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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a political party has a First Amendment right to make unlimited campaign expenditures in coordination with the party's congressional candidates, notwithstanding the limits on such coordinated expenditures imposed by the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*

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The Solicitor General, on behalf of the Federal Election Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-53a) is reported at 213 F.3d 1221. The opinion of the district court (App. 54a-91a) is reported at 41 F. Supp. 2d 1197. An earlier opinion of this Court in this case (App. 92a-142a) is reported at 518 U.S. 604. An earlier opinion of the court of appeals (App. 143a-162a) is reported at 59 F.3d 1015. An earlier opinion of the district court (App. 163a-180a) is reported at 839 F. Supp. 1448.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 441a(d) of Title 2, United States Code, provides in pertinent part:

> (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; 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.

STATEMENT

1. This case involves the application of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* (FECA or Act), to the campaign spending of political parties. The Act imposes limits on contributions to candidates for federal office. Individuals may contribute no more than $1000 to any federal candidate, and multicandidate political committees no more than $5000, with respect to any election. 2 U.S.C. 441a(a)(1)(A) and (2)(A).

Since its decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court has recognized a "funda-

mental 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." *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (*NCPAC*); see also *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *Nixon* v. *Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 903-904 (2000). In *Buckley*, the Court upheld the FECA's limitations on contributions, finding that they serve a compelling government interest in "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." 424 U.S. at 25; see *id.* at 23-38. The Court struck down the Act's restrictions on independent expenditures, however, reasoning that "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent 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; see *id.* at 39-59.

The instant case involves a category of payments commonly known as "coordinated expenditures," see *Buckley*, 424 U.S. at 46, which involve direct interaction with the candidate (or her agents) but do not involve a transfer of funds to the candidate herself. The FECA defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the

purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or her agents "shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i).[1] See *Buckley*, 424 U.S. at 46 ("expenditures controlled by or coordinated with the candidate and his campaign * * * are treated as contributions rather than expenditures under the Act"); *NCPAC*, 470 U.S. at 492 (coordinated expenditures "are considered 'contributions' under the FECA").

The FECA authorizes the national and state committees of a political party to make coordinated expenditures on behalf of their federal candidates well in excess of the contribution limits that apply to other entities. 2 U.S.C. 441a(d)(1); see H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976) ("but for [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in [Section 441a(a)(1) and (2)]"). In elections for the United States Senate, Section 441a(d) initially authorized each national or state party committee to expend the greater of $20,000 or 2 cents multiplied by the voting age population of the State in which the election is held. 2 U.S.C. 441a(d)(3)(A). That limit is periodically adjusted for inflation. 2 U.S.C. 441a(c). By 1996, the coordinated party expenditure limit for the Senate election in

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[1] "[I]ndependent expenditure[s]," by contrast, are defined as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] 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).

Colorado had increased to approximately $171,000. C.A. App. 332. If a state party committee chooses not to make the coordinated expenditures that Section 441a(d) permits, it may assign its right to do so to a designated agent, such as a national committee of the party. See *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-43 (1981) (*DSCC*).

2. The instant case arises out of an enforcement action filed by petitioner Federal Election Commission (FEC or Commission) against respondent Colorado Republican Federal Campaign Committee.[2] The gravamen of the enforcement action was that respondent's payment for an advertisement attacking the voting record of Tim Wirth—at that time a candidate for the Democratic nomination for United States Senator—was an "expenditure" within the meaning of the FECA. App. 144a-145a, 164a-166a. Under the FEC's interpretation of the statute, that expenditure was conclusively presumed to be coordinated with the Republican Party's candidate for the Senate, on the theory that political party committees were deemed to be "incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates." *DSCC*, 454 U.S. at 28-29 n.1; see App. 105a-106a (518 U.S. at 619-620). Because respondent had previously

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[2] The Commission is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, 437g. Congress has authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437d(a)(6); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

assigned its entire Section 441a(d) coordinated expenditure authority to the National Republican Senatorial Committee, the FEC found probable cause to believe that respondent had violated the FECA limits on coordinated expenditures. App. 147a-148a.

Respondent contested the enforcement action. It also asserted a counterclaim, arguing that Section 441a(d)(3) is facially violative of the First Amendment. The district court dismissed the enforcement action, holding that the payment at issue was not subject to the FECA limits because it was not made "in connection with" any federal election. See App. 166a, 171a-180a. The court declined to address respondent's First Amendment challenge. App. 166a, 180a. The court of appeals reversed, holding that the payment was subject to (and violative of) the FECA cap on party coordinated expenditures, and that the cap was constitutional. App. 143a-144a, 149a-162a.

3. This Court reversed, sustaining respondent's challenge to the FEC's enforcement action while declining to adjudicate respondent's counterclaim. App. 92a-142a (518 U.S. 604 (1996)) (*Colorado I*).

a. Three Justices concluded that the payment in question was properly regarded as an "independent" rather than a "coordinated" expenditure because the Chairman of the Colorado Republican Party had approved the advertisement and had consulted only with party officials. See App. 98a-100a (518 U.S. at 613-614) (Breyer, J., joined by O'Connor and Souter, JJ.). The plurality noted that under *Buckley* restrictions on independent campaign expenditures are presumptively violative of the First Amendment. App. 100a-101a (518 U.S. at 614-615). The plurality found no justification for subjecting political parties to restrictions on independent spending that could not constitutionally be

imposed upon other entities. App. 101a-105a (518 U.S. at 615-619). The plurality rejected the government's contention that expenditures made by a political party in support of its candidates can be conclusively presumed to be coordinated. App. 105a-110a (518 U.S. at 619-623).

The plurality declined to consider the argument, raised in respondent's counterclaim, that the FECA limits on political party expenditures are unconstitutional even as applied to expenditures that are in fact coordinated with the candidate. See App. 110a-114a (518 U.S. at 623-626). The plurality explained that neither the parties' briefs nor the opinions of the lower courts had focused on that question. App. 111a (518 U.S. at 624). It also observed that because many party coordinated expenditures are "virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)," App. 111a (518 U.S. at 624), "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," App. 112a (518 U.S. at 625). In the plurality's view, the difficulty of the constitutional question and the parties' failure to focus on it "provide[d] a reason for this Court to defer consideration of the broader issues until the lower courts have reconsidered the question." App. 113a (518 U.S. at 625).

b. Four Justices would have struck down the FECA limits on party expenditures even as applied to expenditures that are in fact coordinated with the candidate. See App. 114a-119a (518 U.S. at 626-631) (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part);

App. 119a-140a (518 U.S. at 631-648) (Thomas, J., joined in part by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part). Two Justices would have upheld the Commission's enforcement action. App. 140a-142a (518 U.S. at 648-650) (Stevens, J., joined by Ginsburg, J., dissenting).[3]

4. The case was remanded to the district court for further consideration of respondent's counterclaim. On remand, the district court granted respondent's motion for summary judgment and declared the FECA limits on party expenditures unconstitutional. App. 54a-91a. The court stated that "[t]he only permissible purpose for limitations on campaign expenditures is to prevent corruption or the appearance thereof." App. 79a. It concluded that "[g]iven the purpose of political parties in our electoral system, a political party's decision to support a candidate who adheres to the [party's] 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." App. 87a-88a.

5. The court of appeals affirmed. App. 1a-53a.

a. The court of appeals stated that "[f]rom the birth of this republic into the 21st century, political parties

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[3] After this Court's decision in *Colorado I*, the Commission initiated a rulemaking proceeding and sought public comments to consider, *inter alia*, possible criteria for determining when spending by parties is coordinated. See Independent Expenditures and Party Committee Expenditure Limitations, 62 Fed. Reg. 24,367 (1997) (proposing revisions to 11 C.F.R. Pts. 100, 104, 109, 110 (proposed May 5, 1997)). Although that part of the rulemaking had been held in abeyance pending ongoing litigation, the Commission solicited further public comments in December 1999. 64 Fed. Reg. 68,951-68,952, 68,955 (1999). The FEC has not yet proposed a final rule on that subject.

have provided the principal forum for political speech and the principal means of political association." App. 13a. The court concluded that "the premise of [the FEC's] 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." App. 20a. It stated that "[p]olitical parties today represent a broad-based coalition of interests, and there is nothing pernicious about this coalition shaping the views of its candidates. * * * 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." App. 21a-22a (internal quotation marks omitted). The court concluded that the challenged FECA provision "constitutes a significant interference with the First Amendment rights of political parties," App. 24a (internal quotation marks omitted), and that "[t]he FEC has not demonstrated * * * that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process," App. 25a.

b. Chief Judge Seymour dissented. App. 26a-53a. She stated that the panel majority had "create[d] 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." App. 26a-27a. Chief Judge Seymour explained that Section 441a(d) reflected Congress's effort to balance competing interests by "permitting [parties] to make coordinated expenditures on behalf of their federal candidates far in excess of the limits imposed on others," App. 38a, without leaving party expenditures wholly unconstrained. See App. 38a-39a. Chief Judge Seymour concluded that "*[a]s 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. 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." App. 50a (footnote omitted).

REASONS FOR GRANTING THE PETITION

Congress has limited the amounts of money that an individual or political committee may contribute to a candidate for federal office. Congress has expressly provided, moreover, that expenditures made in coordination with the candidate will be treated as contributions. This Court has sustained the FECA's limits on campaign contributions against constitutional attack, and it has approved the application of those limits to coordinated expenditures.

Recognizing the distinctive role that political parties have come to play in our system of government, Congress has authorized party committees to make coordinated expenditures in amounts much greater than the limits that apply to other donors. The court of appeals nevertheless struck down those higher limits, holding that political party committees have a First Amendment right to make *unrestricted* coordinated expenditures in support of candidates for federal office. The court's decision disregards the principle, lying at the core of the FECA, that a federal elected official should not be unduly beholden to a single source of financial support. The court of appeals' ruling sets aside the balance struck by Congress on a matter peculiarly within the legislative competence, and it threatens substantial disruption of the statutory scheme. Review by this Court is therefore warranted.

A. As the dissenting judge in the court of appeals explained, Congress "recognize[d] 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." App. 38a (Seymour, J., dissenting). Congress has declined, however, to provide political parties a complete exemption from the contribution limits that apply to other donors. As the dissenting judge observed, "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." App. 39a (Seymour, C.J., dissenting); see *Nixon* v. *Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 912 (2000) (Breyer, J., concurring) ("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."); cf. *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (*NRWC*) (Congress's "careful legislative adjustment of the federal electoral laws * * * to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference").

The court of appeals struck down the FECA limits on campaign expenditures by political parties, holding that the parties have an unrestricted First Amendment right to spend money in support of, and in coordination with, candidates for federal elective office. In so doing, the court rejected the balance struck by Congress on a question that is peculiarly within the legislative competence. The court of appeals' "exercise of the grave power of annulling an Act of Congress," *United States*

v. *Gainey*, 380 U.S. 63, 65 (1965), warrants review by this Court.[4]

B. The court of appeals' decision has far-reaching consequences. Respondent's counterclaim asserted that "the First Amendment forbids the government to limit [respondent's] coordinated expenditures. The FEC's attempts and intent to impose or enforce any limit on such coordinated expenditures are unconstitutional, unlawful, and void." C.A. App. 28; see *id.* at 29 (requesting "[a] declaratory judgment pursuant to 28 U.S.C. § 2201 that [respondent] has the right to make unlimited expenditures from lawfully received contributions in support of its candidates for federal office, and that any limits that FECA purports to impose are invalid and void."). The district court agreed, entering a declaratory judgment "that the Party Expenditure Provision, 2 U.S.C.A. § 441a(d) (West 1997), is unconstitutional and cannot be enforced against [respondent]." App. 91a. The court of appeals affirmed, holding that "§ 441a(d)(3)'s limit on party spending is not closely drawn to the recognized governmental interest but instead constitutes an unnecessary abridgment of First Amendment freedoms." App. 25a-26a (internal quotation marks omitted). Thus, the effect of the court of appeals' decision is that respondent's coordinated expenditures in support of candidates for federal office are subject to no FECA limitation whatever.

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[4] In 1988 Congress eliminated most of this Court's mandatory appellate jurisdiction. See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662. The legislative history of that enactment, however, reflects the understanding that "[u]nder usual circumstances any lower Federal court decision invalidating an act of Congress presents issues of great public importance warranting Supreme Court review." H.R. Rep. No. 660, 100th Cong., 2d Sess. 9 (1988).

The concept of a "coordinated expenditure" covers a variety of financial arrangements between a candidate and her supporters, many of which are functionally and constitutionally indistinguishable from direct contributions to candidates for federal office. The Court in *Buckley* recognized the need "to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." 424 U.S. at 46. It explained that because "such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act," the FECA's "contribution ceilings * * * prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 46, 47. Citing *Buckley*, the plurality in *Colorado I* observed that "many [coordinated] expenditures are * * * virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)." App. 111a (518 U.S. at 624); see also App. 112a (518 U.S. at 625) (noting that "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").

Under the court of appeals' decision, political party committees within the Tenth Circuit may now employ "the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." *Buckley*, 424 U.S. at 46. That holding effectively exempts party committees within the Tenth Circuit from the FECA contribution limits, and it significantly undermines the operation of the federal statutory scheme. Review by this Court is

warranted in light of the substantial practical effect of the court of appeals' decision.

C. The court of appeals' decision is incorrect.

1. This Court in *Buckley* upheld the FECA's $1000 limit on contributions to candidates for federal office, finding it justified by the compelling government interest in preventing both the fact and the appearance of political corruption. See 424 U.S. at 23-30. The Court has repeatedly referred, with apparent approval, to that aspect of the *Buckley* Court's analysis. See *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986); *NRWC*, 459 U.S. at 208; *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 196-197 & n.16 (1981) (plurality opinion). Most recently, the Court in *Shrink Missouri* relied on *Buckley* in upholding Missouri's $1000 limit (adjusted for inflation) on contributions to candidates for statewide office. See 120 S. Ct. at 903-910. The Court distinguished *Colorado I*, noting that in that case "the issue in question was limits on independent expenditures by political parties, which the principal opinion expressly distinguished from contribution limits." *Id.* at 907.

2. As we explain above, see pp. 4-5, 14, *supra*, Congress has determined that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, * * * shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). This Court has recognized that the statutory limits on coordinated expenditures are an essential means of preventing circumvention of the FECA's contribution caps. See pp. 14-15, *supra*. The Court has not attempted to define the full range of circumstances under which a campaign expenditure may properly be treated as

"coordinated." The instant case, however, involves a facial challenge, in which respondent successfully requested a declaratory judgment that it "has the right to make unlimited expenditures from lawfully received contributions in support of its candidates for federal office, and that any limits that FECA purports to impose are invalid and void." C.A. App. 29. Respondent is not entitled to that relief unless the FECA limits on party coordinated expenditures are unconstitutional even as applied to expenditures that are the functional equivalent of direct contributions.[5]

3. The First Amendment does not entitle respondent to an exemption from the FECA limits on coordinated expenditures.

a. This Court's decisions upholding campaign contribution limits have "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." *Shrink Missouri*, 120 S. Ct. at 905.

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[5] As the Court explained in *NEA* v. *Finley*, 524 U.S. 569, 580 (1998),

> [f]acial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973); see also *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored"). To prevail, [the plaintiff] must demonstrate a substantial risk that application of the provision will lead to the suppression of speech. See *Broadrick*, *supra*, at 615.

See also *Hill* v. *Colorado*, 120 S. Ct. 2480, 2498 (2000), ("speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications") (internal quotation marks omitted). The FECA statutory limit on party coordinated expenditures "contemplates a number of indisputably constitutional applications." *Finley*, 524 U.S. at 584.

The effective operation of democratic government is threatened if public officials are, or appear to be, unduly influenced by the preferences of large-scale contributions. See *id.* at 905-906. The Court in *Shrink Missouri* reviewed the available evidence and found "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.

Congress was entitled to conclude that large coordinated expenditures by political parties, like large campaign contributions generally, may be used to exert influence over legislators' behavior while in office. Congress was well aware of the valuable functions performed by political parties in the American system of government. As the Court in *DSCC* observed, "effective use of party resources in support of party candidates may encourage candidate loyalty and responsiveness to the party." 454 U.S. at 42. Presumably for that reason, Congress did not subject political parties to the same limits on campaign contributions that it established for other persons and organizations, but instead fixed limits in Section 441a(d) that are higher by many thousands of dollars.[6]

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[6] The Act imposes a $1000 contribution limit per election for individuals and a $5000 limit for multicandidate political committees, and the limits are not indexed for inflation. 2 U.S.C. 441a(a)(1)(A) and (2)(A). Section 441a(d) establishes much higher basic limitations on coordinated expenditures by party committees and, pursuant to 2 U.S.C. 441a(c), those limits are adjusted periodically to take into account increases in the Consumer Price Index. For example, in 1996 the coordinated party expenditure limitation for the Senate election in Colorado was approximately $171,000. C.A. App. 332. Under the Act, moreover, the national and state

"[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history [of Section 441a(d)] demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." App. 104a (*Colorado I*, 518 U.S. at 618) (plurality opinion).

Congress declined, however, to leave coordinated spending by political parties wholly unconstrained. Congress's determination that *some* campaign spending by political parties would have salutary effects does not undermine its determination that *unlimited* coordinated expenditures pose the same danger—*i.e.*, the risk of actual or perceived "improper influence" (*Shrink Missouri*, 120 S. Ct. at 905) based on financial largesse—as unrestricted campaign contributions generally.

Thus, respondent's First Amendment challenge to Section 441a(d) necessarily depends on the proposition that political parties have a preferred constitutional status vis-a-vis individuals or other organizations. The relevant historical evidence provides no support for that contention. Commenting on the political beliefs of men like Washington, Adams, Madison, Hamilton, and Jefferson, the historian Richard Hofstadter has written: "If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party." Richard Hofstadter, *The Idea of a Party System* 3 (1970). Indeed, the Founders viewed political parties as a potential threat to representative governance and

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committees of a political party may *each* spend up to the statutory limit. See 2 U.S.C. 441a(d)(3).

consciously devised a constitutional framework designed to restrain their power. See The Federalist No. 10 (J. Madison) (Jacob E. Cooke ed., 1961).

b. The court of appeals did not question the proposition that party coordinated expenditures may be used as a means of influencing a legislator's performance of his official responsibilities. The court concluded, however, that because the essential function of parties is to facilitate the election of candidates who will implement the party's platform—a function that necessarily involves efforts to influence the behavior of the candidate once he has been elected to office—the exercise of such influence through coordinated spending cannot properly be regarded as a form of "corruption." See App. 22a ("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.") (internal quotation marks omitted).

The court of appeals' analysis underestimates the potential for abuse inherent in large-scale spending by political parties, and it misconceives the underlying justification for contribution limits generally. The premise of the FECA contribution caps is not that a private person's "influence" with government officials is per se illegitimate. Rather, the premise is that such influence should not be based on large infusions of *money*. That judgment applies with full force to coordinated expenditures directed by political party officials.

i. "In the nature of things, a [party] committee must act through its employees and agents." *DSCC*, 454 U.S. at 33. Even when party funds are raised from a large number of contributors, small groups of people may have de facto control over the manner in which those funds are spent. As a result, candidates who benefit

from large coordinated expenditures will likely feel indebted not to the party as an abstract entity, but to the individual party officials who cause those expenditures to be made. Party leaders may thereby acquire the ability to induce the candidates (once elected or re-elected) to take actions favorable to the leaders' own private interests or policy preferences. There is no reason to believe that such individuals are immune from the corrupting temptations and self-interest of other persons. To the contrary, history demonstrates that individual officials of political organizations are particularly well-situated to exert a corrupting influence upon candidates and officeholders in order to advance their private interests. See generally, *e.g.*, *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 88 n.4 (1990) (Stevens, J., concurring); *Igneri* v. *Moore*, 898 F.2d 870, 876 (2d Cir. 1990) (State may enact legislation to deter party officials from "capitalizing on their special relationships" with public officials to "curry[] favor for themselves and their associates").

ii. If party committees were permitted to make unlimited coordinated expenditures in support of candidates for federal office, the party could serve in effect as a conduit for contributions by individuals or political action committees, thereby facilitating evasion of other FECA contribution limits. Thus, an individual or political action committee that has already contributed the maximum $1000 or $5000 directly to the candidate could contribute additional amounts to one or more party committees,[7] and could in various ways com-

[7] Although an individual can contribute no more than $1000 per election to a candidate for federal office, she can contribute up to $5000 to a multicandidate political committee operated by a state political party, and up to $20,000 to a political committee

municate the expectation that all or part of those sums would be used for coordinated expenditures in support of the candidate. Assuming that the candidate were aware of the nexus between the contribution to the party and the party coordinated expenditures,[8] that sequence of payments would create the very danger that the underlying contribution limits are intended to prevent—*i.e.*, the fact or appearance of "improper influence" resulting from payments to "politicians too compliant with the wishes of large contributors." *Shrink Missouri*, 120 S. Ct. at 905.[9]

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operated by a national political party. 2 U.S.C. 441a(a)(1)(A)-(C). A political action committee can contribute no more than $5000 per election directly to a candidate for federal office. 2 U.S.C. 441a(a)(2)(A). Such an organization can contribute additional sums of up to $15,000 to a political committee established by a national political party, and up to $5000 to a state political party committee. 2 U.S.C. 441a(a)(2)(B) and (C).

[8] As the district court recognized, evidence submitted by the FEC in this case indicates that "party committees keep track of the Member of Congress who is responsible for contributions to the campaign committees," and that "[m]any, 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." App. 65a. The evidence further indicates that "the parties take into consideration the fund-raising efforts of candidates in deciding allocations of campaign funds," and that "[c]andidates in need of funding do request assistance and attempt to lobby those with control over allocations." App. 66a. See also App. 46a (Seymour, C.J., dissenting) ("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.").

[9] 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 organi-

The court of appeals suggested (App. 23a) that concerns regarding the possible circumvention of other FECA limits could adequately be addressed through "[v]igilant enforcement of [2 U.S.C.] § 441a(a)(8)," which provides that contributions "earmarked or otherwise directed through an intermediary or conduit" shall be treated as contributions to the candidate herself. This Court has previously recognized, however, that the earmarking provision of Section 441a(a)(8) does not provide a complete response to the danger that contributions to political committees may be used to evade the FECA limits on contributions to candidates. In *Buckley*, the Court upheld the FECA's $25,000 annual aggregate limit on individual contributions, despite the fact that it imposed "an ultimate restriction upon the number of candidates and committees with

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> zations 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 Automobile Workers*, 352 U.S. 567, 576-577 (1957) (quoting 65 Cong. Rec. 9507-9508 (1924) (Sen. Robinson)). As the dissenting judge below recognized, the current FECA limits on party coordinated expenditures reflect "longstanding 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." App. 44a (Seymour, C.J., dissenting).

which an individual may associate himself by means of financial support." 424 U.S. at 38. The Court explained that the $25,000 aggregate limit was "a corollary of the basic individual contribution limitation" that restricts the possibility of evasion "by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Ibid.* See also *California Med. Ass'n*, 453 U.S. at 198 (plurality opinion); *id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment).[10]

Under current federal law, moreover, an individual (or a corporation or union) may donate unlimited amounts of "soft money" to political parties. See App. 102a (*Colorado I*, 518 U.S. at 616) (plurality opinion). Because "soft money" cannot lawfully be spent to influence federal elections, the party cannot (even under the court of appeals' decision) use those donations to make coordinated expenditures on behalf of candidates for federal office. Large soft money donations may, however, be used to induce the party to make large coordinated expenditures with funds acquired from other ("hard money") sources. Those coordinated expenditures may in turn be used to induce elected officials to look favorably upon the soft money donor. The FECA limits on party coordinated expenditures

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[10] As the dissenting judge in the court of appeals explained, "[t]he record [in this case] * * * 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." App. 46a (Seymour, C.J., dissenting).

serve to break that chain, thereby helping to prevent circumvention of the statutory limits on individual contributions to candidates.

iii. As the foregoing analysis indicates, large party coordinated expenditures may be used to further the private interests either of individual party officials or of the party's major contributors. When party coordinated expenditures are employed towards those ends, they raise the very dangers that the FECA contribution limits are intended to address. But even when individual party leaders conscientiously seek to further the interests and values of the membership as a whole, Congress may legitimately choose to limit the extent to which large infusions of *money* may be used to achieve those objectives.

As the Court explained in *Shrink Missouri*,

> [i]n speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," [the Court has] 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 [the Court's] recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

120 S. Ct. at 905 (quoting *Buckley*, 424 U.S. at 28). Congress's authority to "address the power of money 'to influence governmental action'" (*ibid.*) does not depend on the motivation of the donor. The wealthy individual who pays a large sum as an explicit *quid pro quo* for a legislator's vote is guilty of bribery, whether the payor has a pecuniary or similar tangible interest in

the passage or defeat of the proposed legislation, or instead is motivated solely by ideological concerns. With respect to methods "less 'blatant and specific' than bribery" (*ibid.*), Congress may similarly conclude that the undue influence of large campaign contributions upon public policy is inherently subversive of democratic governance, regardless of the donor's motives.

In invalidating the FECA's limits on party coordinated expenditures, the court of appeals "reject[ed] the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process." App. 22a (internal quotation marks omitted). By defining the issue in that manner, the court of appeals attacked a straw man. The justification for Section 441a(d) is not that party leaders should be prevented from exerting influence over the official behavior of the party's candidates. Rather, the cap reflects the same premise as the FECA contribution limits generally—*i.e.*, that large infusions of money are an inappropriate *method* of influencing an officeholder's conduct.[11] That judgment is as applicable to political parties as to other potential donors.

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[11] Similarly, the justification for imposing contribution limits upon individuals or political action committees is not that persons outside the government should be prevented from exerting "influence" over federal policy. To the contrary, individuals have a constitutional right "to petition the Government for a redress of grievances," U.S. Const. Amend. I, and "to engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The FECA limits on contributions made by individuals and political committees reflect the premise that a legislator's conduct should not be affected by an actual or anticipated infusion of *money* from a single source—not a suspicion of private influence per se. Congress's decision to treat

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2000

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large monetary contributions as a source of special concern is neither irrational nor constitutionally problematic.