the 20-year history of the Party Expenditure Provision to suggest that in-fact coordinated expenditures by political parties are protected from congressional regulation by the First Amendment, even though this Court's prior cases have permitted regulation of similarly coordinated expenditures by individuals and other political groups. See *Buckley*, 424 U.S., at 46-47. This issue is complex. As Justice KENNEDY points out, *post*, at 629-630, party coordinated expenditures do share some of the constitutionally relevant features of independent expenditures. But many such expenditures are also virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills, see *Buckley*, *supra*, at 46). Moreover, political parties also share relevant features

with many PAC's, both having an interest in, and devoting resources to, the goal of electing candidates who will "work to further" a particular "political agenda," which activity would benefit from coordination with those candidates. *Post*, at 630. See, *e.g.*, *NCPAC*, 470 U.S., at 490 (describing the purpose and activities of the National Conservative PAC); *id.*, at 492 (coordinated expenditures by PAC's are subject to FECA contribution limitations). Thus, a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits.

But the focus of this litigation, and of the lower court opinions, has not been on such issues, but rather on whether the Government may conclusively deem independent party expenditures to be coordinated. This lack of focus may reflect, in part, the litigation strategy of the parties. The Government has denied that any distinction can be made between a party's independent and its coordinated expenditures. The Colorado Party, for its part, did not challenge a different provision of the statute—a provision that imposes a $5,000 limit on any contribution by a "multicandidate political committee" (including a coordinated expenditure) and which would apply to party coordinated expenditures if the entire Party Expenditure Provision were struck from the statute as unconstitutional. See §§ 441a(a)(2), (4), (7)(B)(i). Rather than challenging the constitutionality of this provision as well, thereby making clear that it was challenging Congress' authority to regulate in-fact coordinated party expenditures, the Party has made an obscure severability argument that would leave party coordinated expenditures exempt from that provision. See Reply Brief for Petitioners 11,

n. 9. While these strategies do not deprive the parties of a right to adjudicate the counterclaim, they do provide a reason for this Court to defer consideration of the broader issues until the lower courts have reconsidered the question in light of our current opinion.

Finally, we note that neither the parties nor the lower courts have considered whether or not Congress would have wanted the Party Expenditure Provision's limitations to stand were they to apply only to coordinated, and not to independent, expenditures. See *Buckley*, *supra*, at 108; *NCPAC*, *supra*, at 498. This nonconstitutional ground for exempting party coordinated expenditures from FECA limitations should be briefed and considered before addressing the constitutionality of such regulation. See *United States v. Locke*, 471 U.S. 84, 92, and n. 9 (1985).

JUSTICE THOMAS disagrees and would reach the broader constitutional question notwithstanding the above prudential considerations. In fact, he would reach a great number of issues neither addressed below, nor presented by the facts of this case, nor raised by the parties, for he believes it appropriate here to overrule *sua sponte* this Court's entire campaign finance jurisprudence, developed in numerous cases over the last 20 years. See *post*, at 635-644. Doing so seems inconsistent with this Court's view that it is ordinarily "inappropriate for us to reexamine" prior precedent "without the benefit of the parties' briefing," since the "principles that animate our policy of *stare decisis* caution against overruling a longstanding precedent on a theory not argued by the parties." *United States v. International Business Machines Corp.*, 517 U.S. 843, 855, 856 (1996). In our view, given the

important competing interests involved in campaign finance issues, we should proceed cautiously, consistent with this precedent, and remand for further proceedings.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, concurring in the judgment and dissenting in part.

In agreement with JUSTICE THOMAS, *post*, at 631-634, I would hold that the Colorado Republican Party (Party), in its pleadings in the District Court and throughout this litigation, has preserved its claim that the constraints imposed by the Federal Election Campaign Act of 1971 (FECA), both on its face and as interpreted by the Federal Elections Commission (FEC), violate the First Amendment.

In the principal opinion's view, the FEC's conclusive presumption that all political party spending relating to identified candidates is "coordinated" cannot be squared with the First Amendment. *Ante*, at 619-623. The principal opinion finds the presumption invalid, and I agree with much of the reasoning behind that conclusion. The quarrel over the FEC's presumption is beside the point, however, for under the statute it is both burdensome and quite unrealistic for a political party to attempt the expenditure of funds on a candi-

date's behalf (or against other candidates) without running afoul of FECA's spending limitations.

Indeed, the principal opinion's reasoning with respect to the presumption illuminates the deficiencies in the statutory provision as a whole as it constrains the speech and political activities of political parties. The presumption is a logical, though invalid, implementation of the statute, which restricts as a "contribution" a political party's spending "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i). While the statutory provision applies to any "person," its obvious purpose and effect when applied to political parties, as the FEC's presumption reflects, is to restrict any party's spending in a specific campaign for or against a candidate and so to burden a party in expending its own money for its own speech.

The central holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), is that spending money on one's own speech must be permitted, *id.*, at 44-58, and this is what political parties do when they make the expenditures FECA restricts. FECA calls spending of this nature a "contribution," § 441a(a)(7)(B)(i), and it is true that contributions can be restricted consistent with *Buckley*, *supra*, at 23-38. As the principal opinion acknowledges, however, and as our cases hold, we cannot allow the Government's suggested labels to control our First Amendment analysis. *Ante*, at 621-622. See also, *e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). In *Buckley*, we concluded

that contribution limitations imposed only "marginal restriction[s]" on the contributor's First Amendment rights, 424 U.S., at 20, because certain attributes of contributions make them less like "speech" for First Amendment purposes:

> "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*, at 21 (footnote omitted).

We had no occasion in *Buckley* to consider possible First Amendment objections to limitations on spending by parties. *Id.*, at 58, n.66. While our cases uphold contribution limitations on individuals and associations, see *id.*, at 23-38; *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182, 193-199 (1981) (plurality opinion), political party spending "in cooperation,

consultation, or concert with" a candidate does not fit within our description of "contributions" in *Buckley*. In my view, we should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving FECA's restrictions on political party spending.

The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs. See, *e.g.*, *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Cf. *Morse v. Republican Party of Va.*, 517 U.S. 186, 250-251 (1996) (KENNEDY, J., dissenting). A party performs this function, in part, by "identify[ing] the people who constitute the association, and . . . limit[ing] the association to those people only." *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). Having identified its members, however, a party can give effect to their views only by selecting and supporting candidates. A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa.

It makes no sense, therefore, to ask, as FECA does, whether a party's spending is made "in cooperation, consultation, or concert with" its candidate. The answer in most cases will be yes, but that provides

more, not less, justification for holding unconstitutional the statute's attempt to control this type of party spending, which bears little resemblance to the contributions discussed in *Buckley*. *Supra*, at 627-628 and this page. Party spending "in cooperation, consultation, or concert with" its candidates of necessity "communicate[s] the underlying basis for the support," 424 U.S., at 21, *i.e.*, the hope that he or she will be elected and will work to further the party's political agenda.

The problem is not just the absence of a basis in our First Amendment cases for treating the party's spending as contributions. The greater difficulty posed by the statute is its stifling effect on the ability of the party to do what it exists to do. It is fanciful to suppose that limiting party spending of the type at issue here "does not in any way infringe the contributor's freedom to discuss candidates and issues," *ibid.*, since it would be impractical and imprudent, to say the least, for a party to support its own candidates without some form of "cooperation" or "consultation." The party's speech, legitimate on its own behalf, cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals. The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the restrictions imposed here. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 494-495 (1985).

We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of

interests between the two entities during an election. Party spending "in cooperation, consultation, or concert with" a candidate therefore is indistinguishable in substance from expenditures by the candidate or his campaign committee. We held in *Buckley* that the First Amendment does not permit regulation of the latter, see 424 U.S., at 54-59, and it should not permit this regulation of the former. Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in *Buckley*, but that type of regulation is not at issue here.

I would resolve the Party's First Amendment claim in accord with these principles rather than remit the Party to further protracted proceedings. Because the principal opinion would do otherwise, I concur only in the judgment.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join as to Parts I and III, concurring in the judgment and dissenting in part.

I agree that petitioners' rights under the First Amendment have been violated, but I think we should reach the facial challenge in this case in order to make clear the circumstances under which political parties may engage in political speech without running afoul of 2 U.S.C. § 441a(d)(3). In resolving that challenge, I would reject the framework established by *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), for analyzing the constitutionality of campaign finance laws and hold that § 441a(d)(3)'s limits on independent and coordinated expenditures fail strict scrutiny. But even under *Buckley*, § 441a(d)(3) cannot stand, because the anti-

corruption rationale that we have relied upon in sustaining other campaign finance laws is inapplicable where political parties are the subject of such regulation.

I

As an initial matter, I write to make clear that we should decide the Colorado Republican Party's (Party's) facial challenge to § 441a(d)(3) and thus address the constitutionality of limits on coordinated expenditures by political parties. JUSTICE BREYER's reasons for not reaching the facial constitutionality of the statute are unpersuasive. In addition, concerns for the chilling of First Amendment expression counsel in favor of resolving that question.

After the Federal Election Commission (FEC) brought this action against the Party, the Party counterclaimed that "the limits on its expenditures in connection with the general election campaign for the Office of United States Senator from the State of Colorado imposed by 2 U.S.C. § 441a(d) are unconstitutional, both facially and as applied." App. 68. Though JUSTICE BREYER faults the Party for not "focus[ing] specifically upon coordinated expenditures," *ante*, at 623, the term "expenditures" certainly includes both coordinated as well as independent expenditures.[1] See 2 U.S.C. § 431(9)(A) ("The term 'expenditure' includes . . . *any* purchase, payment, distribution, loan,

[1] JUSTICE BREYER acknowledges as much when he asserts earlier in his opinion that "the unmodified term 'expenditure'" reflects a congressional intent "to limit *all* party expenditures." *Ante*, at 621 (emphasis in original).

advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office" (emphasis added)). Moreover, at the time the Party filed its counterclaim, all party expenditures were treated by law as coordinated, see *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28-29, n.1 (1981), so a reference to expenditures by a party was tantamount to a reference to coordinated expenditures.

Given the liberal nature of the rules governing civil pleading, see Fed. Rule Civ. Proc. 8, the Party's straightforward allegation of the unconstitutionality of § 441a(d)(3)'s expenditure limits clearly suffices to raise the claim that neither independent nor coordinated expenditures may be regulated consistently with the First Amendment. Indeed, that is precisely how the Court of Appeals appears to have read the counterclaim. The court expressly said that it was "analyzing the constitutionality of limits on coordinated expenditures by political committees," 59 F.3d 1015, 1024 (CA 10 1995), under § 441a(d)(3).

For the same reasons, the fact that the Party's summary judgment affidavits did not "specifically allege," *ante*, at 623, that the Party intended to make coordinated expenditures is also immaterial. The affidavits made clear that, but for § 441a(d)(3), the Party would spend in excess of the limits imposed by that statute, see App. 159 ("[T]he State Party intends to pay for communications within the spending limits of [§ 441]. . . . However, the State Party would also like to pay for communications which costs [*sic*] exceed the spending limits of [§ 441a(d)], but will not do so due to the deterrent and chilling effect of the statute"), as did

the Party's brief in this Court, see Brief for Petitioners 23-24 ("The Colorado Party is ready, willing and able to make expenditures expressly advocating the election or defeat of candidates for federal office that would exceed the limits imposed by § 441a(d), but it has been deterred from doing so by the obvious and credible threat of FEC enforcement actions").

Finally, though JUSTICE BREYER notes that this is the first Federal Election Campaign Act of 1971 (FECA) case to raise the constitutional validity of limits on coordinated expenditures, see *ante*, at 624, that is, at best, an argument against granting certiorari. It is too late for arguments like that now. The case is here, and we needlessly protract this litigation by remanding this important issue to the Court of Appeals. Nor is the fact that the "issue is complex," *ibid.*, a good reason for avoiding it. We do not sit to decide only easy cases. And while it may be true that no court has ever asked whether expenditures that are "*in fact*" coordinated may be regulated under the First Amendment, see *ibid.*, I do not see how the existence of an "in fact" coordinated expenditure would change our analysis of the facial constitutionality of § 441a(d)(3), since courts in facial challenges under the First Amendment routinely consider applications of the relevant statute other than the application before the court. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Whether or not there are facts in the record to support the finding that this particular expenditure was actually coordinated with a candidate, we are not, contrary to the suggestion of JUSTICE BREYER, incapable of considering the Government's interest in

regulating such expenditures and testing the fit between that end and the means used to achieve it.[2]

The validity of § 441a(d)(3)'s controls on coordinated expenditures is an open question that, if left unanswered, will inhibit the exercise of legitimate First Amendment activity nationwide. All JUSTICE BREYER resolves is that when a political party spends money in support of a candidate (or against his opponent) and the Government cannot thereafter prove any coordination between the party and the candidate, the party cannot be punished by the Government for that spending. This settles little, if anything. Parties are left to wonder whether their speech is protected by the First Amendment when the Government can show—presumably with circumstantial evidence—a link between the party and the candidate with respect to the speech in question. And of course, one of the main purposes of a political party is to support its candidates in elections.

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[2] JUSTICE BREYER'S remaining arguments for avoiding the facial challenge are straw men. See *ante*, at 625 (if § 441a(d)(3) were invalidated in its entirety, other FECA provisions that the Party has not challenged might apply to coordinated party expenditures); *ibid.* (if § 441a(d)(3) were upheld as to coordinated expenditures but invalidated as to independent expenditures, issues of severability would be raised). That resolution of the primary question in this case (the constitutionality of § 441a(d)(3) with respect to all expenditures) might generate issues not previously considered (such as severability) is no reason for not deciding the question itself. Without suggesting that remand is the only appropriate way to deal with possible corollary matters in this case or that these arguments have merit, I point out that we can, of course, decide the central question without ruling on the issues that concern JUSTICE BREYER.

The constitutionality of limits on coordinated expenditures by political parties is squarely before us. We should address this important question now, instead of leaving political parties in a state of uncertainty about the types of First Amendment expression in which they are free to engage.

II

A

Critical to JUSTICE BREYER'S reasoning is the distinction between contributions[3] and independent expenditures that we first drew in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). Though we said in *Buckley* that controls on spending and giving "operate in an area of the most fundamental First Amendment activities," *id.*, at 14, we invalidated the expenditure limits of FECA and upheld the Act's contribution limits. The justification we gave for the differing results was this: "The expenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," *id.*, at 19, whereas "limitation[s] upon the amount that any one person or group may contribute to a candidate or political committee entai[l] only a marginal restriction upon the contributor's ability to engage in free communication," *id.*, at 20-21. This conclusion was supported mainly by two assertions

[3] Coordinated expenditures are by statute categorized as contributions. See 2 U.S.C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate").

about the nature of contributions: First, though contributions may result in speech, that speech is by the candidate and not by the contributor; and second, contributions express only general support for the candidate but do not communicate the reasons for that support. *Id.*, at 21. Since *Buckley*, our campaign finance jurisprudence has been based in large part on this distinction between contributions and expenditures. See, *e.g.*, *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 259-260, 261-262 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm.* (*NCPAC*), 470 U.S. 480, 497 (1985); *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182, 196, (1981) (plurality opinion).

In my view, the distinction lacks constitutional significance, and I would not adhere to it. As Chief Justice Burger put it: "[C]ontributions and expenditures are two sides of the same First Amendment coin." *Buckley v. Valeo*, 424 U.S., at 241 (concurring in part and dissenting in part).[4] Contributions and expenditures both involve core First Amendment expression because they further the "[d]iscussion of public issues and debate on

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[4] Three Members of the *Buckley* Court thought the distinction untenable at the time, see 424 U.S., at 241 (Burger, C. J., concurring in part and dissenting in part); *id.*, at 261 (White, J., concurring in part and dissenting in part); *id.*, at 290 (Blackmun, J., concurring in part and dissenting in part), and another Member disavowed it subsequently, see *Federal Election Comm'n v. NCPAC*, 470 U.S. 480, 518-521 (1985) (Marshall, J., dissenting). Cf. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 678 (1990) (STEVENS, J., concurring) (stating that distinction "should have little, if any, weight in reviewing corporate participation in candidate elections").

the qualifications of candidates . . . integral to the operation of the system of government established by our Constitution." *Id.*, at 14. When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself. Indeed, the individual may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the individual. The contribution of funds to a candidate or to a political group thus fosters the "free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), just as an expenditure does.[5]

Giving and spending in the electoral process also involve basic associational rights under the First Amendment. See BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 Calif. L. Rev. 1045, 1064 (1985) (hereinafter BeVier). As we acknowledged in *Buckley*, "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" 424 U.S., at 15 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). Political associations allow

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[5] See H. Alexander, Money in Politics 234 (1972): "The constitutional arguments against limiting campaign spending also apply against limiting contributions; specifically, it is the right of an individual to spend his money to support a congenial viewpoint. . . . Some views are heard only if interested individuals are willing to support financially the candidate or committee voicing the position. To be widely heard, mass communications may be necessary, and they are costly. By extension, then, the contribution of money is a contribution to freedom of political debate."

citizens to pool their resources and make their advocacy more effective, and such efforts are fully protected by the First Amendment. *Federal Election Comm'n v. NCPAC*, *supra*, at 494. If an individual is limited in the amount of resources he can contribute to the pool, he is most certainly limited in his ability to associate for purposes of effective advocacy. See *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 296 (1981) ("To place a . . . limit . . . on individuals wishing to band together to advance their views . . . is clearly a restraint on the right of association"). And if an individual cannot be subject to such limits, neither can political associations be limited in their ability to give as a means of furthering their members' viewpoints. As we have said, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion).[6]

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[6] To illustrate the point that giving and spending in the political process implicate the same First Amendment values, I note that virtually everything JUSTICE BREYER says about the importance of free independent expenditures applies with equal force to coordinated expenditures and contributions. For instance, JUSTICE BREYER states that "[a] political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure." *Ante*, at 615-616. "Coordinated" expression by political parties, of course, shares those precise attributes. The fact that an expenditure is prearranged with the candidate—presumably to make it more effective in the election—does not take away from its fundamental democratic purposes.

Turning from similarities to differences, I can discern only one potentially meaningful distinction between contributions and expenditures. In the former case, the funds pass through an intermediary—some individual or entity responsible for organizing and facilitating the dissemination of the message—whereas in the latter case they may not necessarily do so. But the practical judgment by a citizen that another person or an organization can more effectively deploy funds for the good of a common cause than he can ought not deprive that citizen of his First Amendment rights. Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with like-minded persons. A contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance. As one commentator cautioned, "let us not lose sight of the speech." Powe, Mass Speech and the Newer First Amendment, 1982 S. Ct. Rev. 243, 258.

Echoing the suggestion in *Buckley* that contributions have less First Amendment value than expenditures because they do not involve speech by the donor, see 424 U.S., at 21, the Court has sometimes rationalized limitations on contributions by referring to contributions as "speech by proxy." See, *e.g.*, *California Medical Assn. v. Federal Election Comm'n*, 453 U.S., at 196 (Marshall, J.) (plurality opinion). The "speech by proxy" label is, however, an ineffective tool for distinguishing contributions from expenditures. Even in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the

spender's message—for instance, an advertising agency or a television station. See Powe, *supra*, at 258-259. To call a contribution "speech by proxy" thus does little to differentiate it from an expenditure. See *Buckley v. Valeo*, *supra*, at 243-244, and n. 7 (Burger, C. J., concurring in part and dissenting in part). The only possible difference is that contributions involve an extra step in the proxy chain. But again, that is a difference in form, not substance.

Moreover, we have recently recognized that where the "proxy" speech is endorsed by those who give, that speech is a fully protected exercise of the donors' associational rights. In *Federal Election Comm'n v. NCPAC*, we explained:

> "[T]he 'proxy speech' approach is not useful . . . [where] the contributors obviously like the message they are hearing from [the] organizatio[n] and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." 470 U.S., at 495.

The other justification in *Buckley* for the proposition that contribution caps only marginally restrict speech—that is, that a contribution signals only general support for the candidate but indicates nothing about the reasons for that support—is similarly unsatisfying. Assuming the assertion is descriptively accurate (which is certainly questionable), it still cannot mean that giving is less important than spending in terms of the

First Amendment. A campaign poster that reads simply "We support candidate Smith" does not seem to me any less deserving of constitutional protection than one that reads "We support candidate Smith because we like his position on agriculture subsidies." Both express a political opinion. Even a pure message of support, unadorned with reasons, is valuable to the democratic process.

In sum, unlike the *Buckley* Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits. The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or group to spend for the same purpose. In principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy. I think that the *Buckley* framework for analyzing the constitutionality of campaign finance laws is deeply flawed. Accordingly, I would not employ it, as JUSTICE BREYER and JUSTICE KENNEDY do.

B

Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: Both forms of speech are central to the First Amendment. Curbs on protected speech, we have repeatedly said, must be

strictly scrutinized. See *Federal Election Comm'n v. NCPAC*, *supra*, at 501; *Citizens Against Rent Control/ Coalition for Fair Housing v. Berkeley*, 454 U.S., at 294; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).[7] I am convinced that under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process, like § 441a(d)(3), are unconstitutional.

The formula for strict scrutiny is, of course, well established. It requires both a compelling governmental interest and legislative means narrowly tailored to serve that interest. In the context of campaign finance reform, the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption, see *Federal Election Comm'n v. NCPAC*, 470 U.S., at 496-497, and we have narrowly defined "corruption" as a "financial *quid pro quo*: dollars for political favors," *id.*, at 497.[8]

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[7] In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court purported to scrutinize strictly the contribution provisions as well as the expenditure rules. See *id.*, at 23 (FECA's contribution and expenditures limits "both implicate fundamental First Amendment interests"); *id.*, at 25 (contribution limits, like expenditure limits, are " 'subject to the closest scrutiny' " (citation omitted)). It has not gone unnoticed, however, that we seemed more forgiving in our review of the contribution provisions than of the expenditure rules. See, *e.g.*, *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182, 196 (1981) (plurality opinion) (contributions are "not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection"). But see *id.*, at 201-202 (Blackmun, J., concurring in part and concurring in judgment) (under *Buckley*, there is no lesser standard of review for contributions as opposed to expenditures).

[8] As I explain in Part III, *infra*, the interest in preventing corruption is inapplicable when the subject of the regulation is a

As for the means-ends fit under strict scrutiny, we have specified that "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Federal Election Comm'n v. MCFL*, 479 U.S., at 265.

In *Buckley*, we expressly stated that the means adopted must be "closely drawn to avoid unnecessary abridgment" of First Amendment rights. 424 U.S., at 25. But the *Buckley* Court summarily rejected the argument that, because less restrictive means of preventing corruption existed—for instance, bribery laws and disclosure requirements—FECA's contribution provisions were invalid. Bribery laws, the Court said, "deal with only the most blatant and specific attempts of those with money to influence governmental action," *id.*, at 28, suggesting that those means were inadequate to serve the governmental interest. With respect to disclosure rules, the Court admitted that they serve "many salutary purposes" but said that Congress was "entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant." *Ibid.* Finally, the Court noted that contribution caps leave people free to engage in independent political speech, to volunteer their services, and to contribute money to a "limited but nonetheless substantial extent." *Ibid.*

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political party. My analysis here is more general, however, and applies to all individuals and entities subject to campaign finance limits.

In my opinion, FECA's monetary caps fail the narrow tailoring test. Addressing the constitutionality of FECA's contribution caps, the *Buckley* appellants argued:

> "If a small minority of political contributions are given to secure appointments for the donors or some other *quid pro quo*, that cannot serve to justify prohibiting all large contributions, the vast majority of which are given not for any such purpose but to further the expression of political views which the candidate and donor share. Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent." Brief for Appellants in *Buckley v. Valeo*, O.T.1975, Nos. 75-436 and 75-437, pp. 117-118.

The *Buckley* appellants were, to my mind, correct. Broad prophylactic bans on campaign expenditures and contributions are not designed with the precision required by the First Amendment because they sweep protected speech within their prohibitions.

Section 441a(d)(3), in particular, suffers from this infirmity. It flatly bans all expenditures by all national and state party committees in excess of certain dollar limits, without any evidence that covered committees who exceed those limits are in fact engaging, or likely to engage, in bribery or anything resembling it. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 689 (1990) (SCALIA, J., dissenting) (where statute "extends to speech that has the mere *potential* for producing social harm" it should not be held to satisfy

the narrow tailoring requirement (emphasis in original)). Thus, the statute indiscriminately covers the many conceivable instances in which a party committee could exceed the spending limits without any intent to extract an unlawful commitment from a candidate. Cf. *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (State may not, in effort to stop fraud in charitable solicitations, "lump" truly charitable organizations "with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other"). As one commentator has observed: "[I]t must not be forgotten that a large number of contributions are made without any hope of specific gain: for the promotion of a program, because of enthusiasm for a candidate, or to promote what the giver vaguely conceives to be the national interest." L. Overacker, Money in Elections 192 (1974).

In contrast, federal bribery laws are designed to punish and deter the corrupt conduct the Government seeks to prevent under FECA, and disclosure laws work to make donors and donees accountable to the public for any questionable financial dealings in which they may engage. Cf. *Schaumburg v. Citizens for a Better Environment*, *supra*, at 637-638 (explaining that "less intrusive" means of preventing fraud in charitable solicitation are "the penal laws [that can be] used to punish such conduct directly" and "disclosure of the finances of charitable organizations"). In light of these alternatives, wholesale limitations that cover contributions having nothing to do with bribery—but with speech central to the First Amendment—are not narrowly tailored.

Buckley's rationale for the contrary conclusion, see *supra*, at 641-642, is faulty. That bribery laws are not completely effective in stamping out corruption is no justification for the conclusion that prophylactic controls on funding activity are narrowly tailored. The First Amendment limits Congress to legislative measures that do not abridge the Amendment's guaranteed freedoms, thereby constraining Congress' ability to accomplish certain goals. Similarly, that other modes of expression remain open to regulated individuals or groups does not mean that a statute is the least restrictive means of addressing a particular social problem. A statute could, of course, be more restrictive than necessary while still leaving open some avenues for speech.[9]

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[9] JUSTICE STEVENS submits that we should "accord special deference to [Congress'] judgment on questions related to the extent and nature of limits on campaign spending," *post*, at 650, a stance that the Court of Appeals also adopted, see 59 F.3d 1015, 1024 (CA 10 1995). This position poses great risk to the First Amendment, in that it amounts to letting the fox stand watch over the henhouse. There is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legislative judgment. See generally BeVier 1074-1081. What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it. See *id.*, at 1075 (" 'Courts must police inhibitions on . . . political activity because we cannot trust elected officials to do so' " (emphasis deleted)) (quoting J. Ely, Democracy and Distrust 106 (1980)). See also R. Winter, Political Financing and the Constitution, 486 Annals Am. Acad. Pol. & Soc. Sci. 34, 40, 48 (1986). Indeed, history demonstrates that the most significant effect of election reform has been not to purify public service, but to protect incumbents and increase the influence of special interest groups. See BeVier 1078-1080. When Congress seeks to ration political

III

Were I convinced that the *Buckley* framework rested on a principled distinction between contributions and expenditures, which I am not, I would nevertheless conclude that § 441a(d)(3)'s limits on political parties violate the First Amendment. Under *Buckley* and its progeny, a substantial threat of corruption must exist before a law purportedly aimed at the prevention of corruption will be sustained against First Amendment attack.[10] Just as some of the monetary limits in the *Buckley* line of cases were held to be invalid because the Government interest in stemming corruption was

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expression in the electoral process, we ought not simply acquiesce in its judgment.

[10] See *Buckley v. Valeo*, 424 U.S., at 45-47 (striking down limits on independent expenditures because the "advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption"); *Federal Election Comm'n v. MCFL*, 479 U.S. 238, 263, (1986) (invalidating caps on campaign expenditures by incorporated political associations because spending by such groups "does not pose [any] threat" of corruption); *Federal Election Comm'n v. NCPAC*, 470 U.S., at 498 (striking down limits on independent expenditures by political action committees because "a *quid pro quo* for improper commitments" in that context was a "hypothetical possibility"); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 297 (1981) (stating that "*Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures*" because anticorruption rationale is inapplicable); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (concluding that limits on referendum speech by corporations violate First Amendment because "[t]he risk of corruption . . . simply is not present").

inadequate under the circumstances to justify the restrictions on speech, so too is § 441a(d)(3) invalid.[11]

The Government asserts that the purpose of § 441a(d)(3) is to prevent the corruption of candidates and elected representatives by party officials. The Government does not explain precisely what it means by "corruption," however;[12] the closest thing to an explanation the Government offers is that "corruption" is "'the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.'" Brief for Respondent 35 (quoting *Buckley v. Valeo*, 424 U.S., at 25). We so defined corruption in *Buckley* for purposes of reviewing ceilings on giving or spending by individuals, groups, political committees, and candidates. See *id.*, at 23, 35, 39. But we did not in that case consider the First Amendment status of FECA's provisions dealing with political parties. See *id.*, at 58, n. 66, 59, n.67.

As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. See Nahra, Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities, 56 Ford. L.Rev. 53, 105-106 (1987). What could it mean for a party to "corrupt" its candi-

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[11] While JUSTICE BREYER chides me for taking the position that I would not adhere to *Buckley*, see *ante*, at 626, and suggests that my approach to this case is thus insufficiently "cautiou[s]," *ibid.*, he ignores this Part of my opinion, in which I explain why limits on coordinated expenditures are unconstitutional *even under the* Buckley *line of precedent.*

[12] Nor, for that matter, does JUSTICE BREYER explain what sorts of *quid pro quos* a party could extract from a candidate. Cf. *ante*, at 615.

date or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute "a subversion of the political process." *Federal Election Comm'n v. NCPAC*, 470 U.S., at 497. For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system. To borrow a phrase from *Federal Election Comm'n v. NCPAC*: "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [political groups] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *Id.*, at 498. Cf. *Federal Election Comm'n v. MCFL*, 479 U.S., at 263 (suggesting that "[v]oluntary political associations do not . . . present the specter of corruption").

The structure of political parties is such that the theoretical danger of those groups actually engaging in *quid pro quos* with candidates is significantly less than the threat of individuals or other groups doing so. See Nahra, *supra*, at 97-98 (citing F. Sorauf, Party Politics in America 15-18 (5th ed. 1984)). American political parties, generally speaking, have numerous members with a wide variety of interests, Nahra, *supra*, at 98, features necessary for success in majoritarian elections. Consequently, the influence of any one person or the importance of any single issue within a political party is

significantly diffused. For this reason, as the Party's *amici* argue, see Brief for Committee for Party Renewal et al. as *Amicus Curiae* 16, campaign funds donated by parties are considered to be some of "the cleanest money in politics." J. Bibby, Campaign Finance Reform, 6 Commonsense 1, 10 (Dec.1983). And, as long as the Court continues to permit Congress to subject individuals to limits on the amount they can give to parties, and those limits are uniform as to all donors, see 2 U.S.C. § 441a(a)(1), there is little risk that an individual donor could use a party as a conduit for bribing candidates.

In any event, the Government, which bears the burden of "demonstrat[ing] that the recited harms are real, not merely conjectural," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994), has identified no more proof of the corrupting dangers of coordinated expenditures than it has of independent expenditures. Cf. *ante*, at 618 ("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures"). And insofar as it appears that Congress did not actually enact § 441a(d)(3) in order to stop corruption by political parties "but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending," *ibid.* (citing *Buckley v. Valeo*, *supra*, at 57), the statute's ceilings on coordinated expenditures are as unwarranted as the caps on independent expenditures.

In sum, there is only a minimal threat of "corruption," as we have understood that term, when a political party spends to support its candidate or to

oppose his competitor, whether or not that expenditure is made in concert with the candidate. Parties and candidates have traditionally worked together to achieve their common goals, and when they engage in that work, there is no risk to the Republic. To the contrary, the danger to the Republic lies in Government suppression of such activity. Under *Buckley* and our subsequent cases, § 441a(d)(3)'s heavy burden on First Amendment rights is not justified by the threat of corruption at which it is assertedly aimed.

* * *

To conclude, I would find § 441a(d)(3) unconstitutional not just as applied to petitioners, but also on its face. Accordingly, I concur only in the Court's judgment.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

In my opinion, all money spent by a political party to secure the election of its candidate for the office of United States Senator should be considered a "contribution" to his or her campaign. I therefore disagree with the conclusion reached in Part III of the principal opinion.

I am persuaded that three interests provide a constitutionally sufficient predicate for federal limits on spending by political parties. First, such limits serve the interest in avoiding both the appearance and the reality of a corrupt political process. A party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked.

That interdependency creates a special danger that the party—or the persons who control the party—will abuse the influence it has over the candidate by virtue of its power to spend. The provisions at issue are appropriately aimed at reducing that threat. The fact that the party in this case had not yet chosen its nominee at the time it broadcast the challenged advertisements is immaterial to the analysis. Although the Democratic and Republican nominees for the 1996 Presidential race will not be selected until this summer, current advertising expenditures by the two national parties are no less contributions to the campaigns of the respective frontrunners than those that will be made in the fall.

Second, these restrictions supplement other spending limitations embodied in the Federal Election Campaign Act of 1971, which are likewise designed to prevent corruption. Individuals and certain organizations are permitted to contribute up to $1,000 to a candidate. 2 U.S.C. § 441a(a)(1)(A). Since the same donors can give up to $5,000 to party committees, § 441a(a)(1)(C), if there were no limits on party spending, their contributions could be spent to benefit the candidate and thereby circumvent the $1,000 cap. We have recognized the legitimate interest in blocking similar attempts to undermine the policies of the Act. See *California Medical Assn. v. Federal Election Com m'n*, 453 U.S. 182, 197-199 (1981) (plurality opinion) (approving ceiling on contributions to political action committees to prevent circumvention of limitations on individual contributions to candidates); *id.*, at 203 (Blackmun, J., concurring in part and concurring in judgment); *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (*per curiam*) (approving limitation on total contributions by

an individual in connection with an election on same rationale).

Finally, I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. As Justice White pointed out in his opinion in *Buckley*, "money is not always equivalent to or used for speech, even in the context of political campaigns." *Id.*, at 263 (opinion concurring in part and dissenting in part). It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment. See *id.*, at 262-266.

Congress surely has both wisdom and experience in these matters that is far superior to ours. I would therefore accord special deference to its judgment on questions related to the extent and nature of limits on campaign spending.[*] Accordingly, I would affirm the judgment of the Court of Appeals.

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[*] One irony of the case is that both the Democratic National Party and the Republican National Party have sided with petitioners in challenging a law that Congress has the obvious power to change. See Brief for Democratic National Committee as *Amicus Curiae*; Brief for Republican National Committee as *Amicus Curiae*.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 93-1433, 93-1434

FEDERAL ELECTION COMMISSION,
PLAINTIFF/COUNTER-DEFENDANT/APPELLEE/
CROSS-APPELLANT

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE, DOUGLAS JONES,
DEFENDANTS/COUNTER-CLAIMANTS/APPELLANTS/
CROSS-APPELLEES

[Filed: June 23, 1995
Rehearing Denied: Sept. 6, 1995]

Before HENRY and LOGAN, Circuit Judges, and REED, District Judge.*

LOGAN, Circuit Judge.

The Federal Election Commission (FEC) appeals from the dismissal on the merits of its underlying suit filed against the Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones (collectively the Committee) alleging violations of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431-442. The Committee cross-appeals from

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* The Honorable Edward L. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

the dismissal as moot of its counterclaim challenging the constitutionality of the FECA expenditure limitations. We hold that the Committee expenditures at issue did violate the coordinated expenditure limitation in 2 U.S.C. § 441a(d)(3). We also reach the constitutional issue and hold that § 441a(d)(3) does not violate the Committee's First Amendment rights.

This action stems from the 1986 United States senatorial campaign in Colorado, and pre-election spending by the Committee. In January 1986, then-Congressman Timothy E. Wirth had registered with the FEC as a candidate for the Democratic nomination for the U.S. Senate. Several months later, but before either political party had nominated senatorial candidates, the Committee spent $15,000 for a radio advertisement directed at Wirth's announced candidacy ("Wirth Facts # 1").[1] This spending prompted the

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[1] Wirth Facts # 1 read:

> Paid for by the Colorado Republican State Central Committee.
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

I Jt. App. 95-96.

Colorado Democratic Party's administrative complaint with the FEC alleging that it was an "expenditure in connection with" the general election campaign of a candidate for federal office in violation of the spending limits set out in FECA § 441a(d)(3).

The FEC made a probable cause determination that the Committee violated the FECA. When the parties were unable to reach a settlement the FEC filed suit. The FEC alleged that the Committee failed to report the amount spent on the anti-Wirth publicity as an "expenditure in connection with" the general election campaign, in violation of FECA §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f). The Committee counterclaimed, alleging that the FECA was an unconstitutional infringement on its First Amendment rights. In ruling on the parties' cross motions for summary judgment, the district court dismissed the underlying action after finding no FECA violation, and dismissed the counterclaim as mooted by its merits ruling. These appeals followed.

I

We first address whether the district court correctly concluded that the Committee did not violate the FECA. We review de novo a district court's grant of summary judgment using the same legal standards as the district court. *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1237 (10th Cir.), *cert. denied*, 506 U.S. 832, 113 S. Ct. 98, 121 L.Ed.2d 58 (1992).

A

The FECA regulates contributions made to federal candidates and political parties, and expenditures made

by persons and political committees. It also imposes recordkeeping and reporting requirements. The Committee acknowledges that it is subject to the FECA as a federally registered committee of the Colorado Republican Party.

The statute limits monetary contributions and expenditures by state and national political party committees as follows:

> **(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office**
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> . . . . .

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds–

> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of–
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000.

2 U.S.C. § 441a(d)(1) and (3). A state political party committee may assign to a designated agent (including a national party committee) the right to make the expenditures the state party could have made. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41-43, 102 S.Ct. 38, 46-48, 70 L.Ed.2d 23 (1981) (*DSCC*). Here the Committee expended funds on the anti-Wirth publicity after assigning to the National Republican Senatorial Committee the authority to make all of the expenditures—$103,248—it was allowed under § 441a(d)(3) for the 1986 U.S. Senate election. *See* I Jt.App. 4, 14; II *id.* 473. The Committee did not report the $15,000 anti-Wirth publicity expense under 2 U.S.C. § 434(b)(4)(H)(iv),[2] instead characteriz-

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[2] 2 U.S.C. § 434(b)(4)(H)(iv) reads in part:

> **(b) Contents of reports**
>
> Each report under this section shall disclose—
>
> . . . . . .
>
> **(4)** for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:
>
> . . . . . .

ing it as an expense for "Voter Information to Colorado Voters—Advertising." II App. 478, ¶ A. The narrow issue is whether the anti-Wirth publicity expense was an "expenditure in connection with the general election campaign" pursuant to § 441a(d)(3) and should have been reported accordingly. If so, the Committee exceeded the § 441a(d)(3) monetary ceiling.

As relevant here, the FECA addresses two types of campaign expenditures: independent and coordinated.[3] A coordinated expenditure is one made "in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley v. Valeo*, 424 U.S. 1, 47 n. 53, 96 S. Ct. 612, 648 n. 53, 46 L.Ed.2d 659 (1976). *See also* 11 C.F.R. §110.7(b)(4). Because political parties are considered incapable of making independent expenditures, the district court correctly found that the anti-Wirth publicity expense was a coordinated expenditure. *See DSCC*, 454 U.S. at 29 n. 1, 102 S. Ct. at 41 n. 1. If that spending was an "expenditure [ ] in connection with" the campaign it

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(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 441a(d) of this title; and

(v) any other disbursements.

[3] An independent expenditure is "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17); *see also* § 441a(a)(7)(A)-(B).

was subject to the monetary limitations at § 441a(d). *Id.* The district court concluded that the Committee's coordinated expenditure on the anti-Wirth publicity was not made in connection with the 1986 Colorado senatorial campaign, and therefore was not subject to the § 441a(d)(3) limits.

B

The FECA does not clearly manifest the meaning Congress intended to attach to the "expenditures in connection with" language in § 441a(d)(3). Acknowledging that there were no controlling or persuasive cases interpreting that section, the district court relied upon *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S. Ct. 616, 93 L.Ed.2d 539 (1986) (*MCFL*), and its interpretation of FECA § 441b. Section 441b[4] restricts

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[4] 2 U.S.C. § 441b provides in relevant part as follows:

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank,

the contributions and expenditures of national banks, corporations, or labor organizations. The Supreme Court in *MCFL* considered whether Massachusetts Citizens for Life, Inc., a nonprofit, nonstock corporation, by financing a newsletter urging voter support for identified pro-life candidates, violated the "independent spending" limitations in § 441b. *Id.* at 241, 107 S. Ct. at 619. Interpreting the term "expenditure in connection with any election" the Court held that the expenditure "must constitute 'express advocacy' in order to be

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or labor organization, as the case may be, prohibited by this section.

. . . .

(b)(2) For purposes of this section and section 79l (h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

subject to the prohibition of § 441b." *Id.* at 249, 107 S. Ct. at 623.

MCFL relied upon the *Buckley* opinion's interpretation of a limitation on independent expenditures "relative to" a clearly identifiable candidate. To avoid invalidating on vagueness grounds what was then FECA § 608(e)(1), the *Buckley* Court held the term encompassed only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44, 96 S. Ct. at 646-47. The opinion clarified in a footnote that this construction would restrict the application to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* n. 52. *MCFL* adopted the same definition, referencing the same footnote, for purposes of § 441b's independent spending limitation. 479 U.S. at 249, 107 S. Ct. at 623.

The district court, noting the identity of the "expenditures in connection with" language in § 441b and in § 441a(d)(3), concluded that the anti-Wirth publicity was not express advocacy and therefore not governed by the § 441a(d)(3) limitations. The district court relied in part on a common law rule of statutory construction that identical words used in different sections of the same statute generally should be given the same meaning. However, the Supreme Court has also stated that "the presumption readily yields to the controlling force of the circumstance that words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Helver-*

ing v. Stockholms Enskilda Bank, 293 U.S. 84, 87, 55 S. Ct. 50, 51, 79 L.Ed. 211 (1934).

Further, we cannot overlook a significant distinction between *Buckley* and *MCFL* and the instant case. The *Buckley* opinion distinguished between independent expenditures—regulated by then FECA § 608(e)(1)—and coordinated expenditures. The *Buckley* opinion unequivocally stated that controlled or coordinated expenditures are treated as "contributions rather than expenditures" under the FECA.[5] 424 U.S. at 46-47 & n. 53, 96 S. Ct. at 648 & n. 53. Although *Buckley* found the ceiling on independent expenditures failed to serve substantial enough government interests to be constitutional, it reached the opposite conclusion as to the limitations on expenditures by national or state political parties. *Id.* at 55-59 & n. 67, 96 S. Ct. at 652-54 & n. 67 ("Does 18 U.S.C. § 608(f) (1970 ed., Supp. IV) violate [constitutional] rights, in that it limits the expenditures of national or state committees of political parties in connection with general election campaigns for federal office? Answer: NO, as to the Fifth Amendment challenge advanced by appellants."). *Buckley* accepted the FECA's treatment of expenditures by national and state committees of political parties as contributions, as have subsequent opinions of the Supreme Court. *See DSCC*, 454 U.S. 27, 29 n.1, 102 S. Ct. 38, 41 n. 1 (1981) ("Party committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates. The Commission has, by regulation, forbidden such 'independent' expen-

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[5] Coordinated expenditures are treated as campaign contributions that must be reported pursuant to § 441a(a)(7)(B)(i).

ditures by the national and state party committees."). Similarly, *MCFL* made the same distinction when interpreting the meaning of independent expenditure limits in § 441b. *MCFL*, 479 U.S. at 259-60, 107 S. Ct. at 628-29.

Subsequent amendments to the FECA include "expressly advocating" into the definition of independent expenditures. *See* 2 U.S.C. § 431(17). Coordinated expenditures of political parties, however, are not defined in this manner. *See id.* § 431(9)(B)(ix); *cf. id.* § 431(8)(B)(v), (x), (xii) (what is not a contribution). This is some evidence of congressional intent that the phrases are not intended to have the same meaning.

The distinction between independent expenditures and political party expenditures that are deemed to be contributions, and their different treatment by the Supreme Court, negates the necessity that "expenditures in connection with" be construed identically in different sections of the FECA. However, the meaning of "expenditures in connection with" is not perfectly clear, else the Court in *MCFL* would not have had to cabin its meaning under § 441b in the manner it did. The question then becomes whether we must construe the phrase as narrowly as the Supreme Court did in *MCFL* in order to uphold its validity.

C

The FEC has issued advisory opinions interpreting the "expenditures in connection with" phrase in § 441a(d)(3) in a manner different than that adopted by the district court and urged upon us by the Committee. We believe this is an appropriate circumstance in which to follow the Supreme Court's admonishment that "if

the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (footnote omitted); *see also DSCC*, 454 U.S. at 37, 102 S. Ct. at 44-45 (the FEC, a bipartisan body, is "precisely the type of agency to which deference should presumptively be afforded").[6]

FEC Advisory Opinion 1984-15 addressed questions raised by the Republican Party regarding spending for a series of television ads denigrating the potential Democratic presidential candidates, relating to an upcoming election. The FEC responded to a specific question whether such spending was within the limitations of § 441a(d).

> These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. *See generally* Advisory Opinion 1978-46. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made

[6] We note that one of the reasons the *Buckley* opinion gave for its "express advocacy" restrictive interpretation of § 608(e)(1)'s "relative to" language was that most who were subject to the statute's criminal sanctions had no right to obtain an advisory opinion of the FEC. *See* 424 U.S. at 40 n.47, 96 S. Ct. at 645 n.47. It noted that only candidates, federal office holders and *political committees* had that right. *Id.* Section 441a(d), at issue before us, applies only to political committees; thus all to whom it applies can secure advisory opinions from the FEC.

> with respect to the presidential general election and in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (May 31, 1984) (footnote omitted). The opinion then concluded that the spending in question was a coordinated expenditure subject to the limitations in § 441a(d)(2).

Advisory Opinion 1985-14 responded to questions from a Democratic Congressional Campaign Committee regarding proposed publicity focusing on a number of congressmen, not all with announced opposition candidates. A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (May 30, 1985). The opinion endorsed Advisory Opinion 1984-15 with its construction of § 441a(d) as regulating expenditures that "both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message."[7]

The FEC has "primary and substantial responsibility for administering and enforcing" the FECA. *Buckley*, 424 U.S. at 109, 96 S. Ct. at 677-78. The FEC argues that its construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electioneering message is a reasonable one to which we must defer. Viewing the

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[7] Advisory Opinion 1978-46 appears more restrictive; it can be read to adopt the express advocacy position. A.O. 1978-46, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978). But even if the more recent decisions represent a change in position by the FEC we must still give the current view deference if the current construction is reasonable. *Rust v. Sullivan*, 500 U.S. 173, 186-87, 111 S. Ct. 1759, 1768-69, 114 L.Ed.2d 233 (1991).

party expenditures as contributions, as we must, we agree.

"[T]he primary interest served by the Act is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *DSCC*, 454 U.S. at 41, 102 S. Ct. at 47. The Supreme Court cases have distinguished between the potential for corruption that attaches to contributions and coordinated expenditures, and those that might develop from independent expenditures, finding less inherent risk in the latter. Our analysis, therefore, with respect to controls on coordinated expenditures and contributions under § 441a is different than that required for § 441b.

Section § 441a(d) addresses the concern that large contributors to political parties will exert undue influence on a candidate if elected to office. The monetary ceiling on coordinated expenditures by political organizations diminishes the potential of such undue influence but preserves the important role of political parties. *See DSCC*, 454 U.S. at 41, 102 S. Ct. at 46-47. In contrast, the purpose behind § 441b is to prevent corporate and labor expenditures from effectively acting as "political war chests" on behalf of candidates, because these organizations could use funds "amassed in the economic marketplace . . . [for] unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257, 107 S. Ct. at 627. The FECA thus provides different regulations tailored to different perceived

evils.[8] Independent expenditures are theoretically unlimited but such expenditures in excess of low limits must be reported, along with identification of those who contributed more than $200. Contribution limits still apply. Giving deference to the FEC's interpretation, we hold that § 441a(d)(3) applies to coordinated spending that involves a clearly identified candidate and an electioneering message, without regard to whether that message constitutes express advocacy.

D

The Committee does not seriously contest that the anti-Wirth publicity was directed at a clearly identified candidate. "Wirth Facts # 1" referenced Wirth's senatorial aspirations and challenged his personal integrity and campaign statements in the context of the current election.[9] Wirth was not yet the Democratic nominee, but the FECA regulates coordinated expenditures made before the primary election. A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766. The Committee's objective to elect the eventual Republican candidate is not diminished because a Democratic nominee has not emerged. *See Buckley*, 424 U.S. at 79,

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[8] We have already discussed how subsequent FECA amendments have adopted the "express advocacy" criteria to differentiate between independent and coordinated expenditures.

[9] *See also* 2 U.S.C. § 431(18) which reads:

> The term "clearly identified" means that—
>
> (A) the name of the candidate involved appears;
>
> (B a photograph or drawing of the candidate appears; or
>
> (C) the identity of the candidate is apparent by unambiguous reference.

96 S. Ct. at 663 (major purpose of expenditures by candidates and political committees "is the nomination or election of a candidate").

We next consider whether "Wirth Facts # 1" contained an electioneering message.[10] Advisory Opinion 1984-15 examined proposed television advertising by the Republican National Committee that would "question or challenge the candidate's statements, position, or record." The FEC concluded that the

> clear import and purpose of these proposed advertisements is to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republican Party nominee. These advertisements relate primarily, if not solely, to the office of President of the United States and seek to influence a voter's choice between the Republican Party presidential candidate and any Democratic Party nominee in such a way as to favor the choice of the Republican candidate. . . . These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made

[10] We agree with the district court that the message in "Wirth Facts # 1" would not constitute express advocacy within the narrow definition of *Buckley* and *MCFL*. It lacks the express words "vote for" or "vote against," or words of similar import, although it comes close when the ad suggests that an identified candidate distorted his voting record.

> with respect to the presidential general election and in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (citation and footnotes omitted). The next year, the FEC relied upon that construction in rendering Advisory Opinion 1985-14 to the Democratic Congressional Campaign Committee stating that "[e]lectioneering messages include statements 'designed to urge the public to elect a certain candidate or party.'" A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (quoting *United States v. United Auto Workers*, 352 U.S. 567, 587, 77 S. Ct. 529, 539, 1 L.Ed.2d 563 (1957)).

Any reasonable reading of "Wirth Facts # 1," which included the notation of Republican Party sponsorship, would leave the reader (or listener) with the impression that the Republican Party sought to "diminish" public support for Wirth and "garner support" for the unnamed Republican nominee. "Wirth Facts # 1" unquestionably contained an electioneering message. We conclude that the anti-Wirth publicity was an "expenditure in connection with" the 1986 Colorado senatorial election because it named both a clearly identifiable candidate and contained an electioneering message. The Committee, therefore, violated the FECA by making a § 441a(d)(3) expenditure after delegating to the National Republican Senatorial Committee the authority to spend all of the Committee's available funding for the 1986 Colorado Senate race.

II

We next consider the Committee's constitutional challenges to the FECA. The Committee asserts that

the monetary caps in § 441a(d)(3) violate its First Amendment guarantees of freedom of speech and association. The Committee focuses on the alleged absence of a compelling governmental interest served by the restrictions in § 441a(d)(3) and also asserts that the statute discriminates based upon content. The FEC's position is that *Buckley* and later cases endorse distinctions between independent expenditures and contributions, and that other FECA contribution ceilings have consistently been upheld as constitutional by the Supreme Court. We agree with the FEC that § 441a(d)(3) is a permissible burden on speech and association.

The primary purpose of the contribution and expenditure caps in the FECA are to prevent corruption or the appearance of corruption. *Buckley* 424 U.S. at 25-26, 96 S. Ct. at 637-38. The FECA starts from the premise that political committees may make only minimal expenditures in connection with campaigns, § 441a(a) (dollar limits on contributions), then creates one exception at § 441a(d)(3) (coordinated expenditure limits for certain political committees made in connection with federal election campaigns). *DSCC*, 454 U.S. at 28-29 n. 1, 102 S. Ct. at 40-41 n. 1; 11 C.F.R. § 110.7(b); *see also* 2 U.S.C. § 431(14)-(16). This exception allows for greater monetary support by political parties than would otherwise be permitted by § 441a(a). The coordinated expenditures permitted by § 441a(d)(3) are treated for purposes of reporting and monetary limitations as contributions from the political committee to the candidate, § 441a(a)(7)(B)(i); *see also* § 434(b)(4)(H)(iv), and fall within the contribution ceilings contained in § 441a(a). *See Buckley*, 424 U.S. at 46, 96 S. Ct. at 647-48; *FEC v.*

National Political Action Committee, 470 U.S. 480, 492, 105 S. Ct. 1459, 1466, 84 L.Ed.2d 455 (1985) (*NCPAC*).

The same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees.[11] The opportunity for abuse is greater when the contributions (or in the instant case, coordinated expenditures) derive from sources inherently aligned with the candidate, rather than with independent expenditures. *See Buckley*, 424 U.S. at 26-27, 96 S. Ct. at 638-39; *NCPAC*, 470 U.S. at 497, 105 S. Ct. at 1468-69. The Committee, stressing the benefits of party discipline and the broad interests of party success, argues that the dangers of domination of candidates by large individual donors do not apply to party expenditures. But party expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures. The members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized

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[11] We acknowledge that *Buckley* upheld then 18 U.S.C. § 608(f) as constitutional when challenged as discriminatory under the Fifth Amendment, and not the First Amendment, which is the basis for the Committee's constitutional challenge here. *Buckley*, 424 U.S. at 59 n. 67, 96 S. Ct. at 654 n. 67. However, *MCFL* adopted much of the reasoning in *Buckley* in analyzing the First Amendment challenges to § 441b. We do not, therefore, discount the importance of *Buckley* in the context of our First Amendment analysis.

political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties. This case is, therefore, ideally postured for deference to the congressional will.

The Supreme Court has endorsed the government's interest in curtailing large campaign contributions as legitimate. In addition to preventing corruption or the appearance of corruption, these restrictions "equalize the relative ability of all citizens to affect the outcome of elections," *Buckley*, 424 U.S. at 26, 96 S. Ct. at 638, and to a degree cap campaign costs and increase accessibility to our political system. *Id.* The Court has distinguished between restrictions on contributions and restrictions on independent expenditures and then invalidated spending restrictions while upholding contribution limits. *Id.* at 58-59, 96 S. Ct. at 653-54.

By treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, "secur[ing] a political *quid pro quo* from current and potential office holders." *Id.* at 26-27, 96 S. Ct. at 638. Contribution limits regulate the quantity of political speech, but do not foreclose speech or political association. We do not see this monetary cap as content based; it is rather a consequence of the funding source. We uphold as constitutional, against the Committee's First Amendment challenge, the spending limits in § 441a(d)(3).

We REVERSE and REMAND with instructions that the district court enter judgment in favor of the FEC, and for a determination under 2 U.S.C. § 437g(a)(6) of the appropriate civil penalty.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIV. A. NO. 89 N 1159

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE, ET AL., DEFENDANTS

[Filed: Aug. 30, 1993]

ORDER AND MEMORANDUM OF DECISION

NOTTINGHAM, District Judge.

This case involves alleged violations of the Federal Elections Campaign Act of 1971, as amended, 2 U.S.C.A. §§ 431-456 (West 1985) (the "Act"). Plaintiff Federal Election Commission sued Defendant Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones, claiming that defendants had failed to report a certain payment as an "expenditure," as required by 2 U.S.C.A. § 441a(d)(3). Plaintiff seeks declaratory, civil, and injunctive relief under the Act. The matter comes before the court on (1) "Defendants' Motion for Summary Judgment" filed May 15, 1990, and

(2) "Plaintiff's Motion for Summary Judgment" filed July 6, 1990. Jurisdiction is based on 28 U.S.C.A. § 1345 (West 1976).

FACTS

Defendant Colorado Republican Federal Campaign Committee (the "Committee") is an unincorporated political association. It works to advance the goals and values of the Republican Party in the State of Colorado. (Defs.' Statement of Undisputed Facts and Supp. Exs. ¶1 [filed May 15, 1990] [hereinafter "Defs.' Statement"], *admitted at* Pl. Fed. Election Comm'n's Resp. to Defs.' Statement of Undisputed Facts and Supp. Exs. ¶1 [filed July 6, 1990] [hereinafter "Pl.'s Resp. to Defs.' Statement"].) It is the federally-registered committee for the Republican Party in Colorado and is therefore (as it acknowledges) subject to the Act.

Section 441a(d)(3) of the Act limits the amount which such a committee may expend "in connection with the general election campaign of a candidate for federal office." 2 U.S.C.A. § 441a(d)(3). In 1986, the Committee assigned its yearly right to make expenditures under the Act to the National Republican Senatorial Committee. (Defs.' Statement ¶16, Ex. 4 [Defs.' Resp. to Pl.'s Req. for Admis.], *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶15-16.) The Committee thereafter paid $15,000 for a radio advertisement, entitled "Wirth Facts # 1" [hereinafter "the Advertisement"], the text of which follows:

> Paid for by the Colorado Republican State Central Committee

> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

(Defs.' Statement ¶ 7, *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee devised "Wirth Facts # 1" as a response to a series of television advertisements featuring then-Congressman Wirth. These advertisements were sponsored by the Committee for Tim Wirth, Inc. (Pl. Fed. Election Comm'n's Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. and in Opp'n to Defs.' Summ. J. Mot. at 6 [filed July 6, 1990] [hereinafter "Pl.'s Mot."].) The Advertisement ran between April 4 and 13, 1986, four months before the August Democratic primary and seven months before the November general election. (Defs.' Statement ¶¶ 4-6, admitted at Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee is required by section 434(b)(4)(H)(iv) to make quarterly or monthly reports which must contain any section 441a(d)(3) expenditures. *See* 2 U.S.C.A. § 434(a)(4)(A)(i). In the Committee's quarterly report, it listed the $15,000 paid for the Advertisement as an operating expense—not as a section 441a(d)(3) expenditure—and identified it as

"voter information to Colorado voters—advertising." (Defs.' Statement, Ex. 12 at 3 [Defs.' Br. for Fed. Election Comm'n Proceedings].) On June 12, 1986, the Colorado Democratic Party filed an administrative complaint with the Federal Election Commission ("Commission"), alleging, inter alia, that defendants' expenditure for the Advertisement violated the Act. On January 10, 1989, the Commission determined there was probable cause to believe defendants had violated sections 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f) of the Act. When settlement negotiations failed, the Commission instituted this civil action.

The parties filed cross-motions for summary judgment on plaintiff's claim that defendants failed to comply with the Act. Defendants maintain section 441a(d)(3) does not apply to the money paid for the Advertisement because it was not an expenditure "in connection with" the general election of a candidate for federal office. (Defs.' Mem. in Supp. of Defs.' Mot. for Summ. J. at 6-7 [filed May 15, 1990] [hereinafter "Defs.' Mot."].) Defendants also assert a counterclaim alleging that section 441a(d)(3) is unconstitutional. No material facts are in dispute. Because I find that plaintiff has failed to demonstrate the Advertisement was "in connection with" the general election of a candidate for federal office, I grant defendants' motion for summary judgment and deny plaintiff's motion. I therefore need not, and do not, reach defendants' challenge to section 441a(d)(3)'s constitutionality.

ANALYSIS

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted where there is "no genuine issue as to any material fact and

the . . . moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. *Id.*, 477 U.S. at 321, 106 S. Ct. at 2552. Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. A triable issue of material fact exists only where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir. 1990). If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson*, 477 U.S. at 250, 106 S. Ct. 2511.

Section 441(d)(3) of the Act is at the center of this dispute. It provides:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure *in connection with the general election campaign of a candidate for Fed-*

> *eral office* in a State who is affiliated with such party which exceeds–
>
> > (A) in the case of a candidate for election to the office of Senator . . ., the greater of—
> >
> > > (i) 2 cents multiplied by the voting age population of the State . . .; or
> > >
> > > (ii) $20,000. . . .

2 U.S.C.A. § 441a(d)(3) (emphasis added). Because the Committee assigned the full amount of expenditures permitted by section 441a(d)(3) to the National Republican Senatorial Committee, *see Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39-40, 102 S. Ct. 38, 46, 70 L.Ed.2d 23 (1981) [hereinafter *DSCC*], it no longer had the right to make section 441a(d)(3) expenditures. As a consequence, the Committee's expenditure of $15,000 for the Advertisement, if made "in connection with" the general election campaign, was a violation of the spending limits established by section 441a(d)(3).

Two types of expenditures are regulated under the Act: coordinated and independent. A coordinated expenditure is one made in cooperation with, or with the consent of, a candidate, his agents, or an authorized committee of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 47 n. 53, 96 S. Ct. 612, 647 n. 53, 46 L.Ed.2d 659 (1976). An independent expenditure is one made without the knowledge or permission of a candidate, his agent, or his campaign committee. *Id. See* 2 U.S.C.A. § 431(17). Coordinated expenditures are considered "contributions" under section 441a(a)(7)(B)(i); as such, they may be more freely limited than independent expenditures.

Buckley, 424 U.S. at 48, 96 S. Ct. at 647-48; *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491, 105 S. Ct. 1459, 1466, 84 L.Ed.2d 455 (1985) [hereinafter *NCPAC*]. In *Buckley*, the Court upheld as constitutional the limitations on contributions to candidates and struck down as unconstitutional limitations on independent expenditures. *NCPAC*, 470 U.S. at 491, 105 S. Ct. at 1465. *See also Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260, 107 S. Ct. 616, 630, 93 L.Ed.2d 539 (1986) [hereinafter *MCFL*] ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 194, 196-97, 101 S. Ct. 2712, 2720, 2724-25, 69 L.Ed.2d 567 (1981) (same).

Expenditures by party committees are considered to be coordinated expenditures subject to the monetary limits of section 441a(d). *DSCC*, 454 U.S. at 27 n.1, 102 S. Ct. at 40 n.1.[1] Party committees have been deemed incapable of making independent expenditures in connection with the campaigns of their party's can-

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[1] Defendants point to a passage in *Buckley* which classifies 2 U.S.C.A. § 608(f) (West 1970) (recodified as section 441a[d]) as an "expenditure ceiling," as opposed to a contribution limitation. According to defendants, this reference suggests the Court considered section 441a(d) to regulate independent expenditures. It is unclear how referring to section 441a(d) as an "expenditure" limitation necessarily suggests the section regulates *independent* expenditures. In light of the Court and Commission's other pronouncements, and the fact that this reference is dicta, *see Buckley*, 424 U.S. at 58 n.66-67, 96 S. Ct. at 653 n. 66-67, I do not find this singular reference persuasive.

didates. *DSCC*, 454 U.S. at 27 n. 1, 102 S. Ct. at 40 n. 1. *See also* FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5819 (July 18, 1985); FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984).

The Commission has the "primary and substantial responsibility for administering and enforcing the Act," and has "extensive rulemaking and adjudicative powers." *Buckley*, 424 U.S. at 109-10, 96 S. Ct. at 677-78. When interpreting the Act, the Commission's interpretation is presumptively entitled to deference. *DSCC*, 454 U.S. at 38, 102 S. Ct. at 45. The Commission has, by regulation, forbidden independent expenditures by national and state party committees. *See* 11 C.F.R. § 110.7(B)(4) (1981).

Defendants suggest that because no Republican candidate had been nominated, the expenditure was necessarily "independent," not "coordinated." However, for purposes of determining whether an expenditure is coordinated or independent, it is irrelevant whether a candidate has been nominated at the time the expenditure is made. *See* FEC Advisory Opinion 1984-15, 1 Fed.Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984). "[N]othing in the Act, its legislative history, Commission regulations, or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election." *Id.* Organizations whose major purpose is the nomination or election of a candidate "are, by definition, campaign related," *Buckley*, 424 U.S. at 80, 96 S. Ct. at 663, regardless of whether a specific candidate has been nominated. Based on Supreme Court precedent and the Commission's interpre-

tation of the statute, I find that the Committee's expenditure was coordinated. It was made on behalf of the Republican candidate, whomever that might be; and it is irrelevant that no particular person had been designated.

The Committee's expenditure would nevertheless not be subject to section 441a(d)(3) limitations unless the expenditure was made "in connection with" the general election campaign of a candidate for federal office. No controlling or persuasive authority has interpreted the phrase "in connection with" in the context of section 441a(d)(3). The Court, however, has interpreted the phrase "in connection with" in the context of section 441b, which, like section 441a(d)(3), regulates contributions and expenditures. In *MCFL*, the Court held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249, 107 S. Ct. at 623. *See also Buckley*, 424 U.S. at 80, 96 S. Ct. at 663. "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *See Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S. Ct. 2499, 2504, 110 L.Ed.2d 438 (1990); *Sorenson v. Secretary of Treasury of the United States*, 475 U.S. 851, 860, 106 S. Ct. 1600, 1606, 89 L.Ed.2d 855 (1986); *Barnson v. United States*, 816 F.2d 549 (10th Cir.), *cert. denied*, 484 U.S. 896, 108 S. Ct. 229, 98 L.Ed.2d 188 (1987) (when the same words are used in different sections of the same law, they will be given the same meaning).

This rule of statutory construction is usually followed where different parts of the same act have a similar purpose, as do sections 441a(d)(3) and 441b. Both sec-

tions 441a(d)(3) and 441b are intended to regulate contributions and expenditures of multi-person organizations. While section 441a(d) regulates expenditures by national committees, state committees, or subordinate committees of the state committees, section 441b regulates expenditures by national banks, corporations, or labor organizations. Since I examine the statute as a whole, I find the Court's interpretation of "in connection with" in the context of section 441b to be persuasive of my interpretation of the same words in section 441a(d)(3).

Plaintiff urges the court to adopt the Commission's interpretation of "in connection with" which would require the Advertisement to contain a "clearly identified candidate" and an "electioneering message." FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin.Guide (CCH) ¶5819 (July 18, 1985). According to plaintiff, section 441b differs significantly from section 441a(d)(3), in that 441b regulates independent expenditures, whereas section 441a(d)(3) regulates coordinated expenditures. Although *Buckley* acknowledges that coordinated expenditures may be more freely regulated than independent expenditures, it does not follow that the identical words, when used with reference to coordinated expenditures, should be given a more expansive interpretation.

The Supreme Court's decision in *Buckley* suggests just the opposite. When examining the intrusiveness of the statute's regulations on first amendment freedoms, the Court found that a limitation on coordinated expenditures was justified in order to stem "the reality or appearance of corruption in the electoral process." *Buckley*, 424 U.S. at 46, 96 S. Ct. at 647-48. Although

the Court found the justification for regulating coordinated expenditures outweighed the infringement on the First Amendment, this conclusion does not create a carte blanche for expansive regulation of coordinated expenditures. On the contrary, the fact that section 441a(d)(3) implicates first amendment freedoms argues for adoption of the more narrowly defined "express advocacy" interpretation in order to minimize intrusions.[2] Moreover, as *Buckley* notes, the limitation on contributions by state political committees, "[r]ather than undermining freedom of association, . . . enhances the opportunity of bona fide groups to participate in the election process." *Buckley*, 424 U.S. at 33, 96 S. Ct. at 642. Given that the effect of the regulation is to enhance the political freedom of committees, I find that the "express advocacy" standard, which is a less intrusive limitation on a committee's freedom, is consistent with the Act's purpose. I do not find any compelling justification within the Commission's advisory opinion, nor in plaintiff's argument, for expanding *Buckley*'s carefully circumscribed exception to its prohibition against regulation of freedom of speech.

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[2] A narrow interpretation of the words "in connection with" also addresses the constitutional concerns raised by defendants. Defendants contend that if all expenditures by state committees were deemed contributions subject to section 441a(d)(3), then they would not be free to speak in favor of their candidates. (Defs.' Mem. in Opp'n to Pl.'s Mot. for Summ. J. and in Reply to Pl.'s Opp'n to Defs.' Mot. for Summ. J. at 4 [filed July 25, 1990] [hereinafter "Defs.' Reply"].) By adopting a more narrowly defined interpretation of "in connection with," state political committees remain free to engage in speech which does not expressly advocate the election of its candidates.

The Commission does not point to any other section of the statute where the courts have given the language "in connection with" the expansive interpretation the Commission advocates in this case. In fact, the courts have consistently interpreted "in connection with" as requiring "express advocacy." *See Federal Election Comm'n v. Furgatch*, 807 F.2d 857, 864 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S. Ct. 151, 98 L.Ed.2d 106 (1987); *Federal Election Comm'n v. Central Long Island Tax Reform*, 616 F.2d 45, 53 (2nd Cir. 1980).[3] In *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986), the Commission itself advocated the adoption of the "express advocacy" interpretation of "in connection with" in the context of section 441b(a). In adopting the Commission's interpretation, the D.C. Circuit noted:

> [T]he FEC's interpretation is consistent with *Buckley*, in which the Supreme Court held that under the first amendment, the phrases "for the

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[3] In *United States v. International Union UAW-CIO*, 352 U.S. 567, 587, 77 S. Ct. 529, 550, 1 L.Ed.2d 563 (1957), the Court interpreted "in connection with" in the context of a predecessor to the current Act, which prohibited corporate or union contributions or expenditures to be used "in connection with" any election for federal office. *Id.*, 352 U.S. at 568, 77 S. Ct. at 530. The Court held that the "in connection with" found in the statute was understood to proscribe "the expenditure of union dues to pay for commercial broadcasts that are designed to urge the public to elect a certain candidate or party." *Id.*, 352 U.S. at 587, 77 S. Ct. at 550. It is unclear from this language whether the Court was adopting a different interpretation of "in connection with" or merely applying the "express advocacy" standard. Plaintiff does not explain how this language differs materially from the "express advocacy" standard. Since no court has subsequently adopted the language used in *International Union UAW-CIO*, I decline to do so in this case.

> purposes of influencing any election" and "in connection with any election" must be defined as the "express advoca[cy] [of] the election or defeat of a clearly-identifiable candidate," a definition that was subsequently incorporated into the Act. *See* 2 U.S.C. § 431(17). To be sure, the Court limited these definitions to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions, *see Buckley*, 424 U.S. at 78-80, 96 S. Ct. at 663-64. Nonetheless the fact that the Court in *Buckley* formulated these definitions for this statutory language demonstrates that the FEC's similar interpretation of the same language is logical, reasonable, and consistent with the overall statutory framework. *The fact that the FEC adopted this interpretation for all relevant statutory provisions, even where not constitutionally required, only adds to its reasonableness for it enhances the consistency and evenhandedness with which the FEC ultimately administers the Act.*

Orloski, 795 F.2d at 166-67 (emphasis added). *See also* FEC Advisory Opinion 1978-46, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5348 (Oct. 5, 1978) (suggesting that section 441a(d) requires "express advocacy").

The "thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *DSCC*, 454 U.S. at 35, 102 S. Ct. at 44; *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5, 98 S. Ct. 566, 573 n.5, 54 L.Ed.2d 538 (1978). I do not find the Commission's suggested interpretation of "in connection with" to be entitled to deference where it is

neither thorough nor consistent with either its own previous rulings or the courts' holdings. I conclude that "express advocacy" is required in order for a coordinated expenditure to be "in connection with" the general election campaign of a candidate for federal office under section 441a(d)(3).

Having made this determination, I must decide whether the Advertisement constituted "express advocacy." The Court has adopted a bright-line test for identifying speech which constitutes "express advocacy," recognizing that:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42, 96 S. Ct. at 645. *See Furgatch*, 807 F.2d at 860; *Federal Election Comm'n v. National Organization for Women*, 713 F. Supp. 428, 432 (D.D.C. 1989). The Court defined "express advocacy" as "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' or 'reject.'" *Buckley*, 424 U.S. at 46 n.52, 96 S. Ct. at 647 n.52. Speech is "advocacy" if it "presents a clear plea for specific action, and . . . it must be clear what action is advocated." *Furgatch*, 807 F.2d at 864. Speech which is merely informative would not be considered "advocacy." *Id.* When determining whether speech constitutes "ex-

press advocacy," the focus is on the actual wording used. *Buckley*, 424 U.S. at 42, 96 S. Ct. at 646.

The Advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests, the Advertisement contains an indirect plea for action. The Advertisement concludes with "Tim Wirth has the right to run for the Senate, but he doesn't have the right to change the facts." Even assuming the Advertisement indirectly discourages voters from supporting Wirth, it does not contain the direct plea for specific action required by *Buckley* and *Furgatch.*

According to plaintiff, the surrounding circumstances suggest the Advertisement was, in fact, a plea for action. The Advertisement identified Wirth by name and position, referred to his senate candidacy, responded to Wirth's own campaign advertisements, and said "paid for by the Colorado Republican State Central Committee." (Pl.'s Mot. at 15.) At the time the Advertisement ran, plaintiff maintains, Wirth was the only credible announced Democratic candidate for Senate. *Id.* In addition, the public "knew" the sponsor of the Advertisement, *i.e.*, the Republican party, would eventually nominate a candidate. Thus, the Advertisement implicitly urged the public both to vote against Wirth and to support whomever the Republican candidate would be. Plaintiff also points to contemporaneous press statements of Howard "Bo" Callaway, then Chairman of the Colorado Republican Party, concerning the state committee's general purpose which allegedly leave "no doubt that the intent of the ad was to attack Mr. Wirth's candidacy for the Senate." (Pl.'s Mot. at 10-11, 17-18.)

I do not believe this type of indirect urging constitutes "express advocacy" under the *Buckley* analysis. *Buckley* adopted a bright-line test that expenditures must "in express terms advocate the election or defeat of a candidate" in order to be subject to limitation. *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 471 (1st Cir. 1991). In adopting a bright-line approach, the Court noted the difficulty in interpreting the meaning and effects of words:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43, 96 S. Ct. at 646 (quoting *Thomas v. Collins*, 323 U.S. 516, 535, 65 S. Ct. 315, 325, 89 L.Ed. 430 [1945]). In adopting the "express advocacy" standard, the Court sought to protect issue advocacy. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential. . . . Discussion of public issues and debate on the quali-

fications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14-15, 96 S. Ct. at 632. Trying to determine whether the surrounding circumstances, coupled with the implications of the Advertisement, constitute "express advocacy" leads to the type of semantic dilemma which the Court sought to avoid by adopting a bright-line rule. I decline to blur *Buckley*'s bright-line rule by interpreting the Advertisement's criticism of Wirth as "express advocacy." Viewing the facts in the light most favorable to plaintiff, I find that the Advertisement does not call for the type of "express advocacy" required by *Buckley*. Because I conclude that no reasonable trier of fact could find for plaintiff on the basis of the evidence presented, defendants are entitled to summary judgment as a matter of law. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

With regard to plaintiff's motion for summary judgment, the analysis of whether the Advertisement constitutes "express advocacy" is the same. Defendants allege that the Advertisement neither contains a direct plea for action, nor conveys support for a particular candidate. According to defendants, the Advertisement simply informed the public about the political record of an incumbent Colorado congressman; it did not advocate voting for or against any political candidate. (Defs.' Mot. at 7.) In addition, the Advertisement was broadcast seven months before the general election—before either party had chosen its candidate. (Defs.' Reply at 10.) Defendants claim Wirth's senate candidacy was referenced in the Advertisement only for the purpose of identifying his statements. (Defs.'

Reply at 9.) Plaintiff fails to adequately rebut these claims. Accordingly, plaintiff's motion for summary judgment is denied.

Conclusion

Because I find that the expenditure for the Advertisement was not "in connection with" the general election of a candidate for federal office, it was not subject to section 441a(d)(3) limitations and did not violate the Act. Since I am able to resolve the dispute on statutory grounds, I do not reach defendants' challenge to the constitutionality of section 441a(d)(3). Defendants cannot avoid this result by posturing the constitutional issue as an independent counterclaim. It is therefore

ORDERED as follows:

(1) Plaintiff's motion for summary judgment is DENIED; and

(2) Defendants' motion for summary judgment is GRANTED. All claims against defendants are dismissed. Defendants' counterclaim is DISMISSED as moot.