No._____

In The
Supreme Court of the United States

Anh "Joseph" Cao and the
Republican National Committee, *Petitioners*

v.

The Federal Election Commission, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petition for Writ of Certiorari

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Kaylan L. Phillips
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 facsimile
jboppjr@aol.com
Lead Counsel for Petitioners

Joseph F. Lavigne
Thomas P. Hubert
JONES WALKER
201 St. Charles Ave.
Suite 5100
New Orleans, LA 70170
504/582-8000
Counsel for Petitioners

December 8, 2010

Blank Page

Questions Presented

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"), the constitutionality of limits on coordinated political party expenditures in a case involving "more of the party's own speech," as opposed to "payment of the candidate's bills," was "not reach[ed]." *Id.* at 456 n.17. *See also id.* at 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting) ("unresolved" "constitutionality ... as applied to" "coordinated expenditures ... not ... functionally identical to contributions"). This case presents that issue, certified to the Fifth Circuit thus: "Do the expenditure and contribution limits and contribution provision in 2 U.S.C. §§ 441a(d)(2-3), 441a(a)(2)(A), and 441a(a)(7)(B)(i) violate ... First Amendment rights ... as applied to coordinated communications that convey the basis for the expressed support?"

Two questions are presented:

1. Whether the holding that contributions may be limited under lowered scrutiny because they "do[] not communicate the underlying basis for the support," "involve[] little direct restraint on [speech]," "involve speech by someone [else]," and "transformation ... into political debate involves [another's] speech," *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), permits the government to restrict expenditures for communications constituting a political party's own speech because the communications are coordinated with a candidate.

2. In the alternative, whether party coordinated expenditures constituting a party's own speech may constitutionally be treated as contributions if the only coordination is "on which time slot the advertisement should run for maximum effectiveness," *Colorado-II*,

533 U.S. at 468 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).

Parties to the Proceeding

Petitioners in this Court (Plaintiffs below) are Anh "Joseph" Cao and the Republican National Committee ("RNC"). Plaintiff Republican Party of Louisiana was held to lack standing under 2 U.S.C. 437h and is not a petitioner.

Respondent in this Court (Defendant below) is the Federal Election Commission ("FEC").

Corporate Disclosure Statement

Neither Petitioner is a corporation, so there is no parent company or publicly held company owning 10% or more of stock. Sup. Ct. R. 29.6.

Table of Contents

Questions Presented. . . . . (i)

Parties to the Proceeding. . . . . (iii)

Corporate Disclosure Statement. . . . . (iii)

Table of Authorities. . . . . (viii)

Petition. 1

Opinions Below. 1

Jurisdiction. 1

Constitutions, Statutes, and Regulations Involved.. 1

Statement of the Case. 1

A. Introduction. 1

B. Background. 3

C. Statutory Scheme. 3

D. Facts. 5

E. Litigation. 6

F. Issue, Holding & Dissents. 7

Reasons to Grant the Petition. 12

I. Important Questions Presented Have Not Been, but Should Be, Settled by this Court..... 12

A. The Constitutionality of Treating as Contributions a Party's Own-Speech Coordinated Expenditures Is an Unresolved Question Not Precluded by *Colorado-II*..... 12

B. The Constitutionality of Treating as Contributions a Party's Own-Speech Expenditures when Coordination Is Only as to Timing or Otherwise *De Minimis* Is an Unresolved Question..... 15

C. The Constitutionality of Limits on Own-Speech, Coordinated Party Expenditures Is an Important Question that this Court Should Decide..... 16

1. The Question Is Important Because It Implicates Foundational Principles of Campaign-Finance Law..... 16

a. *Buckley* Created the Constitutional Distinction Between Contributions and Expenditures..... 16

b. *Buckley* Provides the Analytical Keys for Protecting "Own Speech" Coordinated Expenditures..... 17

c. *Buckley* Required Strict Scrutiny of "Expenditure" Limits, Which Scrutiny Applies to Limits on "Own Speech" Communications.. . 18

d. A Test for "Own Speech" Is Required.. 19

e. The *Cao Ad* Is RNC's Own Speech.. 22

f. FEC Did Not Show a Sufficient Anti-Corruption Interest to Regulate RNC's "Own Speech."... 23

2. The Question Is Important Because Political-Party Speech Is Burdened and Disadvantaged.. 25

a. Because of the Need to Avoid Coordination, RNC's Independent Expenditures Cannot Truly Be Its Own Speech.. 25

b. Independent Expenditures Do Not Adequately Protect Parties' First Amendment Speech Right.. . 28

c. RNC's Goals Cannot Be Accomplished Through Independent Expenditures.. 29

d. Parties Should Be Favored but Are Now Disfavored as to Free Speech.. 31

II. The Decision Below Conflicts with *Buckley* and *Colorado-II*... 34

Conclusion... 35

Table of Contents - Appendix

Opinion below, *In re Cao*, 619 F.3d 410 (5th Cir. 2010)... 1a

District Court Order and Reasons, *Cao v. FEC*, 688 F.Supp.2d 498 (E.D. La. 2010)... 89a

U.S. Const. amend. I... 195a

2 U.S.C. § 431(8)... 195a

2 U.S.C. § 431(9)... 200a

2 U.S.C. § 431(16)... 204a

2 U.S.C. § 431(17)... 204a

2 U.S.C. § 437(h)... 204a

2 U.S.C. § 441a(a)(2)(A)... 205a

2 U.S.C. § 441a(a)(7)(B)(i)... 205a

2 U.S.C. § 441a(d)(2-3)... 205a

Table of Authorities

Cases

Buckley v. Valeo, 424 U.S. 1 (1976). . . . . *passim*

California Democratic Party v. Jones, 530 U.S. 567 (2000) 32

Cao v. FEC, 688 F.Supp.2d 498 (E.D. La. 2010) . . . . . *passim*

Citizens United v. FEC, 130 S. Ct. 876 (2010). . . . 14, 23-24, 28, 31-33

Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996). 3, 5, 31

EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009) 34

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989). 32

FEC v. Colorado Republican Federal Campaign Committee, 41 F.Supp.2d 1197 (D. Colo. 1999). 24

FEC v. Colorado Republican Federal Campaign Committee, 213 F.3d 1221 (10th Cir. 2000). . . . 23

FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001). . . . . *passim*

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007) 14

In re Cao, 619 F.3d 410 (5th Cir. 2010). . . . . *passim*

McConnell v. FEC, 540 U.S. 93 (2003). 14

Randall v. Sorrell, 548 U.S. 230 (2006). 32

SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010). 33

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). 32

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997). 31

Wisconsin Right to Life v. FEC, 546 U.S. 410 (2006) 14-15

Constitutions, Statutes, Regulations & Rules

U.S. Const. amend. I. . . . . *passim*

11 C.F.R. § 109.21. 8

11 C.F.R. § 110.11(b)(1)-(3). 20

11 C.F.R. § 110.11(d)(i). 20

11 C.F.R. § 110.11(d)(ii) 20

11 C.F.R. § 110.11(d)(iii). 20

2 U.S.C. § 431. 7

2 U.S.C. § 431(8). 1, 3

2 U.S.C. § 431(9). 1, 3

2 U.S.C. § 431(16). 1, 4

2 U.S.C. § 431(17). 1, 4

2 U.S.C. § 437h. . . . . (iii), 1, 6, 7

2 U.S.C. § 441a(a)(2)(A). . . . . (i), 1, 4

2 U.S.C. § 441a(a)(7)(B)(i). . . . . (i), 1, 4

2 U.S.C. § 441a(d). 20

2 U.S.C. § 441a(d)(2-3). . . . . (i), 1, 3, 5

28 U.S.C. § 1254(1). 1

28 U.S.C. § 1331. 7

28 U.S.C. § 2201. 7

28 U.S.C. § 2202. 7

U.S. Supreme Court Rule 10. . . . . 12, 34

U.S. Supreme Court Rule 29.6. . . . . (iii)

Other Authorities

FEC, Advisory Opinion 2010-09 33

FEC, Advisory Opinion 2010-11 33

Jonathan D. Salant & Traci McMillan, *Karl Rove, Republican-Leaning Groups Amass Winning Record in 2010 Midterms* (Nov. 3, 2010).. 33

Blank Page

Petition

Petitioners seek a writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit to review its judgment herein.

Opinions Below

The Fifth Circuit's opinion is in the Appendix ("App.") at 1a and available at *In re Cao*, 619 F.3d 410 (5th Cir. 2010) (en banc) ("*Cao*"). The district court's Order and Reasons, App. 89a, is available at *Cao v. FEC*, 688 F.Supp.2d 498 (E.D. La. 2010).

Jurisdiction

The Fifth Circuit's judgment was entered September 10, 2010. This Court has jurisdiction. 28 U.S.C. 1254(1).

Constitutions, Statutes, and Regulations Involved

Appended are: First Amendment, App. 195a; 2 U.S.C. 431(8) ("contribution" definition), App. 195a; 2 U.S.C. 431(9) ("expenditure" definition), App. 200a; 2 U.S.C. 431(16) ("independent expenditure" definition), App. 204a; 2 U.S.C. 431(17) ("political party" definition), App. 204a.; 2 U.S.C. 437h (judicial review provision), App. 204a; 2 U.S.C. 441a(a)(2)(A) ($5,000 contribution limit), App. 205a; 2 U.S.C. 441a(a)(7)(B)(i) ("Coordination-Contribution Provision"), App. 205a; 2 U.S.C. 441a(d)(2-3) ("Party Expenditure Provision"), App. 205a.

Statement of the Case

A. Introduction

This case presents a question that this Court has expressly reserved: whether a political party's "expendi-

tures" that contain a party's "own speech" may be treated as "contributions" if they are coordinated with the party's candidate. If treated as contributions, they are subject to limits diminishing the amount of coordinated "own speech" possible. Under this Court's fundamental First Amendment distinction between "contributions" and "expenditures," *see Buckley*, 424 U.S. at 19-23, an expenditure for a communication containing a party's own speech should not be subject to treatment and limitation as a contribution even if coordinated.

If that is so, the next question is where the line is to be drawn in a test defining a party's "own speech." The Plaintiffs and the two dissents here offer three options that provide a basis for this Court's analysis in establishing a constitutional test.

Moreover, this case shows that "independent expenditures," which are the only currently available avenue for a political party's unlimited "own speech," do not adequately protect a party's First Amendment right to engage in its own core political speech. And recent judicial decisions leave political parties—traditionally favored—at a disadvantage relative to corporations, unions, trade associations, special interest groups, and political action committees ("PACs") in their ability to engage in independent expenditures.

This petition should be granted so that this Court may answer the unresolved question and provide a test for determining when a coordinated political party expenditure constitutes the party's "own speech," thereby reducing somewhat the disadvantage that political parties now face.

B. Background

This case is a successor to *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado-I*"), and *Colorado-II*, 533 U.S. 431.

Colorado-I "held that spending limits set by the Federal Election Campaign Act ("FECA") were unconstitutional as applied to the Colorado Republican Party's independent expenditures in connection with a senatorial campaign." *Colorado-II*, 533 U.S. at 437. The case was "remanded for consideration of the party's claim that all limits on expenditures by a political party in connection with congressional campaigns are facially unconstitutional and thus unenforceable even as to spending coordinated with a candidate," and *Colorado-II* "reject[ed] that facial challenge to the limits on parties' coordinated expenditures." *Id.*

Colorado-II did "not reach" the constitutionality of the Party Expenditure Provision limits, 2 U.S.C. 441a(d)(2)-(3), as applied to communications "involv-[ing] more of the party's own speech," as opposed to "no more than payment of the candidate's bills." 533 U.S. at 456 n.17. As the dissent put it, this Court left "unresolved" their "constitutionality . . . as applied to" "coordinated expenditures . . . not . . . functionally identical to direct contributions." *Id.* at 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting). This case raises that unresolved issue, i.e., whether the First Amendment permits Congress to deem a party's "own speech" expenditures to be contributions by reason of coordination, even minor coordination, such as timing.

C. Statutory Scheme

FECA regulates the "contributions," 2 U.S.C. 431(8) (definition), and "expenditures," 2 U.S.C. 431(9) (defini-

tion)—including "independent expenditures," 2 U.S.C. 431(17) (definition)—of "political parties," 2 U.S.C. 431(16) (definition). *Buckley* held that under the First Amendment Congress may limit "contributions" but not "expenditures." 424 U.S. at 23-50.[1] So the constitutionally required distinction between contributions and expenditures is vitally important to parties.

FECA imposes a $5,000 limit per election on contributions from a political party to a candidate. 2 U.S.C. 441a(a)(2)(A). If a political party coordinates what would otherwise be an expenditure—regardless of the *degree* of coordination—FECA requires that expenditure to count, as an "in-kind contribution," against applicable contribution limits under the Coordination-Contribution Provision. 2 U.S.C. 441a(a)(7)(B)(i).

The Party Expenditure Provision provides additional spending authority for political parties—treated

---

[1] *Buckley* noted that federal law treats coordinated expenditures as contributions, 424 U.S. at 46 n.53, but the constitutionality of applying this to *own-speech* communications of the sort identified as fully-protected speech by *Buckley*, 424 U.S. at 19-23, was neither raised nor decided. The specific constitutional analysis in *Buckley*'s General Principles, *id.*, must control the application of FECA's treatment of coordinated expenditures as contributions. *Buckley* said that the coordinated-expenditure problem to be avoided was "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," *id.* at 46, which does not include own-speech communications. Moreover, there would have been no reason for *Colorado-II* to leave open the question of applying contribution limits to own-speech party coordinated expenditures if mere coordination resolved the constitutional problem.

as coordinated but not necessarily actually coordinated—which is adjusted for inflation and authorizes (in 2010) $43,500 in races for the House of Representatives (except for races in single-district states, for which the limit is $87,000) and ranging from $87,000 to $2,395,400 for Senate races. 2 U.S.C. 441a(d)(2-3).

In addition, parties may make independent expenditures in an unlimited amount, as permitted by *Colorado-I*, 518 U.S. at 608. But in practice this provides inadequate protection for a party's right to engage in its "own speech." *See infra* Part I.C.2.

D. Facts[2]

RNC is the national committee of the Republican Party. It seeks to advance its core principles by advocating Republican positions and electing Republican candidates.

In 2008, Anh "Joseph" Cao was a Republican candidate for U.S. Representative in Louisiana. Cao wanted to participate with RNC to the maximum extent constitutionally permissible in the activities outlined below.

When the complaint was filed, RNC had already reached its $5,000 contribution limit and spent or committed to spend its $42,100 coordinated expenditure limit in connection with Cao's race. RNC would have made more expenditures subject to the contribution and expenditure limits had it been legal to do so. A specific activity that RNC intended was broadcasting the following *Cao Ad*:

---

[2] The district court made findings of fact. (App. 102a-158a.). This case is not moot because it is capable of repetition yet evading review and Petitioners verified their intent to engage in materially similar future activity.

Why We Support Cao

The Republican National Committee has long stood for certain core principles, which we believe are the fundamentals of good government. When it comes to the issues of lower taxes, individual freedoms and a strong national defense, we need leaders who will stand with the American people and defend those issues.

We need leaders who understand that our economy is in a recession, our individual freedoms are constantly under attack and we continue to fight the global war on terrorism to keep our families safe.

Joseph Cao understands and fights for those issues. And, that is why we ask you to join us in supporting him on December 6. It's important for Louisiana and important for the country.

The *Cao Ad* would have been coordinated with Cao only as to the best timing for airing it.[3]

E. Litigation

Plaintiffs filed their initial complaint on November 13, 2008. On December 23, they moved for certification of constitutional questions under FECA's judicial review provision, 2 U.S.C. 437h. The certification motion

---

[3] The Fifth Circuit majority made much of the fact that Rep. Cao became aware of the *content* of the ad in the course of litigation. App. 41a-47a. Chief Judge Edith Jones in dissent noted that "after the past several years in litigation Cao would have to admit his awareness of the ad!" and that "[t]iming-only is the stipulation in the district court and therefore the only 'fact' before us." App. 52a n.4 (Jones, C.J., joined by Smith, Clement, Elrod & Haynes, JJ., concurring in part and dissenting in part) ("Jones dissent").

was first considered on February 4, 2009. After extensive discovery, the parties submitted supplemental briefing on certification. Oral argument was held on November 9. On January 27, 2010, the district court issued an order certifying some of Plaintiffs' proposed questions in whole or in part and dismissing others. Plaintiffs noticed appeal with respect to the non-certified questions on February 17. On March 1, the Fifth Circuit consolidated consideration of certified questions and non-certified questions. The Fifth Circuit's judgment was entered September 10, ruling against Plaintiffs on all counts.[4]

F. Issue, Holding & Dissents

On the "own speech" party coordinated expenditure issue that is the subject of this petition, Plaintiffs noted that *Colorado-II* both recognized that coordinated activity ranges from merely paying a candidate's bills to speech otherwise indistinguishable from an "independent expenditure" communication, which may not be limited, and left open the question of whether "own speech" communications could be treated as contributions by reason of coordination. *See Colorado-II*, 533 U.S. at 456 n.17 (majority), 468 n.2 (dissent). Plaintiffs argued that "own speech" coordinated communications must not be treated as contributions because *Buckley*'s justification for limiting contributions was that were not the contributor's own speech.

---

[4] Under 2 U.S.C. 437h, the district court had jurisdiction to certify questions to the Fifth Circuit en banc, *see also* 28 U.S.C. 1331 (district court federal-question jurisdiction), and the Fifth Circuit had jurisdiction over this case arising under the First Amendment and the Federal Election Campaign Act ("FECA"), 2 U.S.C. 431 *et seq.* *See also* 28 U.S.C. 2201 and 2202 (declaratory judgment jurisdiction).

See Buckley, 424 U.S. at 21. Plaintiffs set out a test for determining "own speech" that asks to whom the communication is *attributable*. *See infra* at 19-21. Plaintiffs also consistently returned to the *Cao Ad*, coordinated only as to timing, as one example of the sort of "own speech" ads that the *Colorado-II* dissent identified as not likely subject to regulation as a contribution. 533 U.S. at 468. This as-applied emphasis indicated clearly that at a minimum—even if the own-speech analysis were not recognized as controlling alone—a timing-only, own-speech ad could not be regulated as a contribution. Plaintiffs readily acknowledged that, *under FEC regulations*, the timing coordination was sufficient to make the *Cao Ad* a coordinated communication subject to coordination limits.

The *Cao* majority erroneously decided that Plaintiffs did not preserve the issue of whether treating own-speech coordinated communications as contributions was unconstitutional as applied to the timing-only, own-speech *Cao Ad*, relying on the oral-argument statements of counsel (1) that "'the degree of coordination does not affect *whose speech* it is at all,'" App. 27a-28a (emphasis added),[5] and (2) that as to whether an ad is *coordinated* it is like "being pregnant. You're either or not," App. 28a.[6] The majority then held that

---

[5] Under Plaintiffs' test for determining "own speech," the controlling analysis is to whom the speech is attributable, not the degree of coordination. *See infra* at 18-20. So the answer cited is consistent with that and does not address the separate issue of whether *de minimis* timing coordination also affects the analysis.

[6] The answer cited is consistent with FEC *regulations*, *see* 11 C.F.R. 109.21, and has nothing to do with any asserted concession that the *Cao Ad* was regulable under

"[a]ssuming that the *Colorado II* Court left open the possibility for an as-applied challenge . . . , the facts and arguments of the instant case do not present this court with that question." App. 33a. This was so, under lowered scrutiny,[7] because "[i]f this court were to accept Plaintiffs' exceedingly broad argument, we would be reaching a conclusion inconsistent with . . . *Colorado II*'s . . . teaching that coordinated expenditures may be restricted." App. 34a.[8]

Colorado-II. The Jones dissent explains this clearly, App. 57a n.8, noting also that the majority left out the following bolded, controlling language from its citation of counsel's oral argument statement: "'There's no degree of being pregnant. You're either or not, and **under their regulations**, it is . . . ,'" App. 57a n.8 (bold in original opinion). Thus, "Counsel conceded only FEC's regulatory interpretation of the consequences of timing-only coordination, *not* the constitutionality of that interpretation." *Id.* (emphasis in original).

[7] The decision below apparently applied the "closely drawn" scrutiny applicable to contribution limits. *See* App. 33a (quoting *Colorado-II*, 533 U.S. at 456, regarding scrutiny applied to contribution limits). But since the issue is whether a party's coordinated own-speech expenditure *may be treated as a contribution*, this begs the question at issue.

[8] The decision below misstates Plaintiffs' position. It says that "under the Plaintiffs' standard, all coordinated expenditures paid for and adopted by the party would be considered a party's own speech and not subject to regulation." App. 35a. But this ignores the fact that Plaintiffs' own-speech test requires that the expenditure be for *speech*. *See infra* at 18-20. And the Fifth Circuit disagreed with the district court's statement that "'[t]he only type of party-coordinated communication that plaintiffs believe is not a

There were two dissents as to the questions presented by this petition. The Jones dissent (Jones, C.J., joined by Smith, Clement, Elrod & Haynes, JJ.), would have decided the issue narrowly as applied to the *Cao Ad*. It stated that "a narrow fact-based challenge [wa]s before the Court," App. 52a (capitalization altered), and that "the court must address narrow issues first," App. 59a (capitalization altered). In evaluating Cao's as-applied challenge, it applied strict scrutiny because the *Cao Ad* "hews closely to the independent expenditure side of the spectrum." App. 68a. It concluded that "[t]he FEC offered *no* evidence or argument that coordination of the Cao Ad as to broadcast timing will appreciably increase the risk or appearance of corruption or circumvention of contribution limits." App. 75a (emphasis in original). And it determined that under either strict or closely-drawn scrutiny the First Amendment prohibited treating the *Cao Ad* as a contribution by reason of coordination. App. 70a-79a.

The "Clement dissent" joined the Jones dissent, but "would go further . . . in fashioning a standard that protects political speech that is not the functional equivalent of a campaign contribution." App. 82a-88a

---

party's "own speech" and therefore may be constitutionally limited is one that a campaign airs and for which the party merely pays the bill.'" App. 35a n.22 (citation omitted). The decision below asserts that "under Plaintiffs' argument even this type of communication would be considered the party's own speech if the party adopted the ad as its own." App. 35a n.22. Of course, that changes the facts. If an ad's speech is attributable to the candidate and the party pays the bill, the payment is an in-kind contribution. If an ad's speech is attributable to the party, it should not be deemed a contribution even if coordinated.

(Clement, J., joined by Jones, C.J., and Smith & Elrod, JJ., concurring in part and dissenting in part). It "s[aw] no reason that timing alone makes any difference in the constitutional analysis, and question[ed] whether a *de minimis* standard provides a line bright enough to avoid chilling protected speech through the threat of an enforcement action." App. 83a. Rather, "[t]he Supreme Court has drawn the relevant distinction between an expenditure and a contribution: a contribution 'serves as a general expression of support . . . ,' while an expenditure 'communicate[s] the underlying basis for support.'" App. 83a (quoting *Buckley*, 424 U.S. at 21). "[T]he goal of the anti-coordination rules . . . [is] preventing circumvention of the contribution limits by . . . simply paying a candidate's bills." 83a (citing *Buckley*, 424 U.S. at 47 n.53). But a "'timing only' standard does nothing to capture the difference between these two constitutionally distinct forms of communications" and "a *de minimis* standard is difficult to apply and interpret." App. 84a. The dissent argued that "[w]hat does make a difference in the constitutional analysis . . . is coordination as to the content of the ad," which was lacking as to the *Cao Ad.* App. 84a. The dissent then set out a "content-driven" "two-pronged standard" to determine when coordinated expenditures may be treated as contributions: "An advertisement is functionally identical to a contribution only if it is susceptible of no other reasonable interpretation than as a general expression of support for the candidate, *and* the ad was not generated by the candidate." App. 85a (emphasis in original).

Reasons to Grant the Petition

The petition should be granted because the Fifth Circuit (I) "decided . . . important question[s] of federal law that ha[ve] not been, but should be, settled by this Court" and (II) did so "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10.

I. Important Questions Presented Have Not Been, but Should Be, Settled by this Court.

The Fifth Circuit decided two important questions of federal law that this Court left "unresolved," *Colorado-II*, 533 U.S. at 468 n.2 (dissent): first, whether a political party's expenditure for a communication that constitutes its own speech may be considered a contribution by reason of coordination (Part I.A); and second, whether the fact that the coordination is only as to timing affects the answer to the first question (Part I.B). These are important questions of federal law that have not been, but should be, decided by this Court (Part I.C).

A. The Constitutionality of Treating as Contributions a Party's Own-Speech Coordinated Expenditures Is an Unresolved Question Not Precluded by *Colorado-II*.

In *Colorado-II*, this Court expressly left open the question of whether the Party Expenditure Provision limits were unconstitutional under the First Amendment as applied to expenditures for communications that constitute a party's own speech, as opposed to merely paying a candidate's bills. *Colorado-II*, 533 U.S. at 456 n.17 (majority), 468 n.2 (dissent). This Court's express holding that it did not reach the own-speech question necessarily decided two things.

First, the mere *fact of coordination* is an insufficient ground under the First Amendment for treating all coordinated expenditures as contributions. If it were sufficient, this Court in *Colorado-II* would not have left open the possibility of a successful as-applied challenge regarding coordinated own-speech communications. Thus, when the decision below said that it could not rule for Plaintiffs because "we would be reaching a conclusion inconsistent with the *Colorado II* Court's teaching that coordinated expenditures may be restricted," App. 34a, it was wrong. *Colorado-II* expressly recognized that the First Amendment may require that some coordinated expenditures not be restricted, specifically those involving a party's own speech, as opposed to merely paying a candidate's bills. By recognizing that potential exception, it did not hold that coordinated expenditures *per se* may be restricted as contributions.

Second, the fact that this Court in *Colorado-II* expressly recognized the as-applied question it left open necessarily means that an as-applied challenge regarding whether some or all coordinated own-speech communications may be treated as contributions is *permitted* and is not actually a *facial* challenge for potentially carving out an exception, whatever the size, to the heretofore general rule that coordinated expenditures may be treated as contributions. So an as-applied challenge may not be rejected on the ground that a favorable ruling on the unresolved own-speech question would effectively overrule *Colorado-II*. Thus, when the decision below insists that Plaintiffs' challenge is really facial because it "rests . . . on the same general principles rejected by the Court in *Colorado II*," and that excluding own-speech coordinated communications

from treatment as contributions "would effectively overrule all restrictions on coordinated expenditures on coordinated expenditures," App. 38a, it was simply wrong.[9]

The decision below makes the same error this Court rejected in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (per curiam) ("*WRTL-I*"). In *WRTL-I*, FEC argued, and the district court held, that the decision facially upholding the prohibition on corporate electioneering communications, *McConnell v. FEC*, 540 U.S. 93,207 (2003), *overruled*, *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) ("*Citizens*"), precluded an as-applied challenge for reasons similar to those asserted here. This Court unanimously reversed, holding that language in a footnote about "'uphold[ing] all applications of the primary definition' of electioneering communications" and the fact of "upholding [the ban] against a facial challenge . . . did not purport to resolve future as-applied challenges." *WRTL-I*, 546 U.S. at 411-12 (quoting *McConnell*, 540 U.S. at 190, n. 73). And in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"), the principal opinion noted that "[l]ast Term, we reversed a lower court ruling, arising in the same litigation before us now, that our decision in *McConnell* left 'no room' for as-applied challenges to [the ban]." 551 U.S. at 456 (Roberts, C.J., joined by

---

[9] The decision below was *factually* wrong because there remain many coordinated expenditures that would rightly be deemed in-kind contributions because they are in the nature of simply paying a candidate's bills. Any coordinated expenditures paying candidates' bills for polling, printing, rent, utilities, consultants, etc. would be properly considered in-kind contributions. Even paying a candidate's media bills would presumably be an in-kind contribution.

Alito, J.) (citation omitted). *See also id.* at 525 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ.) ("*McConnell*'s holding that [the ban] is facially constitutional is overruled."). The arguments rejected in *WRTL-II* must not prevail here.

B. The Constitutionality of Treating as Contributions a Party's Own-Speech Expenditures when Coordination Is Only as to Timing or Otherwise *De Minimis* Is an Unresolved Question.

In addition to the own-speech-as-contribution issue standing alone, also "unresolved" is the question of whether an own-speech communication coordinated only as to timing (or otherwise *de minimis* coordination) may be deemed a contribution. The majority below did not believe that this subset of own-speech communications remained at issue, but for the reasons set out at length in the Jones dissent, App. 49a-82a, and described above, it remains a viable, but unresolved, issue in this case. However, as the Clement dissent explains, a test based merely on timing or other *de minimis* coordination is unsatisfactory and there is strong reason to establish a test for distinguishing all own-speech coordinated communications, App. 82a-88a, which test would subsume the narrow issue of whether the *Cao Ad* must be considered an expenditure because the coordination was only as to timing. But regardless of whether a broader test is established, whether an own-speech ad like the *Cao Ad* that is coordinated only as to timing and states the basis of support for a candidate may constitutionally be treated as a contribution and limited under the First Amendment is a specific question left unresolved in *Colorado-II*. *See* 533 U.S. at 468 n.2 (dissent).

C. The Constitutionality of Limits on Own-Speech, Coordinated Party Expenditures Is an Important Question that this Court Should Decide.

Whether the First Amendment permits a party's own-speech, expenditures to be limited as contributions due to coordination is an important question requiring this Court's resolution. It is important because it implicates this Court's foundational principles of campaign-finance jurisprudence and because political parties' own speech is currently burdened and disadvantaged.

1. The Question Is Important Because It Implicates Foundational Principles of Campaign-Finance Law.

The question presented here is important because it goes to the foundation of this Court's campaign-finance jurisprudence in *Buckley*, 424 U.S. 1.

a. *Buckley* Created the Constitutional Distinction Between Contributions and Expenditures.

The constitutionally significant difference between expenditures and contributions was stated in *Buckley*'s foundational "General Principles" discussion. "[E]xpenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19-20. But contribution limits pose lower First Amendment burdens:

> By contrast . . . a limitation upon the amount that . . . one . . . may contribute to a candidate or political committee entails only a *marginal restriction* upon the contributor's ability to engage in free communication. A contribution serves as

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

Id. at 20-21 (emphases added) (footnote omitted).

b. *Buckley* Provides the Analytical Keys for Protecting "Own Speech" Coordinated Expenditures.

There are two keys to *Buckley*'s foundational analysis that are applicable here. The first is the distinction between a disbursement that is just a "symbolic" or "general expression of support," which is a contribution, and a disbursement that "communicate[s] the underlying basis for the support," which is an expenditure. The second is the related distinction in the last sentence of the block quote, *supra*, which provides a

generally-applicable rule for distinguishing between contributions and expenditures, i.e., does the disbursement fund the payor's own speech to the voters, or does it fund someone else's speech?

This is the foundational analysis to which reference was made in *Colorado-II* regarding the unresolved question of whether a party's coordinated expenditure for a communication containing its own speech could be treated as a contribution. 533 U.S. at 456 n.17 (majority), 468 n.2 (dissent). *Buckley*'s fundamental principles of campaign-finance jurisprudence and the First Amendment preclude the possibility that one's own speech constitutionally may be treated as a contribution rather than an expenditure for any reason because it is not someone else's speech, and so full First Amendment free-speech protections for core political speech engage.

c. *Buckley* Required Strict Scrutiny of "Expenditure" Limits, Which Scrutiny Applies to Limits on "Own Speech" Communications.

Buckley only allowed lowered scrutiny for "contributions" because they were not one's own speech, 424 U.S. at 25, so where full First Amendment speech protections apply, as with "expenditures," strict scrutiny applies, *id.* at 44-45. Thus, if a party communication is considered an expenditure, because it is one's own speech, then strict scrutiny applies. In this case, the *Cao Ad* is clearly RNC's own speech, *see infra* Part I.C.1.e, so strict scrutiny must apply to it and materially similar own-speech coordinated party communications. The decision below applied lowered scrutiny because it deemed the *Cao Ad* a contribution automatically by reason of coordination, App. 40a, but that begs

the question presented here, i.e., whether it *may* be treated as a contribution under *Buckley*'s analysis of First Amendment requirements. The Jones dissent applied strict scrutiny because the *Cao Ad* "hews closely to the independent expenditure side of the spectrum," App. 68a, which provides a narrow reason why strict scrutiny must be applied to coordinated party expenditure limits as applied to the *Cao Ad*.

d. A Test for "Own Speech" Is Required.

If coordinated expenditures for own-speech communications may not constitutionally be limited because their fundamental nature requires First Amendment protection, the next question is how to determine what is a party's "own speech." Plaintiffs and the two dissents below created tests, while the majority avoided that central question in this case.

Plaintiffs' Test. Plaintiffs' own-speech test is based on *Buckley*'s foundational principles and has two parts, based on the words "speech" and "own." First, the coordinated expenditure must be for "speech," i.e., it must for a *communication*, as opposed to merely paying a candidate's bills for rent, polling, utilities, and other activities without a communication element, which presumably would always constitute in-kind contributions. Second, the speech must be a party's "own" in the sense that it is *attributable* to the party. That is the commonsense way we usually evaluate speech (such as when the President adopts language written by his speechwriters). Whether speech is attributable to the party may be determined by the content of the communication, e.g., "The RNC wants to thank you for your support in the recent election." Attribution can also be determined by who pays for and adopts the speech. FEC's disclaimer regulations

provide guidance for attribution, following *Buckley*'s focus on who is *paying* for a communication. First, if a political party (e.g., Republican Party of Louisiana) issues an agency letter to another political party (e.g., RNC) for authorized spending (under 2 U.S.C. 441a(d)), it is the party actually paying for the communication that is attributed authorship, i.e., paid for by _____," even if the payor is acting as "the designated agent" for the other party. 11 C.F.R. 110.11(d)(i). Though the Louisiana GOP might approve, have input in, or even author an ad paid for by RNC, if RNC pays for it, the disclaimer must identify RNC as the payor, i.e., it is RNC's own speech, not the state party's. Second, the regulations equate "paid for by" and "made by," so that who makes the payment controls whose "own speech" it is. *See* 11 C.F.R. 110.11(d)(i) ("paid for by"), (ii) ("made by" and "paid for"), (iii) ("paid for by"). Third, the regulations confirm this understanding in the non-political-party context by requiring the payor to be listed in the disclaimer, even where a communication is "authorized by a candidate . . . but is paid for by any other person," 11 C.F.R. 110.11(b)(1)-(3). So authorization is merely approval: it does not convert a payor's own speech into the candidate's speech.

Plaintiffs set out a test to determine "own speech," which they believe is a common-sense, analytically sound approach to determining to whom the speech is attributable and is consistent with FEC's own regulations assigning attribution credit for a communication. The majority below saw no need to establish an "own speech" test because it decided that *Colorado-II* precludes such a challenge: "If this court were to accept Plaintiffs' exceedingly broad argument, we would be reaching a conclusion inconsistent with . . . *Colorado*

II's . . . teaching that coordinated expenditures may be restricted." App. 34a. Consequently, the majority decided that Plaintiffs here presented an "exceedingly broad argument," not the "as-applied challenge" left open by *Colorado-II*, App. 34a, 37a, because "Plaintiffs' 'own speech' argument would effectively eviscerate" *Colorado-II*. App. 33a. But Plaintiffs did not present a second facial challenge or one based on hypothetical facts. They presented an as-applied challenge with specific facts, including a very specific ad precisely of the sort described in *Colorado-II* as presenting an open question. The fact that Plaintiffs then presented their analysis of where the "own speech" line should be drawn may not be used against them, as the majority did below, to reject the precise as-applied challenge that this Court expressly left open.

Jones Dissent Test. The "test" proposed by the Jones dissent below protects "own speech" in a limited context. It would apply strict scrutiny where an ad "hews closely to the independent expenditure side of the spectrum," App. 68a, and would hold that where the only coordination is *de minimis* and "[w]ithout some link of candidate control or influence, neither the *quid pro quo* corruption nor appearance of corruption that justifies contributions limits can occur," App. 73a (Jones, C.J., joined by Smith, Clement, Elrod & Haynes, JJ.). "Consequently the First Amendment prohibits treating an ad like the *Cao Ad* as a contribution by reason of coordination, App. 70a-79a. The Jones dissent's analysis is transferable to other *de minimis* coordination scenarios because the government will similarly be unable to meet its burden of justifying the coordinated expenditure limits under the applicable scrutiny.

Clement Dissent Test. The own-speech test proposed by the Clement dissent is a "content-driven" "two-pronged standard" to determine when coordinated expenditures may be treated as a contribution: "An advertisement is functionally identical to a contribution only if it is susceptible of no other reasonable interpretation than as a general expression of support for the candidate, *and* the ad was not generated by the candidate." App. 85a (emphasis in original). This dissent also pointed out the deficiencies of a "timing alone" or "*de minimis* standard." App. 83a.

Which of these tests satisfies the First Amendment is an important question that this Court should decide because it is a foundational but undecided question of campaign-finance jurisprudence. Or the Court may need to fashion yet another test to satisfy First Amendment requirements. But some constitutional line is required because parties' own-speech coordinated communications are currently being treated and limited as contributions, which is impermissible under the First Amendment as interpreted by this Court in *Buckley*, 424 U.S. 1.

e. The *Cao Ad* Is RNC's Own Speech.

Under any of the "own speech" tests set out in this case, the *Cao Ad* is clearly RNC's own speech. It is attributable to RNC by its content and would bear a disclaimer showing that RNC paid for the ad. It communicates the underlying basis for the support and is not merely a general expression of support for the candidate and his views, i.e., it is not merely a symbolic expression of support. *De minimis* coordination with Rep. Cao as to timing would in no way alter the fact that this ad is RNC's own speech. The ad is plainly more in the nature of a party's own speech than in the

nature of merely paying a candidate's bills. Disbursements for it should be considered expenditures, not contributions.

f. FEC Did Not Show a Sufficient Anti-Corruption Interest to Regulate RNC's "Own Speech."

The only interest justifying limitations on contributions is preventing corruption or its appearance. *Buckley,* 424 U.S. at 26-27. In *Citizens*, 130 S.Ct. 876, this Court emphatically dismissed the government's fall-back arguments regarding corruption interests. It rejected *any* corruption interest beyond *quid pro quo* corruption. *Id* at 909-10. "Ingratiation and access . . . are not corruption." *Id.* at 910. *Citizens* stated that evidence showing "that speakers may have influence over or access to elected officials does not mean these officials are corrupt" and "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy." *Id.* at 910.

And no anti-circumvention argument relying on access and gratitude justifies restriction. *Colorado-II* justified the Party Expenditure Provision Limits as a means to prevent circumvention.[10] But if the First

---

[10] 533 U.S. at 465 ("We hold that a party's coordinated expenditures . . . may be restricted to minimize circumvention . . . ."). As to other alleged "corruption," the Court found it unnecessary to reach FEC's arguments based on "*quid pro quo* arrangements and similar corrupting relationships between candidates and parties themselves." *Id.* at 456 n.18. However, the Tenth Circuit had rejected FEC's arguments not reached, *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1229-31 (10th Cir. 2000), as it had rejected the circumvention argument, *id.* at 1231-32. And the district court found no factual evidence of

Amendment mandates that parties' "own speech" be treated as "expenditures," the circumvention argument fails as a matter of law because only "contributions" may be limited, not expenditures. And the "own speech" issue was expressly left open despite *Colorado-II*'s holding "that a party's coordinated expenditures . . . may be restricted to minimize circumvention," 533 U.S. at 465. Thus, potential "circumvention" did not foreclose the "own speech" question.

Moreover, Plaintiffs do not engage in the "tallying" identified as problematic in *Colorado-II*, *id.* at 459. *See Deposition of Thomas Josefiak* at 42:11-43:1. And the *Colorado-II* dissenters had strong arguments against any circumvention interest in this context, 533 U.S. at 474-480, and for narrowly-tailored approaches if corruption were proven, *id.* at 581-82. In this as-applied challenge, FEC has been unable to provide evidence of corruption, as defined in *Citizens*, or even of the type of corruption contemplated by *Colorado-II*.

---

quid pro quo corruption between parties and candidates. *FEC v. Colorado Republican Federal Campaign Committee*, 41 F.Supp.2d 1197, 1211-12 (no evidence of corruption in the form of contributors "forc[ing] the party committee to compel a candidate to take a particular position"), 1212-13 (no "corruption" from political parties' influence over candidates because "decision to support a candidate who adheres to the parties' beliefs is not corruption"), 1213 ("FEC has failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof.") (D. Colo. 1999). Here, FEC has again failed to provide evidence of corruption. So there is no *quid pro quo* corruption, and there can be no "*appearance* of corruption" where the alleged "corruption" is *absent*.

In sum, the unresolved issue of whether a party's coordinated expenditures for its own speech may be treated and limited as contributions is clearly presented and involves the most foundational analysis of campaign-finance jurisprudence, i.e., the constitutional difference between a contribution and an expenditure. The analysis of how to state a test for "own speech," i.e., where on the spectrum of coordinated expenditures to recognize protection for a party's own speech, was begun by Plaintiffs and two dissenting opinions. This petition should be granted to finish that analysis.

2. The Question Is Important Because Political-Party Speech Is Burdened and Disadvantaged.

The own-speech question is also important because the current independent-expenditure regime, which is necessitated by the coordinated expenditure restrictions, burdens and disadvantages the First Amendment political-speech rights of parties.

a. Because of the Need to Avoid Coordination, RNC's Independent Expenditures Cannot Truly Be Its Own Speech.

A political party may do an "independent expenditure" that is supposed to be its "own speech," for which it is responsible, for which it may be criticized, and yet be surprised and unhappy because, until the communication is released, the party officials have no idea what it will say. This is because the nature of the relationship between the party and the candidate forecloses the opportunity for an "independent expenditure" to be a party's "own speech."[11]

---

[11] A district court finding of fact shows why the independent-expenditure option does not sufficiently protect

Primarily, prior contacts between the party and the candidate ruin the opportunity for independent expenditures. A party must "worry about whether or not a conversation that took place with a member of Congress . . . was actually going to taint their ability to do an independent expenditure." *Deposition of Thomas Josefiak* at 57:16-58:1.

Additionally, party chairmen "really have no control over what the message is." *Id.* at 58:2-5. "[T]hrough an [i]ndependent [e]xpenditure [p]rogram, the [RNC] chairman . . . has no control over the message, but, then bears full responsibility for what the message is, even though the first time he sees that message is when everyone else sees it." *Id.* at 58:7-11. "[T]he idea that the [RNC] chairman . . . cannot control what

---

RNC's free speech right:

> 49. Because the RNC has a continuous and ongoing relationship with its candidates, special measures must be taken to do independent expenditures regarding its candidates. . . . [T]he RNC may hire an outside consulting group . . . but . . . the RNC . . . may have . . . [no] involvement in the independent expenditure in order for it to be truly independent. . . . [T]he RNC . . . has . . . [no] control over the message of an independent expenditure yet the RNC bears responsibility for that message. The RNC makes its independent expenditures in this way out of a belief that there is no way to have a true "firewall policy." . . .

App. 119-20a. Creating a firewall requires isolating certain staff from all information that might trigger coordination in order to do the independent expenditures. But this cannot involve key party officials, who must maintain contact with candidates.

message the RNC is putting out through an [independent expenditure] [p]rogram has been very troublesome." *Id.* at 58:12-15.

Under the current system, "the only thing the chairman approves is what the budget is for independent expenditures." *Id.* at 59:1-3. That money goes to "individual consulting groups that have no connection . . . with [a candidate's] campaign in order to treat it as truly independent . . . . *Id.* at 59:4-8. The chairman would not be independent from the candidate's campaign because, by nature of the office, he or she "is going to have communications with campaigns, and as a result, could never, never be involved with . . . any sort of [i]ndependent [e]xpenditure [p]rogram." *Id.* at 59:9-13. Nor are other RNC officials allowed to be involved because the program must be conducted in "total isolation from any employee of the RNC in any engagement with an independent expenditure operation, save the counsel's office," which would only assure legal compliance as to disclaimers and the like. *Id.* at 59:14-22. Thus, "no one at the RNC" would have any "control over the content" or "see an independent expenditure until everyone else did when it hit the air waves." *Id.* at 60:2-5.

Therefore, RNC's "own speech" in the form of independent expenditures currently must be written by "outside consultants," who "are hired to write the scripts, take their own polls, do their own research, and decide on their own what the message is going to be." *Id.* at 60:15-18. As a general rule, then, independent expenditures are employed only when there is "no other way" to have an impact on a race. *Id.* at 61:2-16.

b. Independent Expenditures Do Not Adequately Protect Parties' First Amendment Speech Right.

In *Citizens*, this Court decided that "the option to form PACs d[id] not alleviate the First Amendment problems with [the ban on corporate electioneering communications]," 130 S.Ct. at 897, because of the burdens of PAC compliance, *id.* at 897, and the fact that "PACs . . . must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign," *id.* at 898. This analysis is applicable here because similar problems arise with respect to parties' ability to engage in their own speech through independent expenditures. Just as the PAC-option did not adequately protect corporations' right to engage in their own core political speech, the independent-expenditure-option does not adequately protect the right of political parties to engage in their own core political speech.

Treating parties' coordinated "own speech" expenditures as "contributions" is especially problematic because the rules restricting how *parties* can make independent expenditures render such independent expenditures ineffective in advancing s parties' "own speech." Representative Cao explained that the National Republican Congressional Committee ("NRCC") had made some "robocalls" as independent expenditures that "were so . . . badly done and . . . counterproductive that we wanted them to stop." *Deposition of Anh "Joseph" Cao* at 34:8-12. "[W]e wanted them to stop because it was hurting us more than it helped us." *Id.* at 34:17-19. Then-candidate Cao needed Democratic

votes in a heavily Democratic district, but the calls attacked the Democratic party, which alienated potential Democratic voters for Cao. *Id.* at 35:1-21. The underlying problem, Cao said, was that "none of them discussed to me those independent expenditures because we were not allowed to . . . ." *Id.* 34:2-4. Had NRCC been allowed to consult with the Cao campaign, NRCC could have ensured that its "own speech" was helpful, not harmful.

c. RNC's Goals Cannot Be Accomplished Through Independent Expenditures.

Coordinating with candidates not only promotes "efficiency from the ability to raise and spend resources, but, also in getting a message out and giving more information out there to the electorate to make judgment calls." *Id.* at 155:9-13. Coordination allows RNC "[t]o be cohesive in the message," and to "get its speech out there . . . in addition to what the candidate may want to say . . . ." *Id.* at 156:5-9. This is important to assure that the public knows that party affiliation "means something." *Id.* at 156:10-15. And it is important in light of the need to assure that political parties are not disadvantaged in comparison to newly-liberated corporations, unions, PACs, and other special interest groups. *See* Part I.C.1.d.

Furthermore, RNC was unable to do the *Cao Ad* as an independent expenditure because "the ability to even do an independent expenditure at that point in time was difficult." *Id.* at 157:9-13. One reason it was difficult is because the independent expenditure scheme requires "a system that had not been in place," and there was no "time to put it all in place." *Id.* at 157:14-16. Another reason was that RNC could not have written the *Cao Ad* if it were an independent

expenditure because, to create the necessary independence, "this would have had to have been through an outside consultant that would have had to have written this and we wouldn't have had control of the message and it probably would have looked very different than what our message was." *Id.* at 157:17-158:3.

At the time RNC wanted to speak through the *Cao Ad*, it was not practically possible to firewall off RNC staff in order to do an independent expenditure because that "would have had to have started at the beginning of an election cycle." *Id.* at 159:1-12. "And that person would have no communications whatsoever and you sit around there for a year and a half doing nothing and waiting to do independent expenditures and eating resources up for other employees," so "that, as a practical matter, it just doesn't work that way." *Id.* at 159:13-18.

Under the current system, RNC cannot even tell a paid outside consultant the topic on which it wants to speak without destroying the independence of the expenditure. *Id.* at 171:1-20. And even if, for example, one were able to find a consultant that only worked on one issue, "once you hire them . . . , you can't tell them which way to talk about the issue . . . pro or con, or even if they took the same position on pro or con, you wouldn't be able to hone in on what that message was, it would be totally left up to them." *Id.* at 172:2-14.

Allowing a party to express its "own speech" only through "independent expenditures" is a special burden on free speech. "It's the RNC's speech and if the RNC isn't able to say what it really wants to say, and the way it wants to say it, that is a burden and that is a problem." *Id.* at 73:18-21. And it would not be enough

to fix the problem "[i]f coordination regulations were written in such a way to allow the chairman to have control over the script." *Id.* at 73:22-74:2. This is so because "it would not meet the definition of an independent expenditure because that same chairman will have had conversations with the state parties, with the campaigns." *Id.* at 74:4-10. The chairman still has a problem even if "the discussion were not about a particular coordinated expenditure," but rather "about everything but this one particular coordinated expenditure" because "no one is going to believe that they didn't talk about it." *Id.* at 74:16-75:9. This results in a chill. *Id.* at 75:10-12. "[A]rchetypical political speech . . . [should not] be chilled . . . . '"First Amendment freedoms need breathing space to survive."'" *Citizens*, 130 S.Ct. at 892 (citations omitted).

The First Amendment requires that political parties be able to coordinate with their candidates to fully engage in their "own speech." The "independent expenditure" option is inadequate to protect this right.

d. Parties Should Be Favored but Are Now Disfavored as to Free Speech.

Political parties have long had a favored status for allowing citizens to advance "common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). A "political party's independent expression . . . reflects its members' views about the philosophical and governmental matters that bind them together." *Id.* at 615 (Breyer, J., joined by O'Connor and Souter, JJ.). So they have a "unique role in serving" the principles of the First Amendment, *Colorado-I*, 518 U.S. at 629 (Kennedy, J., concurring, joined by Rehnquist, C.J., and Scalia, J.), and political party expression is protected "'core' political speech."

Id. at 616 (citation omitted).

Because political parties bear directly on an individual's right of association, political parties have historically been given special protections. For example, the First Amendment protects a party's primaries, *California Democratic Party v. Jones,* 530 U.S. 567, 574 (2000) (describing constitutional importance of associating in political parties to elect candidates), internal processes, *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 230 (1989) (including how a party chooses to "organize itself, conduct its affairs, and select its leaders"), and rights of association generally, *Tashjian v. Rep. Party of Conn.*, 479 U.S. 208, 224 (1986) ("The Party's determination of the . . . structure which best allows it to pursue its political goals[] is protected by the Constitution"); *Randall v. Sorrell,* 548 U.S. 230, 256 (2006).

But other entities have recently been afforded more free-speech protection than parties. Despite the unique, vital role of parties, all corporations and unions can now use non-federal funds for independent expenditures, while political parties remain limited to federal funds (i.e., funds received subject to federal source-and-amount limits). *See Citizens*, 130 S.Ct. 876. Even beyond the activities *Citizens* permits, corporations may also solicit and spend non-federal funds for grassroots lobbying, for example, while RNC may not. Political parties are similar to corporations or unions in that they are all citizens groups, but parties are unique in that they speak directly for members as an embodiment of collective political beliefs. Justice Breyer noted the harm of disadvantaged parties during the *Citizens* oral argument:

> Suppose we overrule these two cases. Would that leave the country in a situation where corporations and trade unions can spend as much as they want in the last 30 days on television ads . . . but political parties couldn't, because political parties can only spend hard money on this kind of expenditure? And therefore, the group that is charged with the responsibility of building a platform that will appeal to a majority of Americans is limited, but the groups that have particular interests, like corporations or trade unions, can spend as much as they want?

Tr. Oral Arg. at 22 (available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf.).

After *Citizens*, the District of Columbia Circuit held that the First Amendment prohibits limiting contributions to a political committee organized under section 527 of the Internal Revenue Code that only makes independent expenditures. *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010). FEC adopted this holding as nationwide policy. *See* FEC, Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten). So express-advocacy-only groups, receiving unlimited contributions, played a prominent role in the 2010 general election. *See, e.g.*, Jonathan D. Salant & Traci McMillan, *Karl Rove, Republican-Leaning Groups Amass Winning Record in 2010 Midterms* (Nov. 3, 2010)(available at http://www. bloomberg.com/news/2010-11-03/karl-rove-republican-leaning-groups-amass-winning-record-in-2010-midterms.html). Political parties, limited in the amount of contributions they may receive, simply cannot compete with the myriad advocacy groups now competing in the public square

with their own core political speech.

This downgrading of the relative power of political parties led the court in *EMILY's List* to point out the historical anomaly of other groups' advantages over parties. *EMILY's List v. FEC*, 581 F.3d 1, 19 (D.C. Cir. 2009). Here a first step may be taken to rectify the imbalance by recognizing the First Amendment right of political parties to coordinate their own-speech communications with their candidates without having their expenditures limited as if they were contributions.

In sum, the unresolved issue of whether a party's coordinated expenditures for its own speech may be treated and limited as contributions is an important question that this Court should decide because of the substantial negative effects on parties of the current scheme. This case presents an opportunity to enhance the relative power of political parties by simply applying the First Amendment and following *Buckley*'s foundational analysis.

II. The Decision Below Conflicts with *Buckley* and *Colorado-II*.

A second basis on which this Court grants certiorari is whether a decision below conflicts with a decision of this Court. Sup. Ct. R. 10. This conflict exists here as discussed more thoroughly in the context of the discussion above.

The decision below conflicts with *Buckley*, which clearly set out the constitutional distinction between expenditures and contributions, 424 U.S. at 19-21, which foundational distinction does not permit treating parties' coordinated expenditures for communications containing their own speech as contributions that may be limited under lowered scrutiny. *See supra* at 16-18.

And the decision below conflicts with *Colorado-II*, which expressly left open—and thus clearly did not *preclude*, as the decision below held, App. 34a-38a—an as-applied challenge regarding whether the First Amendment permits treating parties' coordinated expenditures that comprise their own speech as contributions that may be limited under lowered scrutiny. 533 U.S. at 456 n.17 (majority), 468 n.2 (dissent). In recognizing the open question, this Court in *Colorado-II* necessarily decided that the mere *fact* of coordination as to "own speech" expenditures does not require that they be deemed contributions as the decision below held. App. 34a, 38a.

In sum, this petition should also be granted because the decision below conflicts with decisions of this Court.

Conclusion

For the reasons stated, this petition should be granted.

Respectfully submitted,

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
Kaylan L. Phillips
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 facsimile
Lead Counsel for Petitioners

Joseph F. Lavigne
Thomas P. Hubert
JONES WALKER
201 St. Charles Ave.
Suite 5100
New Orleans, LA 70170
504/582-8000
Counsel for Petitioners

Blank Page