EN BANC ARGUMENT SCHEDULED FOR MAY 24, 2010

Nos. 10-30080, 10-30146

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AHN "JOSEPH" CAO and REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Certification and Appeal from the
United States District Court for the Eastern District of Louisiana

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BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANT-APPELLEE

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REPRESENTATION OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 THAT ALL PARTIES CONSENT TO THEIR *AMICI* PARTICIPATION IN THIS APPEAL

Amici Campaign Legal Center and Democracy 21 submit this written representation that all parties to this appeal have consented to their participation as *amici curiae*. Consent from Plaintiffs-Appellants was obtained from James Bopp Jr., Esq. Consent from Defendant-Appellee Federal Election Commission was obtained from Harry Summers, Esq.

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CERTIFICATE OF INTERESTED PARTIES

Anh "Joseph" Cao and RNC v. FEC, Nos. 10-30080 & 10-30146

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Anh "Joseph" Cao, Plaintiff-Appellant, U.S. Representative for the Second Congressional District of Louisiana;

2. The Republican National Committee, Plaintiff-Appellant;

3. The Louisiana Republican Party, a Plaintiff below;

4. The Federal Election Commission, Defendant-Appellee.

The undersigned counsel of record also certifies the following with respect to *amici curiae* Campaign Legal Center (CLC) and Democracy 21:

1. The CLC is a nonpartisan, nonprofit corporation organized under Section 501(c)(3) of the Internal Revenue Code. The CLC has no parent corporation and no publicly held corporation has any form of ownership interest in the CLC.

2. Democracy 21 is a nonpartisan, nonprofit corporation organized under Section 501(c)(3) of the Internal Revenue Code. Democracy 21 has no parent corporation and no publicly held corporation has any form of ownership interest in Democracy 21.

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STATEMENT OF INTEREST

Amici curiae Campaign Legal Center (CLC) and Democracy 21 are nonpartisan, nonprofit organizations that work to strengthen the laws governing campaign finance. The federal restrictions on coordinated expenditures challenged in this case are vital to implementing the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431 *et seq*., and to preventing the circumvention of its contribution limits. The CLC and Democracy 21 have a longstanding, demonstrated interest in the effective enforcement of the federal campaign finance laws and this interest is directly implicated in this proceeding. *Amici* submit this brief with the consent of all parties to this case.

SUMMARY OF ARGUMENT

In this action, plaintiffs-appellants Ahn "Joseph" Cao and the Republican National Committee (RNC) (collectively, "plaintiffs") attempt to topple a central pillar of campaign finance law, namely, the principle of coordination.

Plaintiffs challenge the longstanding statutory limits on party coordinated expenditures, *see* 2 U.S.C. § 441a(d)(2)-(3), claiming the limits are overbroad, vague, in excess of Congress' authority, unconstitutionally low and improperly variable. They also attack the $5,000 contribution limit as applied to coordinated

expenditures, *see* 2 U.S.C. § 441a(a)(2)(A), and the statutory standard for coordination at 2 U.S.C. § 441a(a)(7)(B)(i).[1]

Although plaintiffs characterize their suit as specific to spending by a political party and thus merely a "successor" to *FEC v. Colorado Republican Federal Campaign Comm.* (*Colorado II*), 533 U.S. 431 (2001), the broad scope of their arguments makes clear that they are mounting a full-scale assault on the entire scheme for regulating coordinated expenditures under FECA. As such, their action is flatly at odds with decades of Supreme Court precedent that has repeatedly recognized the importance of "prevent[ing] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

In light of this precedent, *amici* urge this court to find in favor of the FEC on all certified questions raised in this *en banc* proceeding, and to affirm the district court's grant of summary judgment to the FEC on plaintiffs' proposed questions 2, 4, 5 and 8(b) and (c). Opinion, *Cao et al. v. FEC*, No. 08-4887 (Jan. 27, 2010) ("Opinion").

Although *amici* believe the entirety of plaintiffs' case is without legal basis, *amici* will focus on two of the claims advanced by plaintiffs, because of their

[1] *Amici* will refer to these three FECA provisions collectively as the "federal coordination restrictions."

exceptionally broad applicability. The first is certified question 2, which asks whether the party coordinated expenditure limit and the related $5,000 contribution limit are unconstitutional as applied to coordinated communications that "convey the basis for the expressed support." Opinion at 84. The second is comprised of proposed questions 2 and 5, which the district court declined to certify. These questions ask whether the federal coordination restrictions are vague, overbroad, and in excess of Congress' authority insofar as they regulate coordinated expenditures beyond express advocacy, the republication of a candidate's campaign literature, "targeted federal election activity," and "paying for a candidate's bills." Brief of Plaintiffs-Appellants ("Pls. Br.") at 34-35; Opinion at 78-79.

As framed by plaintiffs, both of these claims attack not just the basis for the restrictions on *party* coordinated spending, but also the regulation of coordinated spending by any spender, be it an individual, corporation or labor union. Plaintiffs' claims, if accepted, could therefore substantially deregulate not just party coordinated activities, but coordinated activities by any spender, thereby functionally eviscerating the contribution limits that have been central to FECA since its enactment.

For instance, the proposition that a spender should be able to fully coordinate its "own speech" with a candidate without restriction applies in

principle to spending by a non-party as well as by a party. Or at least, plaintiffs do not suggest any limiting principle to the contrary. Further, plaintiffs' overbreadth and vagueness claim also applies in principle to non-party spenders as well as to parties. In essence, it is a challenge to Congress' constitutional authority to limit the coordinated expenditures of *any* spender beyond a narrow subset of activities that the plaintiffs deem "unambiguously campaign related." Pls. Br. at 43, 44-45.

In short, although plaintiffs frame their case as challenging the federal coordination restrictions only as applied to spending by the RNC, their arguments, if accepted, would undercut the legal principle of coordination across the board, and cast doubt not only on the *Colorado II* decision, but on all relevant Supreme Court precedents in this area. Plaintiffs' arguments have no merit, and this Court should reject plaintiffs' invitation to so radically undermine the law on coordination.

ARGUMENT

I. The Federal Law on Coordination

The concept of coordination has been central to campaign finance law since the enactment of FECA in the 1970s.

FECA defines an "expenditure" as "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) (subject to various exemptions). Similarly, the Act defines a "contribution" as "gift, subscription, loan, advance, or deposit 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(8)(A)(i). Only contributions (and not expenditures) are subject to statutory limitation. *See*, *e.g.*, 2 U.S.C. §§ 441a(a)(1)(A) ($2,400 limit on individual contributions to candidate), 441a(a)(2)(A) ($5,000 limit on multicandidate political committee contributions to candidate).

Since 1976, Congress has provided that an "expenditure" that is "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). The Act effectively treats a coordinated expenditure as the functional equivalent of a contribution. FECA, however, makes a special accommodation for coordinated spending by political parties, allowing party committees to make expenditures in coordination with federal candidates in amounts greater than the otherwise applicable $5,000 contribution limit would allow. 2 U.S.C. §§ 441a(d)(2)-(3); 11 C.F.R. § 109.37. Currently, national and state parties are each permitted make expenditures in coordination with candidates for the House of Representatives in amounts of either $43,500 (for states with more than one House seat) or $87,000 (for states with one House seat), and in

coordination with candidates for Senate in amounts between $87,000 to $2,395,400 (depending on the population of the state). 2 U.S.C. § 441a(d)(2)-(3); 11 C.F.R. § 109.33; Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009); Price Index Increases for Expenditure Limitations, 73 Fed. Reg. 8698 (Feb. 14, 2008).

To constitute a coordinated expenditure under FECA, spending must meet two statutory standards: (1) a "content" standard, *i.e*. the spending must constitute an "expenditure" as defined by FECA, *see* 2 U.S.C. § 431(9)(A)(i); and (2) a "conduct" standard, *i.e.* the spending must be in "cooperation, consultation, or concert," or otherwise coordinated, with a candidate, *see* 2 U.S.C. § 441a(a)(7)(B). As the D.C. Circuit has summarized, "if someone makes a purchase or gift with *the purpose of influencing an election* and does so *in coordination* with a candidate, FECA counts that payment as a campaign contribution." *Shays v. FEC,* 414 F.3d 76, 97 (D.C. Cir. 2005) (emphasis added).

This legal framework has been repeatedly endorsed by the Supreme Court. In *Buckley*, the Supreme Court approved Congress' decision to treat "controlled or coordinated expenditures" as contributions subject to FECA's applicable contribution limits. 424 U.S. at 46-47. Similarly, the party coordinated spending limits were declared facially constitutional in *Colorado II* based upon the Court's

conclusion that "there is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate." 533 U.S. at 464. Finally, the changes to the coordination provisions of FECA and the Commission's coordination regulations made by the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002), were upheld in *McConnell v. FEC*, 540 U.S. 93, 221-23 (2003). *See, e.g.,* BCRA § 214(b)-(c), *amending* 2 U.S.C. § 441a(a)(7)(B)(ii); BCRA § 202, *amending* § 441a(a)(7)(C).

II. Plaintiffs' Attempt to Deregulate Coordinated Expenditures that "Convey the Basis for Their Expressed Support" Should Be Rejected.

Despite the longstanding consensus of the courts that the federal coordination restrictions are constitutional, the RNC now argues in certified question 2 that these restrictions violate the First Amendment as applied to coordinated expenditures that allegedly constitute the party's "own speech." The sole precedential authority cited by the RNC for this position is a footnote in the *Colorado II* decision where the Supreme Court simply noted that it was addressing a facial challenge to the coordinated party spending limits, and for this reason, would not reach the question of whether coordinated expenditures that involved more of the party's "own speech" would require different legal treatment. 533 U.S. at 456 n.17. The footnote does not support – much less require – the sweeping exemption sought by plaintiffs. This Court should accordingly answer question 2 in the negative and dismiss this claim.

A. Plaintiffs' "Own Speech" Argument Is Contrary to Supreme Court Jurisprudence on Coordinated Expenditures.

Supreme Court precedent does not support the deregulation of coordinated expenditures that "convey the basis for their expressed support." First, the fact that a coordinated expenditure has communicative content does not justify the application of a heightened standard of review. A coordinated expenditure for the party's "own speech" will nevertheless function as a contribution, and therefore warrants only the intermediate scrutiny applied to contribution limits. Furthermore, the presence of the party's "own speech" in a coordinated communication does not nullify the government's interest in enforcing the federal coordination restrictions to prevent circumvention of the contribution limits. The Supreme Court has made clear that it is the act of coordination that justifies the regulation of a coordinated expenditure as a contribution, and that implicates the government's anti-corruption interest. *See* Opinion at 82; *Colorado Republican Fed. Campaign Comm. v. FEC* (*Colorado I*), 518 U.S. 604, 617-18 (1996). Because a coordinated expenditure for a party's "own speech" neither requires a different level of scrutiny, nor assuages concerns about potential corruption, it should not be exempted from regulation.

1. A Coordinated Expenditure, Even if It Contains Some Measure of the Spender's "Own Speech," Is Not Tantamount to an Independent Expenditure, and Regulation Thereof Does Not Warrant Strict Scrutiny.

Beginning with *Buckley*, the Supreme Court has subjected the regulation of campaign expenditures to closer scrutiny than the regulation of campaign contributions. This differential treatment is based on the "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" for the purpose of First Amendment protection. *Colorado I*, 518 U.S. at 614-15 (1996), *citing FEC v. National Conservative Political Action Comm. (NCPAC)*, 470 U.S. 480, 497 (1985).

Because a limit on expenditures bars spenders from "any significant use of the most effective modes of communication," and represents a "substantial … restraint[] on the quantity and diversity of political speech," it must satisfy strict scrutiny review. *Buckley,* 424 U.S. at 19, 44-45. By contrast, a contribution limit "entails only a marginal restriction upon [one's] ability to engage in free communication," because 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." *Id*. at 20, 21. A regulation of contributions therefore calls for a "less rigorous degree of scrutiny." *McConnell,* 540 U.S. at 137.

The Supreme Court has subjected limits on coordinated expenditures to the same intermediate scrutiny it applies to limits on direct contributions, not to the strict scrutiny it applies to limits on independent expenditures. *See Colorado II,* 533 U.S. at 446; *Buckley*, 424 U.S. at 47. In *Colorado II*, for instance, the Court applied to the party coordinated spending limitation the "scrutiny appropriate for a contribution limit, enquiring whether the restriction is 'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combating political corruption." 533 U.S. at 456.

The RNC does not contest that a "less rigorous" level of scrutiny is typically appropriate for coordination restrictions, but contends that its proposed coordinated expenditures are analogous to independent "expenditures" for the purpose of First Amendment review because they communicate the underlying basis for its support of the Cao campaign. Pls. Br. at 13-14.

However, even assuming *arguendo* that the RNC's proposed coordinated expenditures are more "communicative" than a "cash contribution," they still "function" like contributions because they are coordinated with the candidate, and thus are functionally the same as a cash contribution given to the candidate. For that reason, restrictions on coordinated expenditures do not warrant strict scrutiny review.

First, a coordinated expenditure, by definition, is influenced by a candidate's wishes as to content, media, audience or timing, and indeed may even be "requested" or "controlled" by the candidate. *See*, *e.g.*, 11 C.F.R. § 109.21. Therefore, unlike an independent expenditure, a coordinated communication does not represent the complete and autonomous expression of the spender's viewpoint. *Compare Colorado I*, 518 U.S. at 616 (noting that it is the "independent expression of a political party's views" that is "'core' First Amendment activity"). Indeed, insofar as the candidate is dictating the content or other attributes of the coordinated expenditure, the party is in reality funding the *candidate's* speech, much in the same way that the party would fund a candidate's speech by making a contribution to his campaign which the candidate then uses to fund his ads. If, for instance, a candidate asked the party to run an ad highlighting his vote on health care, targeting elderly voters and running in a particular time frame, that coordinated communication would certainly express more of the candidate's viewpoint and priorities than those of the party. Such an ad, even if it contains some element of the party's "own speech," is closer to "speech by proxy" than to direct speech. *California Medical Ass'n v. FEC*, 453 U.S. 182, 195 (1981). Because a coordinated communication, like any contribution, is therefore "not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection," it does not warrant strict scrutiny. *Id*.

Secondly, a limitation on coordinated expenditures is not as restrictive as a limitation on independent expenditures for the obvious reason that it still leaves the spender free to "engage in independent political expression." *Buckley*, 424 U.S. at 28. Quite simply, if the RNC wishes to disseminate its "own speech," the federal coordination restrictions do not prevent it from spending independently, without limitation, to do so. *Colorado I*, 518 U.S. at 625-26. It would defy reason to apply the strict scrutiny reserved for limits on independent spending to review the restrictions on coordinated spending, when these restrictions clearly allow independent spending to continue unchecked.

Recognizing that the federal coordination restrictions do not curtail its independent spending, the RNC nevertheless maintains that independent communications are not a "viable alternative," given the party's operating structure. Pls. Br. at 19. Many of the RNC's allegations regarding "viability," however, amount to no more than a complaint that independent party spending is not as effective as coordinated party spending. *See*, *e.g.*, Pls. Br. at 20 (stating that had the NRCC been able to consult with the Cao campaign, it could have "ensured that its 'own speech' was helpful, not harmful") (citing Dep. of Thomas Josefiak, 156:5-9); *id*. at 23 (alleging that "coordinating with candidates" promotes "efficiency" and allows the RNC to "be cohesive in the message"). But it is precisely the heightened efficacy of coordinated expenditures that poses the threat

of corruption and justifies their treatment as the equivalent of contributions. In *Buckley,* the Court noted, "The absence of prearrangement and coordination of an 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." *Buckley*, 424 U.S. at 47. In now complaining that the requisite independence "undermines the value" of its expenditures, the RNC is simply reconfirming *Buckley*'s holding, not demonstrating that independent spending is not an "viable alternative."

Further, insofar as the RNC alleges that independent spending is actually *impracticable*, this problem appears to be the result of its erroneous understanding of the law. The RNC first asserts that "under the current interpretation of the law," it must hire "outside consultants" to research and develop its independent advertising. Pls. Br. at 22. But neither FECA nor the Commission's rules require this action. To the contrary, FEC rules create a "safe harbor" that protects a party committee from a finding of coordination if it creates a firewall between employees who communicate with or provide services to a candidate, and employees who develop the party's independent expenditures on behalf of the candidate. 11 C.F.R. § 109.21(h)(1), (2). The RNC next counters that such a firewall was not "practically possible" in connection to the Cao campaign because

it would have needed to firewall off staff from the beginning of the 2008 election cycle. Pls. Br. at 24. This allegation too lacks a legal basis. The FEC has never required a firewall to be erected for the entirety of an election cycle; it requires only that the firewall "prohibit the flow of information … material to the creation, production, or distribution of the communication" and be "described in a written policy that is distributed to all relevant employees." 11 C.F.R. § 109.21(h)(1), (2); Explanation and Justification: Coordinated Communications, 71 Fed. Reg. 33190, 33206 (June 8, 2006), *available at* http://fec.gov/law/cfr/ej_compilation/2006/notice_2006-10.pdf.

Finally, the RNC's claim that independent party spending is impracticable is belied by its own spending in past elections. In the 2008 cycle, Republican federal party committees spent $124,682,649 on independent expenditures. Opinion at ¶ 69 (citing Biersack Decl. ¶ 11, Table 15, FEC Exh. 3). Similarly, Republican federal party committees made $84,906,626 in independent expenditures in 2004, and $115,241,737 in independent expenditures in 2006. Opinion at ¶ 69 (citing Biersack Decl. ¶ 8, Table 7, FEC Exh. 3). This level of spending by the RNC hardly suggests that it views independent expenditures as impracticable or wasteful.

The facts thus make clear that the federal coordination restrictions in no way bar political parties from making independent expenditures for their "own speech,"

and thus cannot be fairly characterized as limits on the party's expenditures. For all these reasons, strict scrutiny is not appropriate.

2. The Government's Anti-Corruption Interest Justifies the Regulation of Coordinated Expenditures Regardless Whether the Coordinated Expenditures "Convey the Basis for their Expressed Support."

The Supreme Court has consistently held that the federal contribution limits are justified by the government's interest in preventing the "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*, 424 U.S. at 25; *see also Nixon v. Shrink Missouri*, 528 U.S. 377, 391 (2000) ("[T]he dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible."). Because the federal coordination restrictions "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions," they too directly further the government's interest in preventing corruption and the appearance of corruption. *Buckley*, 424 U.S. at 46-47. Absent the federal limits on coordinated expenditures, wealthy donors seeking to purchase influence over candidates and officeholders could simply make expenditures at their behest, raising the "danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id*. at 47.

In the case of *party* coordinated expenditures, the animating concern is not that a party will itself corrupt candidates, but that parties "whether they like it or not … act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452. Current law already allows donors to contribute beyond the $2,400 limit on direct contributions to candidates by giving up to $30,400 to national party committees, often "with the tacit understanding that [their] favored candidate will benefit." *Id*. at 458. If, however, the coordinated party spending limits were eliminated, "the inducement to circumvent would almost certainly intensify" and the individual contribution limits would be further "eroded." *Id*. at 457, 460. Indeed, as *Colorado II* clarified:

> There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of unlimited coordinated spending would *attract increased contributions* to parties to finance exactly that kind of spending. *Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits.*

Id. at 464 (emphasis added). The party coordinated expenditure limits are therefore justified by the government's interest in preventing circumvention of the Act and in minimizing the resulting risk of political corruption. *Id*. at 465.

This potential for corruption is in no way lessened – indeed, it is precisely the same – in the case of a coordinated expenditure that allegedly conveys the basis for the party's support of the candidate. There is no reason to believe that a

coordinated expenditure for the party's "own speech" is any less valuable to a candidate than a coordinated expenditure that lacks such content. For instance, the RNC's proposed radio ad promoting Cao's election clearly would have been useful to the Cao campaign, particularly had it been coordinated with the campaign, regardless of whether the ad constituted the party's "own speech." *See* Pls. Br. at 8-9. Even if Cao had *no* input as to the message of the ad, coordinating with his wishes regarding the timing, audience or medium of the ad represents real value to his campaign – value that could be a source of undue influence and political corruption. A coordinated expenditure for the spender's "own speech" thus still "functions" as a contribution, and for this reason, poses the danger of actual or apparent quid pro quo arrangements.

Footnote 17 of the *Colorado II* decision does not suggest otherwise. Although the *Colorado II* majority noted that it did not address the regulation of "expenditures that involve more of the party's own speech," the *reasoning* of the majority opinion compels the conclusion that coordinated expenditures that convey the basis for the expressed support are as corruptive as coordinated expenditures that do not. 533 U.S. at 456 n.17. The act of coordination is the "the constitutionally significant fact" that justifies the regulation of coordinated expenditures as contributions and creates the "danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id*. at 464

(quoting *Buckley*, 424 U.S. at 47). *See also* Opinion at 82. Because coordination is thus the source of corruptive potential, it follows that a coordinated expenditure will be corruptive regardless of whether it funds the spender's "own speech." Put otherwise, even if an ad is influenced only by a candidate's wishes as to timing or target audience and *not* content, the act of coordinating means that the expenditure "often will be 'as useful to the candidate as cash,'" *see McConnell*, 540 U.S. at 221, and consequently, will pose a clear danger of political corruption.

Plaintiffs' attempt to dismiss the force of the government's anti-corruption interest by citing the Supreme Court's recent decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), for the proposition that the anti-corruption interest is limited to the prevention of quid pro quo corruption. Pls. Br. at 18. This is a red herring. First, *Citizens United* reviewed an "outright ban" on independent expenditures by corporations, *see* 130 S. Ct. at 897, and hence did not address the governmental interests that support a limit on contributions or coordinated expenditures. Because a ban on expenditures is subject to a different degree of scrutiny than a limit on contributions, the analysis of the former does not speak to the governmental interests that justify the latter. *Citizens United* is simply inapplicable to this case.

Secondly, even if *Citizens United* could be read to implicitly narrow the government's anti-corruption interest in connection to contributions, the

coordinated party spending limits do prevent real and apparent quid pro quo corruption: they do so by thwarting the circumvention of the contribution limits. *Colorado II*, 533 U.S. at 456-57. Plaintiffs complain that circumvention is not a justifiable government interest, but they cite no legal authority for this proposition. Pls. Br. at 19. Certainly, *Citizens United* did not cast doubt on this governmental interest; the Court did not even address a circumvention argument. Because the coordinated party spending limits defuse attempts to circumvent FECA's contribution limits, they advance the same governmental interest that contribution limits do, namely, preventing quid pro quo corruption and its appearance. *Id*. at 457 ("[S]ubstantial evidence … shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open.").

Furthermore, the Supreme Court has amassed substantial evidence of the political corruption created by unregulated party fundraising and coordinated spending. The Supreme Court has documented that large donations to parties actually *purchase* access to candidates and officeholders. *See, e.g., McConnell,* 540 U.S. at 150-52 (describing evidence of "national party committees peddling access to federal candidates and officeholders in exchange for large soft money donations"); *id.* at 153-54. The *Colorado II* court noted that the parties often serve as "matchmakers" between large donors and candidates, scheduling "special

meetings and receptions [to] give the donors the chance to get their points across to the candidates." 533 U.S. at 461. As former Rep. Martin Meehan testified, "[p]arty fundraising serves as a mechanism for major donors to get special access to lawmakers." Opinion at ¶ 88, *citing* Meehan Decl. at ¶ 1, FEC Exh. 2. If the party coordinated expenditure limits were invalidated, the party could spend large contributions directly for and in coordination with the donor's favored candidates, intensifying the corruptive nexus between large donors and candidates, and increasing the potential for undue access, the purchase of influence and *quid pro quo* agreements. *See* 533 U.S. at 464-65.

Finally, the expansive nature of plaintiffs' argument makes the government's anti-corruption interest all the more acute here. Unlike the plaintiffs in *Colorado II*, whose challenge to the party coordinated spending limits rested on the unique relationship between parties and their candidates, *see id*. at 445, plaintiffs here make a broad argument that would potentially exempt coordinated communications by *any* spender from federal limitation. Under plaintiffs' theory of coordination, a corporation, labor union or wealthy individual would be permitted to collaborate freely with a candidate on the content, timing, or audience of an ad campaign simply by alleging the ads furthered its "own speech." Indeed, in the view of the plaintiffs, the candidate could *direct* and *control* the spending of funds by a corporation, without restriction or limitation, so long as the ads

nominally contained the corporation's "own speech." It is difficult to conceive of campaign activity that would be more likely to create *quid pro quo* arrangements and foster both the appearance and reality of political corruption.

B. Plaintiffs Do Not Make a Principled Attempt to Identify Some Category of Coordinated Expenditures that Functions More as Independent Expenditures Than as Contributions.

As discussed above, an exemption for those coordinated expenditures that allegedly fund the spender's "own speech" is not supported by Supreme Court precedent.

However, insofar as a footnote in *Colorado II* left open the possibility of exempting *any* category of spending from the federal coordination restrictions, it indicated that this treatment would rest on a demonstration that the expenditure "involved more of [the spender's] own speech," than a typical coordinated expenditure. 533 U.S. at 456 n.17. Plaintiffs here have not even attempted to make such a showing.

Instead plaintiffs advance the radical theory that *any* communication that is "attributable" to a party is that party's "own speech." Pls. Br. at 15-16. According to the RNC, the dispositive factor in this test is not the degree to which the party authored the communication or operated independently of the coordinating campaign, but rather simply whether the party "pays for and adopts the speech." *Id*. at 16. Even if the candidate "came up" with the "idea, particular language or

means of communication," the RNC alleges that *any* coordinated expenditure that results is nevertheless the party's "own speech," provided the party pays for the communication. *Id*.

Plaintiffs do not even pretend that their "attribution test" is drawn from the reasoning of footnote 17 in *Colorado II*. That footnote, of course, made no mention of "attribution" or "adoption" as pertinent factors in determining whether a coordinated expenditure "involved" a party's "own speech." *Colorado II*, 533 U.S. at 456 n.17. Nor do plaintiffs attempt to conceal the scope of their argument. Because any party coordinated communication will, by definition, be "paid for and adopted" by the party, plaintiffs' test for their "own speech" would effectively exempt *all party coordinated communications* from the federal limits. Indeed, the only expenditure that plaintiffs suggest would not meet their test is "merely paying a candidate's bills." Pls. Br. at 15.

Given the breadth of plaintiffs' argument, their claim appears to be less an "as applied" challenge to the federal coordination restrictions than an attempt to re-litigate the facial challenge rejected by the Supreme Court in *Colorado II*. Accepting plaintiffs' attribution test would require this Court to effectively overrule *Colorado II*, and also would undercut the fundamental principle of coordination which has informed all Supreme Court decisions since *Buckley*. Because plaintiffs' "own speech" argument is thus foreclosed by *Colorado II* and

contrary to the entirety of the Supreme Court's jurisprudence on coordination, this Court should answer question 2 in the negative and reject this claim.

III. Plaintiffs' Claim that the Federal Coordination Restrictions Are Overbroad and Unconstitutionally Vague Is Frivolous.

In proposed questions 2 and 5, plaintiffs asserted that the party coordinated expenditure limits at 2 U.S.C. § 441a(d)(2)-(3), the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A), and the coordination standard at 2 U.S.C. § 441a(a)(7)(B)(i) are vague, overbroad and in excess of congressional authority. Pls. Br. at 34-51. There is no merit to plaintiffs' claim and the district court properly deemed these questions frivolous.

Further, as was the case with plaintiffs' "own speech" claim, their overbreadth and vagueness claim has the potential to undermine campaign finance law beyond the context of *party* coordinated expenditures. If, for instance, this court were to accept plaintiffs' contention that the coordination standard at 2 U.S.C. § 441a(a)(7)(B) is vague or overbroad, this would not only deregulate *party* coordinated expenditures, but would also call into question this standard as to *non-party* coordinated expenditures as well. This Court should affirm the district court's decision, because plaintiffs' claim lacks any legal basis and threatens to disrupt the federal coordination restrictions applicable to all coordinated spending.

A. Plaintiffs' "Unambiguously Campaign Related" Argument Has No Legal Basis.

Plaintiffs' vagueness and overbreadth claim rests on their argument that Congress may regulate only those activities that are "unambiguously campaign related," which in the context of party coordinated spending, allegedly consist only of the following: communications containing express advocacy; "targeted federal election activity"; paying a candidate's bills; and distributing a candidate's campaign literature. Pls. Br. at 34-35. According to plaintiffs, because the federal coordination restrictions regulate coordinated expenditures beyond these four enumerated categories, the provisions are fatally overbroad and unconstitutionally vague. Pls. Br. at 48-51.

The problem with plaintiffs' position is two-fold. First, the "unambiguously campaign related" test is simply an invention of plaintiffs that has no basis in law. This language appeared in *Buckley,* but was merely incidental to the Supreme Court's discussion of its narrowing construction of the statutory term "expenditure" to encompass only express advocacy. 424 U.S. at 79-80. The "unambiguously campaign related" phrase was not adopted as an independent constitutional test for overbreadth or vagueness, and has never been employed for this purpose in any subsequent Supreme Court case.

Even less credible than the "unambiguously campaign related" test itself, however, is plaintiffs' attempt to *apply* the test in the context of coordinated

spending. They cite absolutely no legal authority to support their enumeration of the four categories of expenditures that they allege are within Congress' authority to regulate; they do not even attempt explain their selection. There is no explanation why, for instance, targeted federal election activity is considered unambiguously campaign related, but non-targeted federal election activity is not, or why express advocacy meets this test, but "electioneering communications" do not.

Although the legal basis for plaintiffs' new test is unclear, what is clear is that they believe that *some* narrowing construction of the "content" standard for "coordinated expenditures" is constitutionally necessary. But insofar as the Supreme Court has drawn any "bright line" to narrow the reach of campaign finance regulation, such a line has been drawn only in the context of independent spending, where the Court has adopted the express advocacy standard. *See* Section B *infra*. The "unambiguously campaign related" argument appears to be little more than plaintiffs' attempt to excise this express advocacy test from the sphere of independent expenditures, and graft it onto the sphere of coordinated spending.[2]

The district court properly rejected this argument, declining to certify Questions 2 and 5. It found that "the unambiguously campaign related language

[2] Indeed, in another lawsuit brought by the RNC, a three-judge district court recently described the "unambiguously campaign-related" test, also promoted there by the RNC, as just "another way of describing the express advocacy test…." *RNC v. FEC*, -- F.Supp.2d --, 2010 WL 1140721, *5 (D.D.C. March 26, 2010) (three-judge court).

and its cousins are reserved for expenditures, and have never been applied to contributions." Opinion at 75. In manufacturing this new test, plaintiffs were "attempting to conflate the Supreme Court's jurisprudence limiting expenditures, where the content of the communication is inherently at issue … with that limiting contributions, where it is the act of coordination with political candidates that makes the communication regulable." *Id*.

In response to the district court decision, plaintiffs on appeal invent yet more tests and standards in an attempt to again justify a narrowing construction of the statutory provisions governing coordinated expenditures. Plaintiffs suggest, for instance, that the federal coordination restrictions must meet the "*Buckley* overbreadth" test and the "*Broadrick*-overbreadth" test, as well as avoiding the "dissolving-distinction problem." Pls. Br. at 36-45. However, as plaintiffs openly concede, these new tests are simply their "unambiguously campaign related" argument recast in different terminology. *See*, *e.g.*, Pls. Br. at 43 ("From this most precise statement of the *Buckley*-overbreadth principle, it is fair to also call the principle the unambiguously-campaign-related principle."). But none of plaintiffs' invented tests alter the fact that the statutory provisions governing coordinated spending are neither overbroad nor vague, and have never been subject to a judicial narrowing construction. This Court should reject all of plaintiffs' novel tests, and affirm the district court's dismissal of this claim.

B. The FECA Provisions Governing Coordinated Expenditures Are Neither Vague Nor Overbroad.

As outlined in Section I *supra*, spending must meet two statutory standards to constitute a coordinated expenditure under FECA: (1) a content standard, *i.e.* the spending must constitute an "expenditure," defined as a disbursement "for the purpose of influencing any election for Federal office," *see* 2 U.S.C. § 431(9)(A)(i); and (2) a "conduct" standard, *i.e.*, the spending must be in "cooperation, consultation, or concert" with a candidate, *see* 2 U.S.C. § 441a(a)(7)(B). By arguing that an "unambiguously campaign related" test must be applied to narrow the scope of regulable coordinated expenditures, plaintiffs appear to be suggesting that the statutory "content" standard is deficient. The Supreme Court, however, has held the opposite. In *Buckley*, the Court found that the statutory "for the purpose of influencing" language was neither vague nor overbroad in connection to coordinated expenditures, and declined to impose the narrowing construction of express advocacy. While this is true for coordinated spending in all contexts, it is particularly true for coordinated spending by political parties.[3]

[3] Furthermore, the Supreme Court has expressed approval of the statutory "conduct" standard as well. The *Buckley* Court raised no objection to the statutory language when it endorsed the regulation of coordinated expenditures as contributions. And in *McConnell*, the Supreme Court addressed and upheld Section 214 of BCRA, which required the Commission to expand the "conduct" prong of its rule to permit a finding of coordination even where the parties did not reach a formal agreement. *See* 540 U.S. at 222 ("[W]e cannot agree with the submission

1. The Express Advocacy Standard Is Not Applicable to Coordinated Expenditures.

Both the definition of "contribution" and the definition of "expenditure" in FECA rely on the operative phrase "for the purpose of influencing any election for Federal office." 2 U.S.C. §§ 431(8)(A)(i) (defining "contribution"), (9)(A)(i) (defining "expenditure").

The *Buckley* Court concluded, in reviewing the regulation of independent expenditures, that this phrase raised vagueness concerns because it potentially "encompass[ed] both issue discussion and advocacy of a political result." *See* 424 U.S. 79; *see also id*. at 39-44, *discussing* 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV) (limiting independent expenditures); and 78-80, *discussing* 2 U.S.C. § 434(e) (1970 ed., Supp. IV) (requiring reporting of independent expenditures). To resolve this specific constitutional concern, the Court imposed the limiting construction of express advocacy.

But that was in the context of independent expenditures. Importantly, the *Buckley* Court found that the "for the purpose of influencing" phrase "presents *fewer problems* in connection with the *definition of a contribution* because of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.* at 24 (emphasis added). Instead of imposing an

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that [the new provision] is overbroad because it permits a finding of coordination or cooperation notwithstanding the absence of a pre-existing agreement.").

"express advocacy" construction on the definition of "contribution," the Supreme Court merely clarified that a contribution includes: (1) "contributions made directly or indirectly to a candidate, political party, or campaign committee," (2) "contributions made to other organizations or individuals but earmarked for political purposes," and (3) "*all expenditures placed in cooperation with or with the consent of a candidate*, his agents, or an authorized committee of the candidate." 424 U.S. at 78 (emphasis added). The *Buckley* Court thus recognized that within the bounds of the "general understanding" of what constitutes a political contribution, the "for the purpose of influencing" language was sufficiently clear as to not require the limiting gloss of express advocacy. Otherwise put, the *Buckley* Court affirmed that the statutory provisions governing contributions – and by extension, coordinated expenditures (*i.e.* expenditures "placed in cooperation with or with the consent of a candidate") – were neither vague nor overbroad.

2. A Narrowing Construction Is Particularly Unwarranted in This Case Because the RNC is a Political Committee.

Application of the narrowing construction of express advocacy is particularly inappropriate here because the RNC, as a political committee, would not be entitled to an express advocacy construction of FECA's definition of "expenditure" even if it were making independent expenditures.

In addressing the potential vagueness of the definition of "expenditure" in

the context of independent spending, the *Buckley* Court said that where the spender is "an individual *other than* a candidate or a group *other than* a 'political committee,'" the term "expenditure should be narrowed to reach "only funds used for communications that *expressly advocate the election or defeat of a clearly identified candidate*." *Id.* at 79-80 (emphasis added). In the case of candidates and political committees, however, the Court held that the broader statutory definition of "expenditure" – spending "for the purpose of influencing" an election – was *not* vague or overbroad. *Id*.

The *Buckley* Court thus did not apply an express advocacy standard in connection to independent expenditures by candidates or political committees. It reasoned that political committees have as their "major purpose" "the nomination or election of a candidate," and therefore all disbursements by such committees could "be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id*. at 79. The narrow "express advocacy" construction of the term "expenditure" was not constitutionally necessary in connection to the independent spending of such "major purpose" groups. *Id*.

The Supreme Court sustained this approach in *McConnell* in its consideration of a BCRA requirement that state parties use hard money to pay for a public communication that "promotes or supports" or "attacks or opposes" a

federal candidate. 2 U.S.C. §§ 431(20)(A)(iii), 441i(b)(1). The Court rejected a vagueness challenge to this provision, finding that the words "clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision." 540 U.S. at 169 n.64. Quoting *Buckley*, the Court noted that "a general requirement that political committees disclose their expenditures raised no vagueness problems because the term 'political committee' 'need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate' and thus a political committee's expenditures 'are, by definition, campaign related.'" *Id*. Thus, the *McConnell* Court reaffirmed that the express advocacy test set forth in *Buckley* does not apply to groups whose major purpose is to influence federal elections.

This precedent confirms that the RNC, as a political committee, is not entitled to a narrowing construction of the governing statutory language: whether this construction is entitled the "express advocacy test" or, as plaintiffs prefer, the "unambiguously campaign related" test, is irrelevant. With respect to candidates and "major purpose" groups, the Supreme Court has repeatedly held that FECA's "for the purpose of influencing" language raises no constitutional vagueness or overbreadth concerns.

CONCLUSION

For the foregoing reasons, the challenged federal coordination restrictions, *see* 2 U.S.C. §§ 441a(d)(2-3), 441a(a)(2)(A), and 441a(a)(7)(B)(i), are constitutional. Accordingly, this Court should reject plaintiffs' certified questions, and affirm the district court's grant of summary judgment in favor of the FEC.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,977 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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