No. 00-191

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE COMMON CAUSE AND DEMOCRACY 21 IN SUPPORT OF PETITIONER

DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY
Suite 1000
1250 I Street, N.W.
Washington, D.C. 20005
(202) 682-0240

FRED WERTHEIMER
DEMOCRACY 21
Suite 400
1825 I Street, N.W.
Washington, D.C. 20006
(202) 429-2008

ROGER M. WITTEN
Counsel of Record
DANIEL H. SQUIRE
MICHAEL PLOTNICK
LOWRY A. CROOK
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae Common Cause and Democracy 21

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INTEREST OF AMICI CURIAE

Common Cause and Democracy 21 submit this brief amicus curiae with the consent of the parties.[1]

[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, amici state that this brief in its entirety was drafted by amici curiae and their counsel. No one other than Common Cause and Democracy 21, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

Common Cause is a non-profit membership organization with more than 175,000 members nationwide. Common Cause promotes, on a non-partisan basis, its members' interest in open, honest, and accountable government and political representation, and seeks to achieve this objective by making government more responsive to citizens through government and election reform. Common Cause has participated as a party or amicus curiae in numerous Supreme Court and lower court cases concerning the constitutionality and implementation of federal and state election laws.

Democracy 21 is a non-profit, non-partisan public policy organization that favors campaign finance laws to prevent the undue influence of money in American politics and to protect the integrity of the electoral and governmental decision making process. Democracy 21 has researched the relationship between money, power, and influence in the American political process, and has participated as an amicus curiae in litigation involving the constitutionality and implementation of campaign finance laws.

STATEMENT OF THE CASE

The Tenth Circuit affirmed a district court ruling invalidating part of an Act of Congress — limits in the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.* ("FECA"), on the amount a political party may spend in coordination with the election campaigns of Senate and House candidates. The relevant statutory provisions are:

- Section 441a(d), which limits the amount political parties and their committees may spend for and on behalf of the party's candidates in connection with a federal election. The statute provides uniform dollar limits for House races (currently $67,560 in states with only one congressional district, and $33,780 in all other districts) and variable limits for Senate races based on the voting age population in each state (the limits currently range from $67,560 in the least-populated states to $1,636,438 in California). 2 U.S.C. § 441a(d)(3).[2]

- Section 441a(d) works in tandem with three other FECA provisions that cap the amount individuals may give directly to candidates' campaigns, to political party committees, and to all recipients on an aggregate basis. Section 441a(a)(1)(A) limits the amount individuals may give to a candidate's campaign to $1,000 for the primary election and $1,000 for the general election. Section 441a(a)(1)(B) imposes a limit of $20,000 per calendar year on individual contributions to national party committees. Section 441a(a)(3) places an aggregate limit of $25,000 per calendar year on individual contributions.

- FECA also provides that a direct expenditure by a person that is coordinated with a candidate must be considered a contribution by the spender to the candidate. 2 U.S.C. § 441a(a)(7)(B)(i). Specifically, if a person spends funds "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate," that "expenditure" is deemed a "contribution" by the person to the candidate. *Id.*

SUMMARY OF ARGUMENT

The Tenth Circuit's holding that Section 441a(d) violates the First Amendment is inconsistent with controlling precedent giving Congress considerable leeway to set contribution limits where Congress aimed to control actual or apparent corruption by private monied interests. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Nixon v. Shrink Missouri Gov't*

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[2] *See* FEC Press Release (Mar. 1, 2000), *available at* http://www.fec.gov/press/441ad2000.htm.

PAC, 120 S. Ct. 897, *on remand sub nom. Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838 (8th Cir. 2000). Because Section 441a(d)'s limits on *coordinated* party expenditures are effectively contribution limits, they are subject to less exacting judicial scrutiny than limits on independent expenditures. *See Shrink Missouri*, 120 S. Ct. at 904-05.

Congress enacted Section 441a(d) as part of an integrated statutory scheme designed to combat corruption by private monied interests, or its corrosive appearance, in federal elections. Section 441a(d) accomplishes this accepted objective by curtailing the ability of private monied interests who make large contributions to a party to use the party and its beholden officials as agents to obtain political favors. Section 441a(d) also prophylactically combats corruption by deterring evasion of the statutory limits on direct contributions to candidates by individuals and PACs. The risks of corruption that Section 441a(d) curtails are precisely the risks associated with contributions by private monied interests to candidates and parties that this Court has consistently recognized as sufficient to justify reasonable limits on contributions and their equivalent, coordinated expenditures. *See Shrink Missouri*, 120 S. Ct. at 906-08; *Buckley*, 424 U.S. at 25-27. The defense of Section 441a(d) does not, in our view, turn at all on any showing that political parties acting independently of their contributors can corrupt party candidates.

Section 441a(d) is closely drawn to accomplish its objectives in that it minimally burdens First Amendment rights. As demonstrated by the record-shattering political spending that occurred in this year's elections, Section 441a(d) leaves political parties with ample opportunities to support and communicate on behalf of their candidates on a coordinated basis. Moreover, under this Court's decision in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 ("*Colorado I*"), *on remand*, 96 F.3d 471 (10th Cir. 1996), *on remand*, 41 F. Supp. 2d 1197 (D. Colo. 1999),

aff'd, 213 F.3d 1221 (10th Cir.), *cert. granted*, 121 S. Ct. 296 (2000), parties are free to make unlimited independent expenditures on behalf of their candidates. There is no evidence in the record suggesting that Section 441a(d) has demonstrably restricted the ability of candidates to raise and expend sufficient funds to communicate their positions.

In enacting Section 441a(d), Congress, using its expert judgment, struck a balance between combating corruption and enhancing the role of political parties in the electoral process. In striking down Section 441a(d), the Tenth Circuit inappropriately substituted its judgment for that of Congress. *See Shrink Missouri*, 120 S. Ct. at 906 n.5, 912; *FEC v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1233 (10th Cir.) (Seymour, C.J., dissenting), *cert. granted*, 121 S. Ct. 296 (2000); *see also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982); *Buckley*, 424 U.S. at 29-30.

ARGUMENT

I. SINCE THIS COURT PROPERLY CONSIDERS COORDINATED EXPENDITURES TO BE "CONTRIBUTIONS," SECTION 441A(D)'S LIMIT ON COORDINATED SPENDING REQUIRES LESS COMPELLING JUSTIFICATION THAN RESTRICTIONS ON INDEPENDENT SPENDING.

Congress in enacting FECA determined that when a person coordinates a political expenditure with a candidate, that expenditure is the practical equivalent of, and therefore constitutes, a "contribution" subject to FECA's limits. *See* 2 U.S.C. § 441a(a)(7)(B)(i). This Court has in a variety of contexts accepted that determination.

In *Buckley*, the Court found that Congress had in FECA characterized "controlled or coordinated expenditures" as "contributions rather than expenditures." *Buckley*, 424 U.S.

at 46.[3] The Court endorsed Congress's reasoning: to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47; *see id.* at 46 n.53.[4] The Court later held that expenditures that political action committees (PACs) coordinate with political candidates are also properly deemed "contributions" to the candidates under FECA. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 492 (1985).

Still later, in *Colorado I*, the Court cited the portions of *Buckley* just discussed when it described the "*contribution* limits" it had previously found constitutional as "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.*" *Colorado I*, 518 U.S. at 610 (emphasis added). Pointing to the difference that coordination makes in the constitutional analysis, the Court in *Colorado I* emphasized that "lack of coordination between the candidate and the source of the expenditure" was "*the constitutionally significant fact*" in its decision. *Id.* at 617 (emphasis added).

In accordance with Congress's determination and this Court's decisions, the court below correctly treated coordinated party expenditures as contributions for purposes of its constitutional analysis. *See Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1226-27 ("Since FECA treats

[3] The Court in *Buckley* analyzed Section 608(c)(2)(B) of FECA, which was subsequently replaced by the analogous provision at issue here, 2 U.S.C. § 441a(a)(7)(B)(i).

[4] Likewise, in the context of upholding FECA's limits on volunteers' incidental expenses, the Court found that "[t]he expenditure of resources at the candidate's direction . . . provides material financial assistance to a candidate. The ultimate effect is the same as if the person had contributed the dollar amount to the candidate." *Buckley*, 424 U.S. at 36-37.

coordinated expenditures as 'contributions,' and the Court has recognized this statutory classification, we apply the foregoing standard [for contributions] to our review of the Party Expenditure Provision.") (citations omitted), *cert. granted*, 121 S. Ct. 296 (2000). That portion of the Tenth Circuit's decision should be upheld.

This Court has consistently ruled that contribution limits do not impose a significant burden on political communication. In *Buckley*, the Court reasoned that the communicative quality of a contribution rests with the symbolic act of contributing and not with the amount of the contribution. *Buckley*, 424 U.S. at 21. On this basis, the Court held that "[a] limitation on the amount of money a person may give to a candidate . . . involves little direct restraint on his political communication . . . ." *Id.*; *see also Colorado I*, 518 U.S. at 615 (reiterating that "restrictions on contributions impose 'only a marginal restriction upon the contributor's ability to engage in free communication'") (quoting *Buckley*, 424 U.S. at 20-21). Recently, the Court explained that *Buckley* "thus said, in effect, that limiting contributions left communication significantly unimpaired." *Shrink Missouri*, 120 S. Ct. at 904.

Accordingly, the Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986). And it has "been plain ever since *Buckley* that contribution limits would more readily clear the hurdles before them." *Shrink Missouri*, 120 S. Ct. at 904. The Court summarized this jurisprudence in *Shrink Missouri*:

> [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]."

Id. (quoting *Buckley*, 424 U.S. at 25, 30) (internal citations omitted). Since coordinated spending is properly treated as a contribution under FECA and this Court's decisions, the Court should apply the *Shrink Missouri* standard in determining the constitutionality of Section 441a(d)'s limit on coordinated party expenditures.

II. SECTION 441A(D) SERVES A CONSTITUTIONALLY SUFFICIENT GOVERNMENTAL INTEREST — COMBATING ACTUAL AND APPARENT CORRUPTION BY PRIVATE MONIED INTERESTS.

Congress enacted Section 441a(d) as part of an integrated statutory scheme to further the government's legitimate interest in combating actual and apparent corruption by private monied interests in connection with federal elections. *Buckley* held that Congress has a constitutionally sufficient interest in regulating campaign contributions and coordinated expenditures. *See* 424 U.S. at 25-26; *see also Colorado I*, 518 U.S. at 609. The Court recognized the significant danger that large private interests can secure political quid pro quos from candidates through large campaign contributions. *See Buckley*, 424 U.S. at 25-26. "Of almost equal concern . . . [was] the impact of the appearance of corruption stemming from the public awareness of the opportunities for abuse inherent in a regime" influenced by private interests. *See Buckley*, 424 U.S. at 27 ("Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . .") (internal quotations omitted). The Court found these dangers to be both grave and "inherent in a system permitting unlimited financial contributions." *Id.* at 28.

The Court revalidated these conclusions in *Shrink Missouri*: "Leave the perception of impropriety unanswered,

and the cynical assumption that donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Shrink Missouri*, 120 S. Ct. at 906. The Court concluded that "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.

Section 441a(d) works to curtail actual and apparent corruption in two ways. First, it curtails the ability of private interests who make contributions to party committees from using those party committees and their beholden officials as their agents to obtain political favors from candidates or officeholders. Second, it curbs evasion of the $1,000 limit on individual contributions and the $5,000 limit on PAC contributions to candidates: political parties are restrained from using coordinated expenditures to launder $20,000 donations from individuals or $15,000 donations from PACs into contributions to candidates that are well in excess of the individual or PAC contribution limits. Section 441a(d) thus addresses the long-acknowledged risks associated with private contributions to candidates. *See Shrink Missouri*, 120 S. Ct. at 905-07.

Section 441a(d) achieves these objectives only imperfectly, to be sure. Other measures, such as a reduction in the $20,000 cap on contributions to party committees, also could be implemented to help achieve Congress's objectives. But Congress was trying to and — using its uniquely expert judgment in this field, *see Shrink Missouri*, 120 S. Ct. at 906 n.5, 912 (Breyer, J., concurring) — did strike a balance in Section 441a(d) between two objectives that were somewhat in tension — enhancing the role of parties and curbing the corrosive influence of private money. While the result may not be the perfect antidote to corruption, courts should not substitute their judgment for that of an expert legislature. "[D]etermining 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." *Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1239 (Seymour, C.J., dissenting).

A. Section 441a(d) Helps Prevent Large Contributors from Obtaining Political Favors by Using Political Parties as Their Agents.

Section 441a(d) serves the legitimate purpose of reducing the extent to which private interests use the political parties and their officials as intermediaries to obtain access to and favored treatment from party candidates. Some private interests make contributions to political parties to influence party candidates and officeholders. Such contributions can and do lead to the actual and apparent corruption that Congress has sought to combat. By limiting a party's ability to pass potentially corrupting contributions through to candidates, Section 441a(d) curtails to a useful degree the ability of private donors to extract political quid pro quos from a candidate by contributing to the candidate's party and, concomitantly, it dispels the corrosive appearance that party donations buy candidate fealty.

Historical and experiential evidence supports the common-sense proposition that private interests attempt to corrupt the electoral process by using political party personnel as agents to seek political favors from the party's candidates or officeholders in exchange for contributions to the party.[5]

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[5] As early as 1924, one Senate leader explained 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.

United States v. United Auto. Workers, 352 U.S. 567, 576-77 (1957) (quoting 65 Cong. Rec. 9507-08 (1924) (statement of Sen. Robinson)).

- Recently, a California businessman named Johnny Chung admitted that he made contributions to the Democratic National Committee (DNC) with the understanding that he would receive, through the party, access to various politicians, including the President. In an interview, Mr. Chung answered:

  > [Q:] And when you began to give money to the DNC, did it make it a lot easier for you to get into the White House?
  >
  > [A:] It will be more easier to do it that way, or I believe if I don't do it, I won't even have a meeting occur.

  (Joint Appendix in 10th Circuit (J.A.) at 275-76.)

- In 1995, the DNC attempted to use the White House to influence an Interior Department decision on behalf of large contributors to the DNC. After meeting with Indian tribe representatives who were making large donations to the party, a senior DNC official called a senior member of the White House staff in an effort to persuade the White House to press the Department of Interior to issue a ruling on a casino license application that favored the Indian tribes. S. Rep. No. 105-167, at 44-46 (1998).

- Also during the mid-1990s, one Roger Tamraz, who was attempting to secure government "backing for his oil pipeline project in the Caucasus," gave large donations to the DNC, concededly for the purpose

of securing access to and support from high ranking executive branch officials. The DNC Chairman allegedly intervened on Tamraz's behalf "in a series of *highly* inappropriate contacts with CIA officials." *Id.* at 43.

- More generally, former Senator Timothy Wirth testified in this case that, throughout his time as a Senator, party officials approached him on behalf of party contributors who sought access to him so that they could press their legislative agenda. (J.A. at 545.)

- Likewise, the record reflects that, throughout the 1980s and early 1990s, as a direct result of contributions to the Democratic Senatorial Campaign Committee (DSCC), party officials often contacted Senate personnel to arrange meetings with Senators on specific topics important to the donors. (J.A. at 453-54.)

These particular examples evidence the general, common-sense point that private interests who have made large contributions to political parties try to use those parties and their officials as agents in efforts to obtain political favors from candidates and officeholders. Some of these examples happen to involve "soft money" contributions which are not regulated by Section 441a(d). Those examples nevertheless illustrate the actual and potential abuses that inherently arise from contributions to political parties. It was Congress's judgment that Section 441a(d) is a useful (albeit incomplete) prophylactic device to curb such abuses, while at the same time permitting activities that enhance the role of parties in our democracy.

These examples, as well as others in the record, validate Congress's judgment that such corruption exists and needs to be remedied:

> 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.

Shrink Missouri, 120 S. Ct. at 906.[6]

Congress's decision to allow individuals to contribute up to $20,000 to national party committees does not reflect a determination that contributions to parties of that magnitude are free from the seeds of actual or apparent political corruption. When Congress struck a balance by allowing much larger contributions to parties than to candidates, it did so as part of an integrated statute that included the provision the Tenth Circuit struck down — Section 441a(d). It is that provision that helps to uncouple party candidates from the large contributions party committees receive from private donors — contributions that carry, according to both Congress and this Court, the strong stench of actual and apparent corruption. Therefore, the only proper inference to draw from the relatively high cap Congress placed on contributions to party committees is that Congress made the judgment that a relatively high party contribution limit is tolerable only so long as Section 441a(d) limits the ability of party committees to act as contributors' agents in passing money through to candidates on behalf of donors.

Finally, the constitutionality of Section 441a(d) does not, in our view, turn on any showing that political parties acting independently of their contributors can or do corrupt party

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6 This Court cited to similar anecdotal evidence from various sources, including newspaper articles, in upholding Missouri's limits on individual contributions to candidates. *See Shrink Missouri*, 120 S. Ct. at 907.

candidates. The issue therefore is not whether there are any "special dangers of corruption associated with political parties" themselves. *See Colorado I*, 518 U.S. at 616, 618. Section 441a(d) is fully consistent with the view that political parties play a critical role in our democracy. Indications in FECA's legislative history that Congress sought, among other objectives, to enhance the role of parties do not, therefore, undermine the conclusion that Section 441a(d) passes constitutional muster.

B. Section 441a(d) Also Deters Evasion of the Constitutional Limits on Direct Private Contributions to Candidates.

In addition, Section 441a(d) is a vital part of Congress's integrated statutory attack on corruption, because it prophylactically deters individual donors, PACs, and candidates from evading other limits whose constitutionality is beyond doubt — the $1,000 limit on individual contributions to candidates, and the $5,000 limitation on PAC donations. *See Buckley*, 424 U.S. at 26-35 ("It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation."). If there were no limit on the amount parties could spend in coordination with their candidates, those candidates would have an unlimited incentive to advise contributors who had already given the statutory maximum to give an additional $40,000 over the course of two years in a House race (or $120,000 over six years for Senators) to the party's committee, which could use all of that money to support that candidate's campaign.

Congress correctly concluded that this type of evasion will occur in the absence of limits on coordinated party expenditures. Indeed, the evasion of individual limits already occurs to some extent. Candidates ask special interest donors

who have "maxed out" on direct contributions they may legally give to the candidate to give additional sums to the candidate's party, with the understanding that the party will spend the funds on behalf of the candidate.

One disturbing example is the DSCC's system of "tallying" in which contributors may ask that their donations be "tallied" to a certain Senator's "tally account." *See* Ruth Marcus, *Contributors 'Tally' Up, Around Limits*, Wash. Post, Oct. 9, 1996, at A1. As the DSCC decides how much to spend on various Senate races, it considers how much each Senate candidate has in his or her "tally account." *Id.* The Senate candidates often believe that the amount in the tally account is money they can spend on their campaign. For example, a Texas Senate candidate, when asked how much his campaign had to spend, included in his answer "some tally money of about $150,000. . . . that, you know, people have tallied in my name to the DSCC." *Id.*

Additional examples demonstrate the evasion of the rules that is possible through the tally system. One Senator actively solicited money from a union's PAC even though it had already contributed the maximum under the law to the Senator. At the request of the Senator and his fundraisers, the PAC donated an additional $14,250 to the DSCC, asking the party to "tally" the funds for the Senator. Greg Gordon, Tom Hamburger & Chadwin Thomas, *The Politics of Money*, Star Trib., Nov. 2, 1996, at 1A. Thus, candidates themselves may raise funds for the party committees with the tacit understanding and expectation that the contributions will be passed through to the candidate.[7]

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[7] Although Section 441a(a)(8) deems a contribution to a party earmarked to a specific candidate as a contribution to the candidate himself, that provision is not sufficient to prevent the evasion of lawful limits by the "tally" system. Under the "tally" system, contributions are made which, while not technically earmarked to a candidate under Section 441a(a)(8), are effectively earmarked to the candidate, and as

Such evasion would be greatly exacerbated if Section 441a(d)'s limits on coordinated expenditures were struck down. Without those limits, the parties essentially could give any "tallied" (or otherwise implicitly earmarked) funds from an unlimited number of donors to House and Senate candidates. In a de facto sense, the $1,000 individual contribution limit to candidates would be increased by $40,000 for House races or by $120,000 for Senate races, by allowing an individual's annual $20,000 contribution to a party to be effectively passed through to a candidate. PAC contribution limits would be similarly increased by $15,000 per year (in addition to the $5,000 limit on PAC contributions to candidates).

This Court has consistently upheld congressional measures designed to curb evasion of contribution limits the Court has sustained. In *Buckley*, the Court upheld FECA's annual aggregate $25,000 limit on an individual's contributions, because it is "a corollary of the basic individual contribution limitation." 424 U.S. at 38. The aggregate limit is necessary to prevent evasion of the annual $1,000 limit "by a person who might otherwise contribute massive amounts of money to a particular candidate through use of unearmarked contributions to political committees likely to contribute to that candidate, *or huge contributions to the candidate's political party*." *Id.* (emphasis added). Likewise, in upholding FECA's $5,000 limit on individual contributions to multicandidate political committees, the Court stated that "an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee." *California Med. Ass'n v. FEC*, 453 U.S. 182, 198 (1981) (plurality).

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demonstrated above, the candidate often expects that such money will be spent on his campaign.

III. SECTION 441A(D) IS CLOSELY DRAWN TO SERVE CONGRESS'S ANTI-CORRUPTION INTEREST.

This Court's jurisprudence establishes that the anti-corruption goals served by Section 441a(d) justify the imposition of the type of restriction at issue here. *See Shrink Missouri*, 120 S. Ct. at 904-05; *Buckley*, 424 U.S. at 26-27; *National Right to Work Comm.*, 459 U.S. at 207-210; *California Med. Ass'n*, 453 U.S. at 197-98. The statute sweeps no more broadly than justified by the important interests it serves.

A. Section 441a(d) Leaves Political Parties Ample Avenues To Communicate Support for or Opposition to Candidates.

Section 441a(d)'s limit on coordinated spending does not impose a burden on political parties' communication that is any more significant than the marginal burden imposed on individual or PAC expression that results from the contribution limits that were at issue in *Buckley* and *Shrink Missouri*. There is no evidence in the record or in experience suggesting that Section 441a(d) "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. To the contrary, political parties have numerous, wide avenues for advocating for or against political candidates or positions, particularly after this Court's holding in *Colorado I* that parties may make unlimited independent expenditures for or against candidates.

Section 441a(d) allows parties to engage in a considerable amount of coordinated spending with their

candidates.[8] The district court noted that the Democratic and Republican parties together made over $35 million in coordinated expenditures in 1996. *See FEC v. Colorado Republican Fed. Campaign Comm.*, 41 F. Supp. 2d 1197, 1200 n.4 (D. Colo. 1999), *aff'd*, 213 F.3d 1221 (10th Cir.), *cert. granted*, 121 S. Ct. 296 (2000).[9] In the year 2000, Section 441a(d) allowed party state and national committees to make coordinated expenditures for each of their Senate candidates that range from $67,560 (in Delaware) to more than $1.6 million (in California), depending on a state's voting-age population.[10] State party committees often authorize national party committees to make their expenditures, effectively doubling the amounts national parties may lawfully spend.

Furthermore, after *Colorado I*, political parties may make unlimited independent expenditures to advocate the election of their chosen candidates. As the FEC pointed out in its 10th Circuit brief, in 1996, the first election cycle in which these party expenditures were permitted, the National Republican Senatorial Committee reported making $9,734,445 in independent expenditures, and the DSCC reported making $1,386,022 in independent expenditures. (FEC 10th Cir. Br. at 9.) In light of these ample opportunities for expression, it cannot seriously be contended that Section 441a(d) prevents parties from

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[8] In addition, the parties may make direct contributions to their candidates. For example, party national committees may contribute up to $17,500 directly to each Senatorial candidate. *See* 2 U.S.C. § 441a(h).

[9] The FEC's 10th Circuit brief asserted that in 1996 the Republican party committees spent a combined total of $30,959,151, and the Democratic party committees spent $22,576,000, on coordinated expenditures. (FEC 10th Cir. Br. at 8.)

[10] *See* FEC Press Release (Mar. 1, 2000), *available at* http://www.fec.gov/press/441ad2000.htm. FECA's dollar limit on party committee contributions or coordinated expenditures was $202,000 per Senate candidate in Colorado this year. *See id.*

amassing or spending "the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

Nor has there been any showing on the record that, as a result of Section 441a(d), candidates have trouble accumulating sufficient funds to mount effective campaigns. *See Buckley*, 424 U.S. at 21; *Shrink Missouri*, 120 S. Ct. at 908-09. To the contrary, campaign spending by House and Senate candidates has increased from $99 million in the 1976 election cycle[11] to well over $683 million in the 2000 cycle.[12] Moreover, candidates in particular races have spent ever more staggering sums: much was made of the fact that the Republican and Democratic candidates in the 1994 California Senate race spent a then-record $44.3 million; this year, the Republican and Democratic candidates in the New York Senate race broke that record by spending $59.3 million.[13] And this year, spending in a single California congressional race topped $9.7 million.[14]

Any burden Section 441a(d) may be seen as imposing on the associational rights of parties and candidates seems more theoretical than real. Candidates remain free to join parties, to campaign under their banner, and to coordinate large expenditures with their parties; and parties remain free to make unlimited independent expenditures on behalf of their candidates. This does not rise to a "significant interference" with associational rights. *Shrink Missouri*, 120 S. Ct. at 904

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[11] Common Cause, *Study of Campaign Finance: Fundraising, PAC Giving and Expenditures 1976 through 1994* (Oct. 1995) (based on FEC reports).

[12] *See* FEC Press Release (Nov. 2, 2000), *available at* http://www.fec.gov/press/110200totals.htm.

[13] Common Cause, *98 Percent of House Incumbents Win Reelection In 2000; 23 of 28 Senate Incumbents Reelected; Incumbents Enjoy Huge Fundraising Advantage, According To Common Cause* (Nov. 14, 2000), *available at* http://commoncause.org/publications/nov00/111400wl.htm.

[14] *Id.*

(internal quotations and citation omitted). In *Buckley*, the Court pointed to the same considerations in upholding individual contribution limits:

> The overall effect of the Act's contribution ceilings is merely . . . to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

424 U.S. at 21-22. The same is true of Section 441a(d): it does not affect the total amount of money available for political expression because parties can spend funds above the coordinated expenditure limit on independent expenditures.

In sum, Section 441a(d) does not significantly limit parties' or candidates' political expression or association; rather, it limits only the parties' and candidates' coordination of spending. The provision withstands First Amendment scrutiny because it is closely drawn to focus only on what this Court has called "the constitutionally significant fact" that an expenditure when coordinated with a candidate is transformed. *See Colorado I*, 518 U.S. at 617.

B. The Tenth Circuit Failed To Defer to Congress's Superior Expertise in Identifying and Countering Political Corruption.

The Tenth Circuit impermissibly substituted its own judgment for that of Congress regarding the need for and efficacy of Section 441a(d). That decision flouts this Court's repeated admonition that courts should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Nat'l Right to Work Comm.*, 459 U.S. at 210; *see also Shrink Missouri*, 120 S. Ct. at 906 n.5, 912 ("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 . . . .") (Breyer, J., concurring); *Buckley*, 424 U.S. at 29-30.

The Tenth Circuit overstepped its authority by finding that Section 441a(d) did not serve either the goal of combating direct corruption by private interests who use parties as agents to obtain political favors or of curbing evasion of contribution limits already judged to be constitutional. First, in holding that it would "not validate limits on the protected speech of a political party as a back-door means of stemming corporate involvement in the legislative process," 213 F.3d at 1229, the Tenth Circuit failed appropriately to defer to Congress's determination that such prophylactic measures were useful in curbing actual and apparent corruption by large private contributors who use parties as agents in their efforts to seek influence. As the evidence outlined in the previous section demonstrated, such corruption is a problem that Congress was wise to address.

Second, the Tenth Circuit inappropriately substituted its judgment for that of Congress in holding that Congress sufficiently addressed the evasion problem by enacting Section 441a(a)(8), which provides that earmarked contributions qualify as direct contributions against the individual limit. *See* 213 F.3d at 1232. As Judge Seymour reasoned in dissent, this Court has made clear that it is within Congress's judgment to decide whether measures in addition to Section 441a(a)(8) were necessary to address the evasion problem. *See id.* at 1243 (Seymour, C.J., dissenting); *see also Buckley*, 424 U.S. at 28; *Shrink Missouri*, 120 S. Ct. at 908 n.7. This is especially true where the burden on speech is not the greater burden associated with independent expenditures. *See Colorado I*, 518 U.S. at 617.

To be sure, Section 441a(d) does not go to the extreme necessary to keep the individual limit inviolate — banning all party expenditures that are coordinated with a candidate and

are financed by contributions from individuals who have made contributions to the candidate. That some evasion of the individual limits may occur, however, does not invalidate Congress's efforts to address the problem by enacting reasonable limits on party coordinated expenditures that at the same time take into account Congress's desire to enhance the role of parties in federal elections. *See Buckley*, 424 U.S. at 30 ("Congress' failure to engage in such fine tuning does not invalidate the legislation.").[15]

[15] A decision affirming the Tenth Circuit's ruling also could have grave implications for the public financing system in place for presidential campaigns. Presidential candidates who accept public funding agree not to accept additional contributions, including expenditures by political parties (and others) coordinated with the candidates. *See* Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 *et seq.* (general election); Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031 *et seq.* (primary elections). A ruling by the Court striking down the limits on party coordinated expenditures could threaten the very basis for the system of presidential campaign financing that has been in place for decades.

CONCLUSION

For these reasons, the judgment of the Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY
Suite 1000
1250 I Street, N.W.
Washington, D.C. 20005
(202) 682-0240

FRED WERTHEIMER
DEMOCRACY 21
Suite 400
1825 I Street, N.W.
Washington, D.C. 20006
(202) 429-2008

ROGER M. WITTEN
Counsel of Record
DANIEL H. SQUIRE
MICHAEL PLOTNICK
LOWRY A. CROOK
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae Common Cause and Democracy 21

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