UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI DIVISION

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civ. No. 22-639 (DRC)

DEFENDANT FEDERAL ELECTION COMMISSION'S BRIEF IN SUPPORT OF ITS PROPOSED FINDINGS OF FACT AND RESPONSES TO PLAINTIFFS' PROPOSED FINDINGS OF FACT

Lisa J. Stevenson
Acting General Counsel

Kevin Deeley
Associate General Counsel

Greg J. Mueller
Shaina Ward
Christopher H. Bell
Sophia H. Golvach
Blake L. Weiman
Attorneys

COUNSEL FOR DEFENDANTS
FEDERAL ELECTION COMMISSION
1050 First Street, N.E.
Washington, D.C. 20463
(202) 694-1650

December 15, 2023

TABLE OF CONTENTS

Page(s)

I. ROLE OF THE DISTRICT COURT IN CERTIFYING A FACTUAL RECORD TO THE COURT OF APPEALS IN A FIRST AMENDMENT CHALLENGE TO FECA 1

A. The District Court's Central Task Is To Provide The Court of Appeals A Comprehensive Record To Evaluate The Danger Of Corruption And Its Appearance 3

B. District Courts Routinely Consider And Include Legislative Facts When Certifying the Record In Constitutional Challenges To FECA 6

II. CERTIFICATION OF THE FEC'S PROPOSED LEGISLATIVE FACTS WILL PROVIDE ESSENTIAL INFORMATION TO THE COURT OF APPEALS AND AID ITS ASSESMENT OF PLAINTIFFS' CONSTITUTIONAL CHALLENGE 9

A. Federal Rules Of Evidence Exclusionary Rules Such As Hearsay Are Not Relevant Here 9

B. Historical Evidence is Appropriate in First Amendment Litigation 11

C. Unambiguous Legal Conclusions Should Be Severed From Related Statements of Fact 12

III. THE COURT SHOULD ACCEPT THE FEC'S PROPOSED FINDINGS OF FACT 13

A. The Court Should Accept the FEC's Proposed Findings Based Upon Record Evidence from Prior Constitutional Challenges to Campaign Finance Legislation 14

B. The Court Should Accept the FEC's Proposed Findings Based Upon Primary and Secondary Sources Evidencing the Public Understanding of the First Amendment in the Founding Era 16

C. The Court Should Accept the FEC's Proposed Findings Based Upon the Public Records of the FEC and Other Government Actors 18

D. The Court Should Accept the FEC's Proposed Findings Based Upon Verifiable Public Reporting 20

E. The Court Should Accept the FEC's Proposed Findings Based Upon Criminal Pleas and Indictments....23

F. The Court Should Accept the FEC's Proposed Findings Based Upon Evidence Submitted by Plaintiffs....23

RESPONSES TO PLAINTIFFS' PROPOSED FINDINGS OF FACTS....29

The Federal Election Commission ("FEC" or "Commission") hereby submits the following responses, pursuant to the Court's November 30, 2023, Status Conference and Minute Entry, explaining the scope of the district court's obligations in adopting Findings of Fact to certify to the Court of Appeals in this matter, addressing the Court's concerns with certain categories of evidence, and responding to Plaintiffs' Proposed Findings of Fact in Support of Certification (Doc. 44 ("Pls. Facts").) As explained *infra*, alongside the Court's obligation to promptly certify plaintiffs' challenge to the Court of Appeals en banc, the Court must also provide that panel with a factual record sufficient for that task, commensurate with the gravity of plaintiffs' facial challenge to landmark federal legislation designed to limit corruption and its appearance. Here the Commission has proposed facts (Doc. 43 ("FEC Facts")) based on relevant and reliable sources of precisely the type upon which the courts of appeals have relied in related challenges and that the Supreme Court has stated are essential in First Amendment litigation. As such, the Commission urges this Court to conduct a thorough review of the record before it and certify a fulsome record that will provide the Court of Appeals with the information necessary to make its important ruling.

I. ROLE OF THE DISTRICT COURT IN CERTIFYING A FACTUAL RECORD TO THE COURT OF APPEALS IN A FIRST AMENDMENT CHALLENGE TO FECA

A robust factual record concerning the risk of corruption is essential to assess constitutional challenges to the federal campaign finance laws. Pursuant to 52 U.S.C. § 30110, FECA prescribes an expedited review procedure that deviates from the normal course of litigation. *See* 52 U.S.C. § 30110 ("The district court immediately shall certify all questions of constitutionality of this Act to the . . . court of appeals for the circuit involved[.]"). Under that procedure, it is the exclusive responsibility of the appellate court to address the merits of plaintiffs' constitutional challenge in the first instance. *See In re Cao*, 619 F.3d 410, 415 (5th

Cir. 2010) (en banc); *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 537 (D.C. Cir.) (en banc), *judgment entered*, 771 F. App'x 8 (D.C. Cir. 2019).

At the same time, the Supreme Court has made clear that section 30110 does not obviate the need for a robust factual record. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). Instead, it is well-settled that the district court in such cases has multiple responsibilities including: (1) make findings of fact sufficient for the appellate court to perform its task; (2) evaluate whether constitutional questions are "frivolous"; and (3) certify the factual record and any non-frivolous questions. *See, e.g.*, *id.*; *Bread Pol. Action Comm. v. FEC*, 455 U.S. 577, 580 (1982) (noting that the district court must make findings of fact and certify constitutional questions pursuant to FECA); *Holmes v. FEC*, 875 F.3d 1153, 1157-58 (D.C. Cir. 2017) (en banc) (discussing procedural history); *Libertarian Nat'l Comm.*, 924 F.3d at 537 (explaining that the court embarked on its review "[w]ith the benefit of the district court's findings of fact and certification order"). Certification of a factual record necessarily requires the Court to exercise its discretion and determine what evidence is sufficiently relevant and reliable to be certified to the Court of Appeals. Furthermore, as detailed *infra* Parts I(B), II(A), and III(A)-(E), this evidence will include legislative facts not subject to standard exclusionary rules found in the Federal Rules of Evidence, which are often critical to constitutional interpretation in campaign finance cases.

Here, the Commission has submitted numerous reliable pieces of evidence critical to allowing the Court of Appeals to assess the merits of this case, of the same type (and in many cases identical to) evidence that the courts of appeals and Supreme Court have relied on in prior section 30110 proceedings. The Commission urges this Court to certify this evidence to provide

the government a fair opportunity to defend this decades-old law limiting corruption and its appearance.

A. The District Court's Central Task is to Provide the Court of Appeals a Comprehensive Record to Evaluate the Danger of Corruption and its Appearance.

The district court's factfinding task under FECA's judicial review provision is straightforward, though necessarily requires the exercise of discretion. As explained by the District of Columbia Court of Appeals in *Buckley v. Valeo*, the district court must create and then certify a record by taking "*whatever may be necessary in the form of evidence* over and above submissions that may suitably be handled through judicial notice, *as of legislative facts*, supported by legislative history or works reasonably available, *to the extent not controverted in material and substantial degree*." 519 F.2d 817, 818 (D.C. Cir. 1975) (en banc) (per curiam) (emphases added). When deciding what facts to certify, courts have typically been "'overinclusive,'" preferring to "'convey as detailed a record as possible to the reviewing court.'" *See Holmes v. FEC*, 99 F. Supp. 3d 123, 126 (D.D.C. 2015), *aff'd in part, rev'd in part and remanded sub nom. Holmes v. FEC*, 823 F.3d 69 (D.C. Cir. 2016) (quoting *Cao v. FEC*, 688 F. Supp. 2d 498, 504 (E.D. La. 2010)); *see also* 9A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 2411 (3d ed.) ("[I] n a nonjury case the court should be slow to exclude evidence challenged under one of the exclusionary rules."). Viewed as a whole, the record should consist of evidence not materially or substantially contradicted sufficient to provide a comprehensive background of the regulatory environment and the government's concerns. *See Mariani v. United States*, 80 F. Supp. 2d 352, 362 (M.D. Pa. 1999), *certified question answered*, 212 F.3d 761 (3d Cir. 2000) ("The court of appeals will thus be presented with extensive findings that comprehensively describe the soft money system, setting forth in sometimes

excruciating detail how corporations can give unlimited amounts of money that influence elections. . . .").

This standard comports with the Supreme Court's long-standing emphasis on the importance of the district court creating a full factual record in section 30110 cases to ensure that the appellate court has the proper context to evaluate the parties' concerns. In *California Medical Ass'n* , the Court rejected Justice Stewart's concern that "[s]ection [30110] litigation will often occur . . . without the fully developed record which should characterize all litigation." 453 U.S. at 208 (Stewart, J., dissenting). The majority explained that, "as a practical matter, immediate adjudication of constitutional claims through a § [30110] proceeding would be improper in cases where the resolution of such questions required a fully developed factual record." *Id.* at 192 n.14; *see also Bread Political Action Comm.*, 455 U.S. at 580 (noting that the district court must make findings of fact prior to certification).

Accordingly, in First Amendment challenges to FECA, district courts have typically certified comprehensive records cataloging varied types of evidence covering, *e.g.*, the historical background of the provisions at issue, pertinent political and social science analyses, public opinion, including through polling data, and reporting on events evidencing public corruption.[1] *See*, *e.g., Cao*, 688 F. Supp. 2d at 504-33 (issuing 156 findings of fact providing extensive context regarding the regulatory environment); *McConnell v. FEC*, 251 F. Supp. 2d 176, 220-33, 296-356, 438-522, 813-918 (D.D.C. 2003), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003)

---

[1] Mindful that a critical opportunity to array facts for the merits question is at the district court, parties in section 30110 cases have striven to provide extremely thorough factual records. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 813-14 (Leon, J.) (praising the parties for the "herculean effort" of compiling the extensive facts and noting that "the job of reviewing and evaluating this record would have been substantially more difficult, and less reliable, in my judgment, if they had not assembled these factual materials with such extraordinary care").

(assembling hundreds of specific findings of fact); *Mariani*, 80 F. Supp. 2d at 362-419 (making 407 findings of fact based on diverse sources).

When district courts provide scant factual records insufficient to consider fully the First Amendment questions before them, courts of appeals do not hesitate to remand the case. *See, e.g.*, Order, *Holmes v. FEC*, Civ. No. 14-5281 (D.C. Cir. Jan. 30, 2015) (per curiam) (Doc. 25-1, PageID 297) (granting remand "in order to provide the parties an opportunity to develop . . . the factual record necessary for en banc review of the plaintiffs' constitutional challenge"); *Anderson v. FEC*, 634 F.2d 3, 4-5 (1st Cir. 1980) (remanding challenge to FECA contribution limit because "the record [wa]s devoid of a factual basis upon which the . . . claims can be assessed"); *Khachaturian v. FEC*, 980 F.2d 330, 332 (5th Cir. 1992) (en banc) (remanding with instructions to "'[t]ake whatever may be necessary in the form of evidence — over and above submissions that may suitably be handled through judicial notice'" (quoting *Buckley*, 519 F.2d at 818)).

At the least, the record certified by the Court in this *facial* challenge should be no less robust than what was certified in a prior *as-applied* challenge to these same laws. *See Cao*, 688 F. Supp. 2d at 504-33. As here, the *Cao* plaintiffs challenged the Supreme Court's *Colorado II* holding that limits on party coordinated expenditures are constitutionally permissible. *See In re Cao*, 619 F.3d at 422 ("[T]he *Colorado II* Court effectively rejected the argument Plaintiffs now make . . . .") (referencing *FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colorado II*"), 533 U.S. 431 (2001)). That court determined the Court of Appeals would be best served by "extensive findings, describing in detail the relationship between political parties, candidates, and donors under the current regulatory system[,]" *Cao*, 688 F. Supp. 2d at 504, and the Fifth Circuit Court of Appeals in fact relied on this evidence. *In re Cao*, 619 F.3d at 431 (relying on

factual findings to conclude that coordinated expenditure limits "hardly amount[] to a ban on free speech"). A crabbed interpretation of the district court's factfinding duty here would be at odds with the weight of authority and would unnecessarily impede the government's defense of its laws.[2]

B. District Courts Routinely Consider and Include Legislative Facts When Certifying the Record in Constitutional Challenges to FECA.

Because constitutional challenges to FECA turn to a significant extent on issues of coercion and corruption in politics and government, considering facts that are legislative, as well as adjudicative, is a critical part of the district court's duty to assemble a comprehensive record. Courts have long recognized the distinction between legislative and adjudicative facts. *See Dayco Corp. v. FTC*, 362 F.2d 180, 186 (6th Cir. 1966). Adjudicative facts "are the facts that normally go to the jury in a jury case." *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161 (D.C. Cir. 1979) (internal quotation marks omitted). They *specifically* concern the immediate parties to a lawsuit and address who did what, where, when, and how. *United States v. Silvers*, Civ. No. 5:18-50, 2023 WL 2714003, at *5 (W.D. Ky. Mar. 30, 2023) (quoting 2 McCormick on Evidence § 328 (8th ed.)). In contrast, legislative facts are "*general* facts which help the tribunal decide questions of law and policy." *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 157 (D.D.C. 2013), *aff'd*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7,

---

[2] Importantly, the district court's duty to create a substantial factual record is not limited by its obligation as a gatekeeper to extirpate frivolous claims, and the district court's latter charge does not narrow its record-making responsibility. Because the appellate court addresses the merits question, the record that the district court is called upon to certify may be more substantial than the evidence the district court will need to consider the frivolousness question. *See* 52 U.S.C. § 30110; *Mariani*, 80 F. Supp. 2d at 362 (recognizing the "unusual posture" created by submissions of fact under prior iteration of section 30110). The district court cannot limit the record it certifies merely to facts it considers relevant to the narrow threshold question. *Mariani*, 80 F. Supp. 2d at 362 (concluding that a record with sometimes "excruciating" detail would best permit the appellate court to address the constitutional merits).

2014) (emphasis added) (quoting *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992)); *accord Ass'n of Nat'l Advertisers*, 627 F.2d at 1161-62.

Legislative facts considered in constitutional cases are frequently drawn from a variety of materials such as academic studies, research papers, news articles, polling data, political and social science analyses, and congressional reports. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 & n.11 (1954) (surveying evidence related to stigmatization from segregated schools); *Muller v. Oregon,* 208 U.S. 412 (1908) (upholding law protecting women from workplace health and safety risks, on basis of Louis Brandeis's famous brief presenting over 100 pages of legislative facts, including sociological and economic reports and committee testimony).

Unlike adjudicative facts, legislative facts are not strictly bound by the rules of evidence. *See Ass'n of Nat'l Advertisers*, 627 F.2d at 1163 n.24; *Silvers*, 2023 WL 2714003, at *8. Indeed, "any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level are inappropriate to judicial access to legislative facts." *See Ass'n of Nat'l Advertisers*, 627 F.2d at 1163 n.24 (cleaned up); 21B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 5103.2 (2d ed.) ("Requiring parties to prove 'legislative facts' with admissible evidence would inhibit the courts and be time consuming and costly to the parties . . . ."). As such, courts have found that evidentiary concerns attendant to adjudicative facts, such as hearsay and authentication issues, do not typically require the exclusion of legislative facts. *See Libertarian Nat'l Comm., Inc.*, 930 F. Supp. 2d at 157 (overruling extensive hearsay objections to the FEC's proposed findings of fact and adopting the FEC's argument that legislative facts "are not subject to the Federal Rules of Evidence"); *see also Holmes*, 99 F. Supp. 3d at 126 (summarily

overruling admissibility objections because the facts to which the plaintiff objected were legislative facts).

Relatedly, legislative facts are free from "any limitation in the form of indisputability," Federal Rule of Evidence 201(a) advisory committee's note to 1972 proposed amendment, and courts have long relied even on legislative facts that could be characterized as disputable when evaluating constitutional challenges. For example, in *Grutter v. Bollinger,* the majority relied heavily on legislative facts in upholding the University of Michigan Law School's consideration of race in admission, 539 U.S. 306, 330 (2003); while dissenting Justice Thomas cited other legislative facts to reach a contrary conclusion. *See id.* at 349-50, 357-60 (Thomas, J., dissenting in part) (citing, *inter alia*, historical speeches).

Legislative facts — disputed or no — commonly play a critical role in campaign finance cases. In *Buckley v. Valeo*, the D.C. Circuit relied upon legislative facts such as polling data, a report concerning illegal contributions by the dairy industry, congressional floor statements, and a Senate committee report. 519 F.2d at 836-40. The Supreme Court then explicitly relied on the D.C. Circuit's discussion of these legislative facts. *Buckley v. Valeo*, 424 U.S. 1, 27 n.28 (1976). Since *Buckley*, the Supreme Court has continued to rely upon legislative facts in evaluating the constitutionality of FECA. *See, e.g.*, *Colorado II*, 533 U.S. at 451-52 & nn.12-13 (relying upon a political scientist's statement, a former Senator's anecdote, a political science book, and FEC disclosure reports); *McConnell*, 540 U.S. at 129-32, 145-52, 169-70 (relying extensively on legislative facts, including congressional reports, detailing how national party committees solicited soft money contributions); *FEC v. Wisc. Right to Life, Inc*, 551 U.S.449, 470 n.6 (2007) (relying on a national survey for the legislative fact that most citizens could not name their congressional candidate and to dispute legislative facts put forth by dissent); *id*. at 504-09, 515-

18 (Souter, J., dissenting) (citing newspaper articles, publications by political scientists and lawyers, surveys by pollsters, an *amicus curiae* brief in *McConnell*, congressional hearings, and the conclusions of a state "blue ribbon" commission); *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8, 17 (2013) (citing to the Federalist Papers and other founding-era sources and laws).[3]

II. CERTIFICATION OF THE FEC'S PROPOSED LEGISLATIVE FACTS WILL PROVIDE ESSENTIAL INFORMATION TO THE COURT OF APPEALS AND AID ITS ASSESSMENT OF PLAINTIFFS' CONSTITUTIONAL CHALLENGE

A. Federal Rules of Evidence Exclusionary Rules Such as Hearsay are Not Relevant Here

During the Court's November 30 Status Conference (the "Conference") and subsequent minute entry that same day ("Minute Entry"), the Court expressed its concern that "many of the proposed findings of fact seem subject to evidentiary issues such as hearsay[.]" While the Federal Rules of Evidence must be fully applicable may be understandable, these rules have only a limited applicability to a minority of the parties' proposed facts in these circumstances. Exclusionary rules like hearsay have *no* application to the numerous legislative facts the Commission seeks to introduce, and the broad exclusion of evidence on this basis would conflict directly with the Court's obligation to submit a fulsome record to the Court of Appeals, which is in any case more than capable of putting this evidence in its proper context.

As explained *supra*, Section I(B), unlike adjudicative facts, legislative facts are not subject to objections on the basis of exclusionary rules such as hearsay. Thus, the Court can adopt the FEC's legislative facts, including those drawn from prior litigation such as *Colorado II*

---

[3] The district courts that have continued to certify records that include general facts going to the central issues in section 30110 cases have thus provided greater aid to appellate courts and reflect a better construction of the review provision than the outlier decisions that have limited fact-finding to adjudicative facts. *Compare, e.g.*, *SpeechNow.org v. FEC*, No. 08-248, 2009 WL 3101036, at *1 (D.D.C. Sept. 28, 2008).

and *McConnell*, just as other courts have done in cases brought under 52 U.S.C. § 30110 — regardless of the hearsay rules that apply to adjudicative facts. *Libertarian Nat. Comm., Inc.*, 930 F. Supp. 2d at 157 ("The Court overrules the LNC's hearsay objections for the reasons set forth by the FEC"); *see Holmes*, 99 F.Supp.3d at 126 (referencing plaintiff's objection that certain facts were "derived from inadmissible hearsay" and summarily concluding that it "overrules most of Plaintiffs' relevance objections"). Indeed, there are many cases where robust findings of fact were made despite the potential evidentiary objections such as hearsay. *See, e.g.*, *Cao*, 688 F. Supp. 2d 498. As detailed *infra* Parts I(B), II(A), and III(A)-(E), a large number of the FEC's proposed facts are legislative in nature, obviating any hearsay objections to their contents.

Moreover, hearsay applies only to evidence that is put forth for the truth of the matter asserted. But because the appearance of corruption is a valid basis for legislating in this protected area, evidence put forward that speaks to the public's perception of corruption, such as "newspaper and magazine articles[,]" are valid evidence not subject to this objection. *See Mariani*, 80 F. Supp. 2d at 362; *see also Democratic Party v. Nat'l Conservative Pol. Action Comm.*, 578 F. Supp. 797, 829 (E.D. Pa.1983), *aff'd in part, rev'd in part*, 470 U.S. 480 (1985) ("The hearsay evidence rule does not bar ... the admissibility of ... authenticated news reports when used to show public perceptions of corruption, rather than corruption in fact."). And as discussed *infra* Parts III(C), (E), various hearsay exceptions established by Federal Rule of Evidence 803 apply to numerous pieces of evidence relied upon by the Commission in its Proposed Findings.

Finally, even where the hearsay exception might otherwise apply to *adjudicative* facts, the Court should exercise its discretion and err heavily on the side of including these facts where

they are relevant to the issue the Court of Appeals will be called to consider. "[I]n the absence of a jury," this Court should be "inclined to be overinclusive rather than underinclusive when presented with close evidentiary disputes, preferring to convey as detailed a record as possible to the reviewing court." *Cao*, 688 F. Supp. 2d at 504 (citing 9A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 2411 (3d ed.) ("[I]n a nonjury case the court should be slow to exclude evidence challenged under one of the exclusionary rules."); *see Holmes*, 99 F. Supp. 3d at 126 (quoting *Cao*). To the extent there are questions about the reliability of a particular piece of evidence, the Court of Appeals is eminently capable of evaluating such questions, with the aid and briefing of the parties.

B. Historical Evidence is Appropriate in First Amendment Litigation

At the Conference and in its Minute Entry, the Court further expressed its concern that the parties sought to submit what was "little more than quotations from historical documents, such as the Federalist Papers[.]"[4] This evidence is appropriate because in recent years the Supreme Court has made abundantly clear that evidence of the nation's "history and tradition" are essential to answering questions regarding the framers' original intent, and hence the scope of various Constitutional provisions including the First Amendment.

In recent years the Supreme Court has made explicit that its assessment of several Constitutional rights turns on historical evidence. For instance, a litigant's right to "be confronted with the witnesses against him," U.S. Constitution amendment VI, "require[s] courts to consult history to determine the scope of that right." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 25 (2022) (quoting *Giles v. Calif.*, 554 U.S. 353, 358 (2008)). The Supreme

[4] To the extent the Court is concerned that historical evidence is presented as overly argumentative or draws legal conclusions, these issues are addressed *infra* Part II(C).

Court has further made clear that the government may regulate firearms only by "demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24.

With respect to the First Amendment itself, the Supreme Court has explained that "[a]n analysis focused on original meaning and history, [] has long represented the rule rather than some exception within the 'Court's Establishment Clause jurisprudence[,]'" and that drawing a line "'between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 575, 577 (2014)) (cleaned up). And as to the freedom of speech protected in the First Amendment, to defend its restrictions the government bears the burden of showing whether the expressive conduct falls outside of the category of protected speech, and thus "must generally point to historical evidence about the reach of the First Amendment's protections." *Bruen*, 597 U.S. at 24-25 (citing *United States v. Stevens*, 559 U.S. 460, 468-71 (2010)).

Because there is every reason to expect that the Court of Appeals, and potentially the Supreme Court, will seek evidence of the nation's history and tradition of government regulation to limit corruption and its appearance, this Court should exercise its ample discretion to certify a record that includes credible evidence speaking to the precise issue that may be outcome-determinative in this litigation.

C. Unambiguous Legal Conclusions Should Be Severed From Related Statements of Fact

The Court also expressed concerns in the Conference and Minute Entry that certain proposed findings were "more akin to legal conclusions[,]" that proposed findings incorporated "editorial comments about [the source's] content," and that such statements "seem more akin to argument than fact." The Court is correct that it need not certify as factual statements which are

purely argumentative or serve no purpose other than to state a legal conclusion. *See Holmes*, 99 F. Supp. 3d at 126 (omitting or modifying proposed findings "that [were] argumentative or drew legal conclusions"); *Cao*, 688 F. Supp. 2d at 504 (omitting proposed findings that "were legal conclusions"). However, the Court should certify proposed findings even if they could theoretically be contested, where these findings constitute relevant legislative facts that will aid the Court of Appeals. *See supra*, Section I(B). In addition, the recitation of settled precedent, and the quoting of existing statutes and regulations, is perfectly appropriate where that precedent and law is not reasonably disputed. *See, e.g., Cao*, 688 F. Supp. 2d at 526-27 (quoting *Colorado II passim*); *id.* at 522-25 (quoting *McConnell passim*); *id.* at 509-17 (citing and quoting FECA and FEC regulations *passim*).

The Court also need not strike the *entirety* of a proposed finding, much less the evidence on which it is based, merely because a particular proposed fact is in part argumentative or improperly draws legal conclusions. In such situations, other courts have explicitly invoked their authority to modify proposed findings to preserve substantive and relevant content. *See Holmes*, 99 F. Supp. 3d at 126 ("This Court has omitted *or modified* any proposed finding of fact that was argumentative or drew legal conclusions.") (emphasis added). This approach is consistent with the Court's obligation to present the Court of Appeals with a robust factual record consistent with the needs of this case. *See supra* Section I(A).

III. THE COURT SHOULD ACCEPT THE FEC'S PROPOSED FINDINGS OF FACT

Mindful of this Court's obligation to efficiently carry out its duty to certify findings of fact to the Court of Appeals, the FEC does not anticipate that it will have the opportunity to reply to any objections to its Proposed Findings of Fact made by plaintiffs. In addition, during Conference the Court raised concerns regarding particular FEC Facts, and counsel for plaintiffs erroneously suggested that the factual record should solely be limited to discovery responses and

depositions in this litigation. As set forth below, each of the categories of evidence the FEC seeks to add to the record in this case are both relevant and reliable and should be certified to the Court of Appeals. The FEC also addresses particular Proposed Findings referenced by the Court at Conference.

A. The Court Should Accept the FEC's Proposed Findings Based Upon Record Evidence from Prior Constitutional Challenges to Campaign Finance Legislation

The FEC has submitted 30 exhibits (FEC Exhs. 2-8, 11-12, 39-43, 85-91, 97-101, 103, 116, 117, and 135) that were entered into evidence and relied upon by Courts of Appeals and the Supreme Court in prior litigation challenging the constitutionality of FECA and the Bipartisan Campaign Reform Act of 2002 ("BCRA"), including evidence from the very case plaintiffs seek to overturn, *Colorado II.*[5] In addition to hearsay objections, counsel for plaintiffs improperly argued that their inability to depose declarants and experts in these cases should serve as a reason to strike these statements. Not so. First, the evidence is offered to prove general points regarding how the campaign finance system has functioned, not any adjudicative facts about plaintiffs. The Court may therefore rely on this material "as it might read *anything* for purposes of ascertaining 'legislative' facts." *Mail Order Ass'n of Am. v. US Postal Service*, 2 F.3d 408, 434 (D.C. Cir. 1993) (citing Federal Rule of Evidence 201(a), Notes of Advisory Committee on 1972 Proposed Rules). Second, even if these declarations had been submitted in support of adjudicative facts, they can be considered by the Court because they are sworn statements. "An interview given under penalty of perjury may, however, be treated as a declaration — and

[5] These noted exhibits are drawn from the following cases: *McConnell v. FEC*, 540 U.S. 93 (2003); *RNC v. FEC*, 98-cv-1207 (D.D.C. 1998) (stipulated dismissal—no opinion on the merits); *RNC v. FEC*, 698 F. Supp. 2d 150, 158, No. 1:14-cv-853 (D.D.C.), *aff'd*, 561 U.S. 1040 (2010); *In re Cao*, 619 F.3d 410 (5th Cir. 2010); *FEC v. Colorado Republican Fed. Campaign Comm.*, 518 U.S. 604 (1996) (*Colorado I*); and *Colorado II*, 533 U.S. 431 (2001). (*See* Docs. 36-2–36-8, 36-11, 36-12, 36-39 – 37-3, 38-5–38-11, 38-17 – 38-21, 38-23, 38-36, 38-37, 39-15.)

therefore may be considered in ruling on a summary judgment motion, Fed R. Civ. P. 56(e) — even though Rule 32(a) prevents its use as a formal deposition." *SEC v. Phan*, 500 F.3d 895, 913 (9th Cir. 2007) (citing *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir. 1981)); *SEC v. Am. Commodity Exch., Inc.*, 546 F.2d 1361, 1369 (10th Cir. 1976) (holding that transcripts from an SEC investigation may be considered in ruling on summary judgment as the equivalent of a declaration)). Moreover, sworn statements from different cases are admissible in a statement of material facts in opposition to summary judgment motion. *See, e.g.*, *Lloyd-El v. Meyer*, No. 87-C-9349, 1989 WL 88371, at *1 n.1 (N.D. Ill. 1989) (denying motion to strike seeking to exclude deposition from unrelated action and allowing deposition in as an affidavit). "They are sworn statements," and can be used to impeach witnesses or a party opponent at trial, and can also be used "against a party on summary judgment." *Burbank v. Davis*, 227 F.Supp. 2d 176, 179 (D.Me. 2002); *see Tobacco & Allied Stocks v. Transamerica Corp.*, 16 F.R.D. 545, 547 (D.Del. 1954) (deposition admitted from prior litigation involving different plaintiffs against the same defendant on related issue).

Plaintiffs' objections are particularly weak because many of the proposed facts to which plaintiffs seek to strike were included in findings of fact in previous litigation that were relied on by the Supreme Court. In each instance in which the Supreme Court has already resolved the challenged fact, at least as relevant to the applicable period of time, this Court does not need to revisit the issue and may simply adopt the finding already made. Once resolved by an appellate court, issues of legislative fact need not be relitigated in lower courts each time they arise. *See, e.g.*, *Carhart v. Gonzales*, 413 F.3d 791, 800-01 (8th Cir. 2005) (legislative fact addressed by the Supreme Court need not be relitigated); *A Woman's Choice v. Newman*, 305 F.3d 684, 688-89 (7th Cir. 2002) (same). Moreover, without exception the evidence is drawn

from cases in which one or more of plaintiffs' fellow Republican political party committee were a plaintiff.

The majority (16 out of 30) of the documents the FEC seeks to rely upon from prior FECA/BCRA litigation are drawn from *McConnell*, in which both the district court and Supreme Court each relied on the robust factual record developed in that litigation. *McConnell*, 251 F. Supp. 2d at 220-33, 438-590, 813-918 (relying on lay and expert declarations and depositions); *McConnell*, 540 U.S. at 146-54 (rejecting challenge by drawing on an extensive district court record including declarations from Members of Congress).[6] These sources present legislative facts from *McConnell* and other sources — detailing, *inter alia*, the nature of national party committees, their relationship with federal officeholders — which are the kinds of "general facts which help the tribunal decide questions of law and policy[,]" and are manifestly relevant to plaintiffs' constitutional challenge. *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992) (internal quotation marks omitted); *see Cao*, 688 F. Supp. 2d at 525 527-28 (citing to facts from *McConnell* litigation). In light of this clear reliability and relevance, the Court of Appeals should have the opportunity to consider the *McConnell* record, review for issues of legislative previously resolved by the Supreme Court, and, at a a minimum, decide for itself what value the testimony holds today.

B. The Court Should Accept the FEC's Proposed Findings Based Upon Primary and Secondary Sources Evidencing the Public Understanding of the First Amendment in the Founding Era

The FEC has submitted 55 exhibits (FEC Exhs. 14-30, 44-81) that are reliable primary and secondary sources evidencing the intent of the Framers in drafting the Constitution and the First Amendment.[7] While historical evidence is not common in a typical lawsuit, it is

---

[6] (*See* Docs. 36-12, 37-1, 37-2, 37-3, 38-6, 38-7, 38-8, 38-18, 38-19, 38-20, 38-21.)

[7] (*See* Docs. 36-14–36-30, 37-4–38-1)

unquestionably relevant to the Court of Appeals' inquiry here, given the Supreme Court's recent and repeated admonishment that the Constitution is to be interpreted by reference to historical tradition and practice. *See supra*, Section II(B). The Supreme Court has cautioned that while "[h]istorical analysis can be difficult[,]" it is nonetheless essential. *Bruen*, 597 U.S. at 25 (quoting *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 803-04 (2010) (Scalia, J., concurring)).

Precisely what historical evidence is most probative is difficult to define in abstract terms, but the evidence and facts the Commission has sought to introduce here are clearly relevant based on Supreme Court guidance. The Supreme Court has "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Bruen*, 597 U.S. at 37 (citing *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122–125 (2011) ("Laws punishing libel and obscenity are not thought to violate 'the freedom of speech' to which the First Amendment refers because such laws existed in 1791 and have been in place ever since.") (additional citations omitted); *see also Printz v. United States*, 521 U.S. 898, 905 (1997) ("[E]arly congressional enactments 'provid[e] contemporaneous and weighty evidence of the Constitution's meaning,'") (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–724 (1986)).

The Commission's evidence accordingly focuses on the public understanding of the government's authority to limit corruption and its appearance in the period shortly before and after the enactment of the First Amendment in 1791. Several FEC-proposed facts refer to excerpts from the Federalist Papers (FEC Exhs. 17-18, 24, 26, 28, 45-46, 56, 59, 66), an oft-cited source for the public understanding of the Constitution and amendments.[8] *See, e.g.*, *Bruen*, 597

[8] (*See* Docs. 36-17, 36-18, 36-24, 36-26, 36-28, 37-5, 37-6, 37-16, 37-19, 37-26.)

U.S. at 6, 36, 68-69; *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8, 17 (2013). Other proposed facts are drawn from exhibits (FEC Exhs. 16, 19, 27, 44, 47, 51, 53-55, 58) that are excerpts from The Records of the Federal Convention of 1787 by Max Farrand, another well-established and trusted authority compiling primary source material.[9] *See*, *e.g.*, *Arizona*, 570 U.S. at 17, 27, 41; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 790-91, 809, 822, 833 (1995). Founding-era state court opinions (FEC Exhs. 69, 73-74, 77- 81) are another common source for interpreting the public understanding of Constitutional rights.[10] *See*, *e.g.*, *Bruen*, 597 U.S. at 51-54. While this Court's charge to the parties does not permit a full defense of each piece of historical evidence relied upon by the FEC, it is beyond dispute that defendants have relied upon relevant and well-established historical sources for Constitutional interpretation.

During Conference the Court specifically raised concerns regarding defendants' Proposed Findings that characterized the Framers as viewing corruption as an "existential threat." FEC Facts ¶ 13 (Doc. 43, PageID 5120) (citing FEC Exh. 19 (Doc. 36-19, PageID 1399).) If the Court believes that this characterization of the cited evidence is not sufficiently supported by that source, the proper course is to decline to adopt the portion deemed to be either argumentative or a legal conclusion and retain the expressly quoted or transcribed content of the source material. *See supra* Section II(C).

C. The Court Should Accept the FEC's Proposed Findings Based Upon the Public Records of the FEC and Other Government Actors

The FEC has submitted 16 exhibits (FEC Exhs. 32-33, 107, 121, 124, 126-27, 129, 131, 134, 144, 146, 152, 154, 156, 158) that report public campaign finance data, or are statements by

---

9 (*See* Docs. 36-16, 36-19, 36-27, 37-4, 37-7, 37-11, 37-13, 37-14, 37-15, 37-18.)

10 (*See* Docs. 37-29, 37-33, 37-34, 37-37, 37-38, 37-39, 37-40, 38-1.)

public and party officials describing the work of their office.[11] These are reliable primary sources reporting relevant campaign finance information, or otherwise straightforwardly describe the work of federal attorneys bringing cases involving corruption and its appearance. These sources are inherently trustworthy, as evidenced by the exception to the hearsay rule applicable to public records and reports set forth in Federal Rule of Evidence 803(8). That rule provides that "A record or statement of a public office" shall not be excluded by the rule against hearsay if it "sets out . . . the office's activities" or "a matter observed while under a legal duty to report" provided that "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." *Id.* This rule is plainly applicable to the agency's own public records the FEC has submitted.[12] (FEC Exhs. 126-27, 134, 144, 146, 158.)[13] It further applies to press releases by U.S. Attorneys' Offices reporting on cases brought by those offices, (FEC Exhs. 121, 152, 154, 156), which in any case present legislative facts not subject to hearsay. *See supra*, Section I(B).[14]

During Conference the Court specifically raised concerns regarding the FEC's Proposed Findings drawn from a U.S. Senate report. (FEC Facts ¶ 88 (Doc. 43, PageID 5145) (citing FEC Exh. 107 (Doc. 38-27, PageID 3114-15, 3075-76) (Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105–167 (1998)) (hereinafter "Thompson Report"). The Thompson Report was the result of a unanimous vote by the U.S. Senate to authorize the Governmental Affairs Committee to conduct an investigation of alleged

---

[11] (*See* Docs. 36-32 – 36-33, 38-27, 39-1, 39-4, 39-6, 39-7, 39-9, 39-11, 39-14, 39-24, 39-26, 39-32, 39-34, 39-36, 39-38.)

[12] These documents also qualify as Records of a Regularly Conducted Activity, Fed. R. Evid 803(6).

[13] (*See* Docs. 39-6, 39-7, 39-14, 39-24, 39-26, 39-38.)

[14] (*See* Docs. 39-1, 39-32, 39-34, 39-36.)

illegal or improper activities in connection with 1996 federal election campaigns, resulting in the Committee issuing "427 subpoenas[,]" holding "32 days of hearings" involving "70 witnesses[,]" "200 depositions," "more than 200 witness interviews," and the receipt of "more than 1,500,000 pages of documents[.]" *Mariani*, 80 F. Supp. 2d at 366. The report unquestionably sets out "the [Senate] office's activities[,]" Fed. R. Evid. 803(8)(A)(i), and has been cited and relied upon by courts in many proceedings[15] challenging campaign finance regulations, including the Supreme Court in *McConnell*, 540 U.S. at 94, 169, 180, 207.

The Commission understands the Court's concern with the Thompson Report to be with defendants' Proposed Findings simply asserting the truth of the Report's contents, rather than addressing the Report's reliability more broadly. The Commission notes that the Proposed Findings it submits here (FEC Facts ¶¶ 86-88 (Doc. 43, PageID 5143-45)) were adopted in substantially similar form by the district court in prior litigation, *Libertarian Nat'l Comm.*, 317 F. Supp. 3d at 239-40, and the Supreme Court has cited the Report for the truth of its contents. *See McConnell*, 540 U.S. at 165 n.61. Nonetheless, if the Court has concerns about the Report's reliability, it could opt for the approach taken by another district court that merely adopted as its findings the fact of the Senate's investigation and its scope. *See Mariani*, 80 F. Supp. 2d at 366.

D. The Court Should Accept the FEC's Proposed Findings Based Upon Verifiable Public Reporting

The FEC has submitted proposed findings based upon 38 exhibits (FEC Exhs. 34-37, 82-84, 92-95, 105-106, 108, 109, 125, 128, 130, 132-133, 136-43, 145, 147-50, 153, 174-77) consisting of public reporting by journalists, authors, and nonprofit organizations.[16] The large

---

[15] *See, e.g.*, *Mariani*, 80 F. Supp. 2d at 366; *Bluman v. FEC*, 800 F. Supp. 2d 281, 283 (D.D.C. 2011); *Shays v. FEC*, 414 F.3d 76, 82 (D.C. Cir. 2005).

[16] (*See* Docs. 36-34 – 36-37, 38-2 – 38-4, 38-12 – 38-15, 38-25, 38-26, 38-28, 38-29, 39-5, 39-8, 39-10, 39-12, 39-13, 39-16 – 39-23, 39-25, 39-27 – 39-30, 39-33, 40-14, 40-15, 40-16, 40-17.)

majority of the FEC's Proposed Findings relying on this evidence make straightforward and uncontroversial assertions about widely-reported events. *See, e.g.*, FEC PFacts ¶ 115 (Doc. 43, PageID 5158) (citing FEC Exh. 137 (Doc. 39-17, PageID 3576-77) (reporting that "In 2005-06 in Ohio, a major contributor to the Republican Party was indicted and convicted in the 'Coingate' scandal.").) These facts are easily verifiable, and if plaintiffs cannot dispute them, they should be accepted by the Court. *Buckley*, 519 F.2d at 818 (directing the district court to take "in the form of evidence . . . legislative facts . . . supported by . . . works reasonably available, to the extent not controverted in material and substantial degree.").

During Conference the Court specifically raised concerns regarding defendants' Proposed Findings based upon an Associated Press report. FEC Facts ¶ 93 (Doc. 43, PageID 5147-48) (citing FEC Exh. 176 (Doc. 40-16, PageID 3998-4000) ("After being indicted on over 50 counts of fraud, RICO violations, violating trade sanctions with Iran, and income-tax evasion, Marc Rich received a presidential pardon that appeared to be in return for $201,000 in contributions to the Democratic Party in 2000 by his ex-wife."). The FEC understands that the Court is concerned with relying upon a press report to establish the "reason" an individual received a presidential pardon. However, this particular Proposed Finding is a paradigmatic example of evidence establishing the appearance of corruption, a Constitutionally sufficient basis for congress to enact campaign finance regulations. *See supra*, Section I(A). Such public reporting therefore establishes legislative facts, evidence that courts regularly consider to establish the constitutionality of legislation, here demonstrating the kind of appearance of corruption that the government seeks to limit. *See, e.g.*, *Libertarian Nat'l Comm.*, 317 F. Supp 3d at 235-37, 241, 243 (citing multiple New York Times and Washington Post articles).

During Conference the Court raised further concerns regarding defendants' Proposed Findings based upon a book by Jack Abramoff, a former lobbyist and political insider, expressing a particular concern that the proposed finding was hearsay. FEC Facts ¶¶ 89-91 (Doc. 43, PageID 5145-47) (citing FEC Exh. 109 (Doc. 38-29, PageID 3132-33) ("During a 1995 meeting involving former House Majority Leader Tom DeLay and executives from Microsoft, the issue being discussed was 'software program encryption export.'")). This and similar proposed facts should be certified because they are legislative facts not subject to the hearsay exclusionary rule. *See supra*, Section I(B). Regarding Mr. Abramoff in particular, the author of the cited source, he has firsthand knowledge of the events recounted in the Commission's Proposed Findings, and indeed he pled guilty in 2006 to corruption charges and served time in prison, as determined by a district court in extensive factual findings based on the same book the FEC cites here. *Libertarian Nat'l Comm.*, 317 F. Supp. 3d at 240-42. The District of Columbia Circuit Court has further observed that "Representative Bob Ney similarly pled guilty to a series of quid pro quos with the lobbyist Jack Abramoff" based on Mr. Ney's Factual Basis for Plea, *Wagner v. FEC*, 793 F.3d 1, 15 (D.C. Cir. 2015), which the FEC cites elsewhere. (FEC Facts ¶ 113 (Doc. 43, PageID 5157-58) (citing FEC Exh. 113 (Doc. 38-33, PageID 3187)).) If the Court finds some of this evidence particularly unreliable despite the inapplicability of the hearsay rule and widespread acceptance of the public accounts, the Court should decline to adopt only those facts for which it determines there to be particular cause for concern and retain the rest which are sufficiently reliable. *See supra*, Section II(C).

As an overall matter, publicly reported evidence is regularly accepted by courts and should be here. *See, e.g.*, *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181, 196-97 (2008) (finding a sufficient danger of voter fraud based on, *inter alia*, a book regarding the Tammany

Hall voting machine and newspaper articles regarding voter roll maintenance and a fraudulent vote in another state).

E. The Court Should Accept the FEC's Proposed Findings Based Upon Criminal Pleas and Indictments

The FEC has submitted 14 exhibits (FEC Exhs. 96, 110-15, 118-19, 122-23, 151, 155, 157) that reflect federal and state court indictments, pleas, and related information. The evidence of pleas and the basis for those pleas are subject to the hearsay exception for judgment of a previous conviction.[17] Fed. R. Evid. 803(22)(A) ("Evidence of a final judgment of conviction" is not subject to the hearsay rule if "the judgment was entered after a trial or guilty plea"). Moreover, federal indictments are sworn statements by federal attorneys that have been approved by a grand jury, making them inherently more reliable than a bare assertion of fact in party briefing.

Even if this evidence were not subject to explicit exceptions to the hearsay rule, this evidence constitutes legislative facts that establish a basis for the government to legislate to limit corruption and its appearance. *See supra* Section I(B). These documents do not involve charges against any party to this case, and instead speak to the policy choices made by congress and the basis for those choices. At the very least, federal indictments of political figures speak to the appearance of corruption, a sufficient reason for their inclusion in the factual findings of this case. *See supra*, Section II(A).

F. The Court Should Accept the FEC's Proposed Findings Based Upon Evidence Submitted by Plaintiffs

The FEC has submitted 19 exhibits (FEC Exhs. 9-10, 31, 104, 159-73)[18] that were submitted by plaintiffs to defendants in this litigation following discovery requests by

---

[17] (*See* Docs. 38-16, 38-30–38-35, 38-38, 38-39, 39-2, 39-3, 39-31, 39-35, 39-37.)

[18] (*See* Docs. 36-9, 36-10, 36-31, 38-24, 39-39–40-13.)

defendants, plus an additional two exhibits (FEC Exhs. 38, 102)[19] reflecting plaintiffs' expert report and deposition of said expert. To the extent this evidence concerns the plaintiff parties themselves, these establish adjudicative facts that are relevant to the burden certain campaign finance regulations allegedly place on the First Amendment activities of plaintiffs. In addition, they are not subject to hearsay or any other exclusionary rule because they meet the criteria for an opposing party's statement. Fed. R. Evid. 801(d)(2).

During Conference, the Court asked that the parties to address the factual dispute raised in the FEC's Facts ¶¶ 328-33 (Doc. 43, PageID 5239). In plaintiffs' interrogatory responses (FEC Exh. 9 (Doc. 36-9, PageID 1092); FEC Exh. 10 (Doc. 36-10, PageID 1148)) and repeated in plaintiffs' proposed findings of fact (Pls. Facts ¶¶ 75.e-f (Doc. 44, PageID 5261)), plaintiffs NRCC and NRSC's claim to have spent $92.4 million and $38 million to "operate" their respective independent expenditure units ("IEUs") during the 2022 election cycle. The FEC's Proposed Findings dispute (1) the specific numbers plaintiff NRSC has offered for its total IEU expenses based on its own documents, (2) plaintiffs' characterization of these expenses as necessary to "operate its IE unit" despite the inclusion of expenses that are not treated as operational under FECA, (3) plaintiffs' lack of evidence substantiating their characterization that these costs were incurred *because of* FECA's limitations on party coordinated expenditures (i.e. that various polls, consultants, staffing expenses, etc. would not have been incurred but for the challenged laws and regulations), and (4) plaintiffs' claims regarding "millions" unnecessarily spent due to the unavailability of the lowest unit rate rule for independent expenditures are wholly unsubstantiated. FEC Facts ¶¶ 328-33 (Doc. 43, PageID 5238-39).

---

19 (*See* Docs. 36-38, 38-22.)

The Commission's concerns go directly to whether plaintiffs' Proposed Findings are reliable or are of a sufficiently factual nature to be certified to the Sixth Circuit, as is appropriate for *adjudicative* facts concerning the parties to this litigation.[20] First, as to the NRSC's spending, the Court can at best find that the NRSC spent approximately $36-37 million on independent expenditures for the 2022 election cycle. This Court should not certify that plaintiff NRSC spent $38 million on its IEU for the 2022 election cycle (Pls. Facts ¶¶ 75.e (Doc. 44, PageID 5261)) because this figure does not accord with plaintiffs' documentary evidence. As noted in the FEC's Facts ¶ 332 (Doc. 43, PageID 5239), during discovery the NRSC produced a spreadsheet stating that its IEU spent only $36,401,107 during this period (RPP_0000199 NRSC Independent Expenditure Data, FEC Exh. 167 (Doc. 40-7, PageID 3930)) and produced an additional document listing actual expenses as $37,379,382 (RPP_0000131 NRSC Independent Expenditures 2022 Budget, FEC Exh. 171 (Doc. 40-11, PageID 3930)). Because neither total reaches the $38 million figure cited in plaintiffs' Proposed Findings, and because the various sources' inconsistency calls all of this data into question, the Court should not certify this total as fact.

Second, this Court should not certify that plaintiffs NRCC and NRSC have spent $92.4 million and $38 million respectively to "operate" their IEUs in the 2022 election cycle. (Pls.

[20] While the Commission does not ask the Court to draw legal conclusions at this stage, it notes that plaintiffs have not explained why their direct spending on political advertisements constitutes a constitutionally relevant "burden." The fact that political advertising is valuable and costs money is not due to any action of the Commission. And plaintiffs NRSC and NRCC have not explained why all of their advertisement spending (as opposed to only a large portion of it) is entitled to the lowest rate offered by advertisers. While courts have considered the "administrative expenses" associated with campaign finance regulation to assess constitutional burdens, *see, e.g.*, *McConnell*, 540 U.S. 93, 234-35; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 201 (1982), it is not clear why plaintiffs' IEU spending sheds any light on the issues in this litigation.

Facts ¶¶ 75.e-f (Doc. 44, PageID 5261).) In fact, the large majority of these expenses by the NRCC and NRSC ($87 million and $34 million respectively) were made on independent expenditures themselves, expenses that would need to be born whether coordinated or independent and which do not appear to operational expenses by party committees in FECA reports. (FEC Facts ⁋⁋ 330, 332 (Doc. 43, PageID 5238, 5239).) Rather, the best way to view what can be gleaned from FECA reports, is that operating expenses of party committees are the day-to-day costs of running the independent expenditure unit. (Clark Decl. ⁋ 14, FEC Exh. 13 (Doc. 36-13, PageID 1301) ("'Operating expenditures' in this context are all 'hard money' expenditures that are not classified as either Independent Expenditures, Coordinated Expenditures or Contributions").) To the extent this Court nonetheless determines that plaintiffs' IEU expenses are sufficiently substantiated to be certified, it should differentiate "administrative" expenses from independent expenditures on political advertising, which is a more accurate representation of this data and will be more useful for the Court of Appeals.

Third, this Court should not certify that plaintiffs NRCC and NRSC have incurred various expenses "to maintain independence from the main party operation[,]" or that in the absence of FECA's coordinated party expenditure limits "those resources would have been allocated by the NRSC and the NRCC toward other party activities," (Pls. Facts ¶¶ 75.e-h (Doc. 44, PageID 5261),) because plaintiffs have provided no evidence that any particular expense would not have been incurred but for the challenged laws and regulations. The sole and exclusive evidence offered by plaintiffs in support of these contentions is the parties' own interrogatory responses. (*Id.*) But as noted in the FEC's own Proposed Findings, ¶¶ 330-32 (Doc. 43, PageID 5238-39), these responses do not prove, and in many cases fail even to explain, why plaintiffs would not have incurred specific costs absent these restrictions. For instance,

plaintiffs' interrogatories provide no basis to conclude that the NRSC's and NRCC IEUs' spending of $1.5 million and $4.4 million respectively on "polling" duplicated data the non-IEU portions of those committees already possessed. (Pls. Facts ¶¶ 75.e-f (Doc. 44, PageID 5261).)

And fourth, while plaintiffs do claim that IEUs incur "millions" in extra expenses because independent expenditures do not qualify "for the lowest-unit rates that are available to candidate-sponsored advertisements but not the NRSC's and the NRCC's [IEUs] (*id.* ¶ 75.h (Doc. 44, PageID 5261) (citing interrogatory responses)), plaintiffs did not produce *any* evidence to substantiate or quantify the alleged burden even though such documents were specifically requested in discovery. (*See* NRSC Discovery Resp. at 50 (Request for Production No. 3), 54 (Request for Production No. 9), FEC Exh. 10 (Doc. 36-10, PageID 1170, 1174); NRCC Discovery Resp. at 48 (Request for Production No. 3), 52 (Request for Production No. 9), FEC Exh. 9 (Doc. 36-9, PageID 1113, 1117).) While the Commission acknowledges that broadcast stations were not legally obligated to provide NRSC and NRCC with the lowest unit rate for their independent expenditures, 47 U.S.C. § 315(b)(1), NRSC and NRCC have provided *no* evidence as to what they were in fact charged for such broadcast communications and how those prices compared what the lowest unit cost for those advertisements would have been. Plaintiffs' contention that under an alternative regime they would "save millions[]" remains unsubstantiated and should not be certified as fact. (*Id.*)

While it is beyond this Court's role to resolve the parties' dispute as to the "burden" IEUs impose on plaintiffs for purposes of assessing FECA's constitutionality, the FEC's objections here go to the reliability of adjudicative facts, and should be sustained. This Court should decline to adopt plaintiffs' characterization of certain costs that constitute bare assertions unsupported by record evidence. Instead, the Court should certify plaintiffs' Proposed Findings,

which almost exclusively pertain to facts involving plaintiffs themselves, only where plaintiffs have supported those findings by reliable and relevant evidence that is surely within their possession and control.

RESPONSES TO PLAINTIFFS' PROPOSED FINDINGS OF FACTS

Set forth below are each of plaintiffs' proposed findings of fact and the Commission's specific responses and objections, including references to the relevant portions of the Commission's Proposed Findings of Fact ("FEC Facts") (Doc. 43) and supporting exhibits. The headings listed below are copied verbatim from plaintiffs' submission, and any FEC response to those headings appears in response to the plaintiffs' proposed fact immediately following the heading. Where the Commission's response to individual or sequential paragraphs is the same or "none," the FEC has condensed its response and refers to plaintiffs' paragraphs by number only.

I. DEFENDANTS

II. PLAINTIFFS

¶¶ 1-10. FEC RESPONSE: None.

III. THE REGULATORY FRAMEWORK ON COORDINATED PARTY EXPENDITURES

11. FECA regulates the financing of federal elections through political "contributions" and "expenditures."

FEC RESPONSE: None, except to note that the referenced regulation does not set forth the complete scope of FECA's regulations. The Commission more broadly has exclusive jurisdiction over *civil* enforcement of FECA. 52 U.S.C. §§ 30101-46. Specifically, the Commission is empowered to formulate policy with respect to FECA, *id.* § 30106(b)(1)); to make rules and regulations necessary to carry out the Act, *id.* §§ 30107(a)(8), 30111(a)(8), 30111(d)); to issue advisory opinions concerning the application of FECA and Commission regulations to any proposed transaction or activity, *id.* §§ 30107(a)(7), 30108; and to civilly enforce the Act and the Commission's regulations, *id.* §§ 30106(b)(1); 30109.

12. FECA defines a "contribution" to include "any 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." 52 U.S.C. § 30101(8)(A)(i); *see* 11 C.F.R.§ 100.52. Contributions thus may be made through either direct financial support to a candidate, campaign, or other federal political committee or in-kind payments for goods or services on behalf of a candidate, campaign, or other federal political committee. *See, e.g.*, 11 C.F.R. § 100.52 ("[T]he term anything of value includes all in-kind contributions.").

FEC RESPONSE: None except to note that, while the quoted language in this paragraph appears in the statutory definition of the term "contribution," the paragraph does not set forth the complete statutory definition of that term. 52 U.S.C. § 30101(8).

13. FECA similarly defines an "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A)(i); *see* 11 C.F.R. § 100.111.

FEC RESPONSE: None except to note that, while the quoted language in this paragraph appears in the statutory definition of the term "expenditure," the paragraph does not set forth the complete statutory definition of that term. 52 U.S.C. § 30101(9).

¶¶ 14-17. FEC RESPONSE: None.

18. The FEC's regulations define the term "earmarked" to mean a donor's "designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. § 110.6(b). "If, for example, a donor gives money to a party committee but directs the party committee to pass the contribution along to a particular candidate, then the transaction is treated as a contribution from the original donor to the specified candidate" and is subject to the donor's candidate base limit (*i.e.*, $3,300). *McCutcheon v. FEC*, 572 U.S. 185, 194 (2014) (plurality opinion).

FEC RESPONSE: None except to note that, while the quoted language in this paragraph appears in the statutory definition of the term "earmark," the paragraph does not set forth the complete regulatory definition of the term "earmarked contribution." 11 C.F.R. § 110.6 (a), (b), (d).

¶¶ 19-21. FEC RESPONSE: None.

22. For the current 2023-2024 election cycle, the base limit on individual donor contributions to the general operating account of a national party committee is $41,300 per year, and the base limit on individual donor contributions to the general operating account of any state, district, and local party committee is $10,000 per year. *See* FEC, *Contribution Limits*, https://bit.ly/3ID8W7N (last visited May 16, 2023).

FEC RESPONSE: None except to note that the $10,000 limit is per state and is shared between a state party and "affiliated" local committees, 52 U.S.C. § 30116(a)(1)(D), 11 C.F.R. § 110.3(b); and local committees of a given political party may receive separate contributions of up to $5,000 per year from individuals if the committee's fundraising is generally separate from — and thus the committee is not "affiliated" with — the state committee of their political party. *See, e.g.*, FEC Advisory Op. 2005-02 (Corzine), at 6-7, http://saos.fec.gov/aodocs/2005-02.pdf.

23. Under FECA, political party committees have three primary options for providing financial support to federal candidates from their general operating accounts: (1) contributions, (2) coordinated party expenditures, and (3) independent expenditures.

FEC RESPONSE: The Commission objects to this fact as contrary to the record and the law. The Act provides special exemptions to the definitions of contributions and expenditures for parties, which are ways that a party can financially support federal candidates from their general operating accounts in addition to making contributions, coordinated party expenditures, and independent expenditures. (FEC Facts ¶ 262 (Doc. 43, PageID 5213-14).) As plaintiffs admit, "Congress expressly permits political party committees to pay for certain party advertising in full coordination with their general election nominees without limit." (Pls. Facts ¶ 34 (Doc. 44, PageID 5251).)

A party can also make expenditures from their general account that financially support federal candidates that are not deemed "coordinated" and which are also not "independent expenditures," as that term is defined in FECA, *i.e.*, by not "expressly advocating the election or defeat of a clearly identified candidate," 52 U.S.C. § 30101(17); *see also* FEC Facts ¶¶ 310-13

(Doc. 43, PageID 5231-32). For example, while such advertisements must now be funded by hard money (*i.e.*, from contributions subject to FECA's source and amount limitations), a party can make so-called "issue ads" that "do not urge the viewer to vote for or against a candidate in so many words" but that "are no less clearly intended to influence the election." *McConnell*, 540 U.S. at 193; *id.* at 216 ("[E]xpress advocacy represents only a tiny fraction of the political communications made for the purpose of electing or defeating candidates during a campaign."). Another example is expenditures made by national, state, and local party committees for voter registration efforts, voter identification, get-out-the-vote drives, and generic party advertising, "which confer substantial benefits on federal candidates." *Id.* at 168; *see also* FEC Facts ¶¶ 259-60 (Doc. 43, PageID 5212-13).

24. In general, FECA imposes a $5,000 per election base limit on contributions, direct or in-kind, from a political party committee to a federal candidate. 52 U.S.C. § 30116(a)(2)(A). In connection with the 2024 election, Senate candidates may receive up to $57,800 from their national party. *Id.* § 30116(h); FEC, *Contribution Limits*, https://bit.ly/3ID8W7N (last visited May 16, 2023).

FEC RESPONSE: None except to note that, as of January 1, 2023, a party's national committee *and* its Senatorial campaign committee may contribute $57,800 combined per campaign to each Senate candidate, which is *in addition* to the $5,000 in contributions that all multicandidate political committees can make under 52 U.S.C. § 30116(a)(2). 52 U.S.C. § 30116(h); FEC, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 88 Fed. Reg. 7088, 7089-90 (Feb. 2, 2023).

¶ 25. FEC RESPONSE: None.

26. Unlike direct contributions, title to any money spent on coordinated party expenditures remains with the party committee making the expenditure, not with the candidate. The party committee making the expenditure, not the candidate, ultimately decides how and for what purpose the money is spent. *See, e.g.*, Exhibit F – Plaintiff National Republican Senatorial Committee's First Objections and Responses to Defendant's First Set of Discovery Requests (NRSC Discovery Resps.), Interrogs. 4, 10 (Doc. 41-1, PageID # 4031-33, 4039-44) (describing

coordinated party expenditure approval processes); Exhibit G – Plaintiff National Republican Congressional Committee's First Objections and Responses to Defendant's First Set of Discovery Requests (NRCC Discovery Resps.), Interrogs. 4, 10 (Doc. 41-2, PageID # 4087-88, 4095-99) (describing coordinated party expenditure approval processes); *see also* Exhibit H – Expert Report of Professor Raymond J. La Raja (La Raja Rep.) 32 (Doc. 41-3, PageID # 4153) ("The party committee making the expenditure, not any candidate, ultimately controls how and for what purpose it spends its money.").

FEC RESPONSE: None except to note that, while the party committee may maintain formal control or ownership of the funds used for coordinated expenditures, "the supported nominee or candidate typically will suggest or recommend how the party committee should spend its money." (FEC Facts ¶ 204 (Doc. 43, PageID 5193) (quoting NRSC's First Objections and Responses to Defendant's First Set of Discovery Requests ("NRSC Discovery Resp."), at 32, FEC Exh. 10 (Doc. 36-10, PageID 1152)); *see also* NRCC's First Objections and Responses to Defendant's First Set of Discovery Requests ("NRCC Discovery Resp."), at 29-33, FEC Exh. 9 (Doc. 36-9, PageID 1094-98) (same); FEC Facts ¶¶ 205-06 (Doc. 43, PageID 5193-94) (examples).)

27. FECA subjects national committees, such as the Republican National Committee and the Democratic National Committee, and state party committees to hard spending limits on coordinated party expenditures. At the same time, it strips the national senatorial and congressional party committees, such as the NRSC and the NRCC, and all local party committees of any right to make their own coordinated party expenditures. 52 U.S.C. § 30116(d); 11 C.F.R. § 109.32.

FEC RESPONSE: The Commission objects to this fact as contrary to the record and the law to the extent it states that national senatorial and congressional party committees were "strip[ped] . . . of any right to make their own coordinated expenditures." The use of the "strip" implies the removal of a right that senatorial and congressional party committees would otherwise have. *See, e.g.*, Merriam Webster Dictionary defining "strip" (https://www.merriam-webster.com/dictionary/strip). To the contrary, FECA provides that *all* multicandidate political committees, including NRSC and NRCC, can contribute up to $5,000 to a candidate. 52 U.S.C.

§ 30116(a)(2). "FECA's special provision, which we shall call the 'Party Expenditure Provision,' creates a *general exception* from this contribution limitation[.]" *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 611 (1996) ("*Colorado I*"). Moreover, FECA does give senatorial and congressional party committees—unlike other political committees—the right to make coordinated party expenditures, that right is just conditional upon receipt of an assignment of authority from national or state party committees. 52 U.S.C. § 30116(d)(3); 11 C.F.R. § 109.33(a).

28. FECA's limits on coordinated party expenditures are based on office sought, state, and voting-age population and are adjusted annually for inflation. 52 U.S.C. § 30116(c), (d)(2)-(3). For presidential, Senate, and any House races in states with only one representative, Congress has set the coordinated party expenditure limits according to a formula that multiplies by 2 cents the voting-age population of the United States or the relevant state, depending on the federal office involved. *Id.* For House races in states with multiple representatives, Congress set the coordinated party expenditure limits at $10,000 per race (also adjusted annually for inflation). *Id.* § 30116(d)(3)(B). In 2022, the coordinated party expenditure limits for House nominees were $55,000 in states with more than one representative and $109,900 in states with only one representative; the limits for Senate nominees ranged from a low of $109,900 to a high of $3,348,500, depending on the state's voting-age population. For 2023, the coordinated party expenditure limits range from $118,700 to $3,623,400 for Senate candidates, and from $59,400 to $118,700 for House candidates. 11 C.F.R. § 109.32; FEC, *Coordinated Party Expenditure Limits*, https://bit.ly/3DcUySP (last visited May 16, 2023).

FEC RESPONSE: The Commission objects to this fact as contrary to law, in part. The correct formula for calculating the party coordinated expenditure limit for Senate candidates and for House of Representatives candidates for states with only one Congressional district is *the greater of*: (a) the base figure ($20,000) multiplied by the percent difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 1974); or (b) $0.02 multiplied by the voting age population of the state, multiplied by the difference in the price index. 52 U.S.C. § 30116(c)(1)(B), (d)(3)(A); 11 CFR §§ 109.32(b), 110.17. As of January 1, 2023, the Act allows a political party's national and state committees (including

subordinate state committees) to each coordinate spending with a House of Representatives candidate up to $59,400 in states with more than one congressional district and $118,700 in states with only one congressional district; and a Senate candidate in a range from $118,700 to $3,623,400, depending on the state. 52 U.S.C. § 30116(d)(3); FEC, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 88 Fed. Reg. 7088, 7088-89 (Feb. 2, 2023).

¶¶ 29-31. FEC RESPONSE: None.

32. Political party committees often will spend up to their authorized dollar limit on coordinated party expenditures in competitive races. Thielman Decl. ¶ 15 (Doc. 19-1, PageID # 178). For example, the NRSC spent the entirety of its assigned coordinated spending authority in coordination with the Vance campaign. *Id*.

FEC RESPONSE: The Commission objects to this fact as contrary to the record to the extent that it refers to both Republican and Democratic party committees. While true that party committees will typically reach the 95% threshold only in competitive races, the record indicates that Democratic committees do not "often" do so in competitive races. (*Compare* FEC Facts ¶ 321 (Republican committees), *with id.* ¶ 322 (Democratic committees) (Doc. 43, PageID 5234-36).)

33. Regularly, however, party committees will further self-limit their speech through coordinated party expenditures to ensure compliance with FECA's limits in the event of an unexpected cost becoming known only after the election is over. Thielman Decl. ¶ 16 (Doc. 19-1, PageID # 178); Winkelman Decl. ¶¶ 15-16 (Doc. 19-2, PageID # 188); NRSC Discovery Resps., Interrogs. 1, 2, 3, 10, 12, 14, 17 (Doc. 41-1, PageID # 4024-31, 4039-44, 4045-46, 4048-51, 4054-55); NRCC Discovery Resps., Req. for Admis. 3 & Interrogs. 1, 2, 3, 10, 12, 14, 17 (Doc. 41-2, PageID # 4079, 4081-87, 4095-99, 4100- 01, 4102-05, 4109-10); La Raja Rep. 18 (Doc. 41-3, PageID # 4139) ("[E]ven in the most competitive of races, the parties often fall just shy of reaching the limit due to compliance concerns. They regularly reserve some portion of their coordinated authority in the event of unanticipated campaign expenses coming up post-election that need to be deemed coordinated to ensure legal compliance and thus avoid FEC or other enforcement actions."). The NRCC, for example, ordinarily will spend short of the full amount of any coordinated spending authority assigned to it, reserving a portion of its authority to ensure compliance with the limits in the event of such an unexpected cost arising after the election. Winkelman Decl. ¶¶ 15-16 (Doc. 19-2, PageID # 188); NRCC Discovery Resps.,

Req. for Admis. 3 & Interrogs. 1, 2, 3, 10, 12, 14, 17 (Doc. 41-2, PageID # 4079, 4081-87, 4095-99, 4100-01, 4102-05, 4109-10).

FEC RESPONSE: The Commission objects to this fact as speculative, hypothetical, and without foundation. Other than their self-serving declarations, plaintiffs have provided *no* evidence as to the frequency or amount of "unexpected cost [that also would be deemed a party coordinated expenditure] becoming known only after the election is over."

To the contrary, the evidence that is before the Court indicates that the frequency and amount of unexpected party coordinated expenditure costs would likely not be substantial. As plaintiffs point out, NRSC and NRCC retain title and control over such expenditures (Pls. Facts ¶ 26 (Doc. 44, PageID 5249)), so NRSC and NRCC presumably would be aware of the costs incurred in the vast majority of instances. It is also unlikely to be a surprise which of those costs are coordinated since, as plaintiffs state, "the supported nominee or candidate typically will suggest or recommend how the party committee should spend its money." FEC Facts ¶ 204 (Doc. 43, PageID 5193) (quoting NRSC Discovery Resp. at 32, FEC Exh. 10 (Doc. 36-10, PageID 1152)); *see also* NRCC Discovery Resp. at 29-33, FEC Exh. 9 (Doc. 36-9, PageID 1094-98) (same); *cf. McConnell*, 540 U.S. at 222-23 (holding that "FECA's longstanding definition of coordination delineates its reach in words of common understanding," and rejecting vagueness challenge (internal quotation marks omitted)). Indeed, as the parties recognized, the majority of coordinated party expenditures are party coordinated communications (Pls. Facts ¶ 30 (Doc. 44, PageID 5250), FEC Facts ¶¶ 237-39, 249 (Doc. 43, PageID 5204-05, 5209)), and in the examples plaintiffs produced during discovery, those consisted of an agent of the candidate campaign contacted the plaintiffs to ask for funding for an already completed advertisement (FEC Facts ¶¶ 204-06 (Doc. 43, PageID 5193-94))—which would almost certainly (and thus unsurprisingly)

qualify as a coordinated party communication if funded by the plaintiff, *see* 11 C.F.R. §§ 109.21(d)(1), (2), (6); 109.37(a)(1), (2)(i), (3).

Moreover, Commission regulations also include three safe harbors, including one providing for the establishment and use of a firewall policy that prohibits the flow of information between the individuals providing services to the party paying for the communication and the individuals providing services to the candidate's committee. 11 C.F.R. §§ 109.21(f)-(h), 109.37(a)(3). And NRCC and NRSC have established what they call "independent expenditure units" with separate vendors from those utilized for coordinated communications, office space, and staff. (NRCC Discovery Resp. at 26-27, FEC Exh. 9 (Doc. 36-9, PageID 1091-92); NRSC Discovery Resp. at 27-28, FEC Exh. 10 (Doc. 36-10, PageID 1147-48).)

In addition, before the Commission may commence an investigation, at least four of the six Commissioners must find there is reason to believe a violation of the law has occurred. 52 U.S.C. § 30109(a)(2). The Commission does not have the authority to impose civil penalties; rather, it may only encourage a voluntary conciliation. *Id.* § 30109(a)(4)(A), (6)(A). If conciliation fails, and at least four Commissioners have determined that there is probable cause to believe a violation has occurred, then, if at least four Commissioners have voted to authorize it, the Commission can file a *de novo* civil suit. *Id.* § 30109(a)(4)(A)(i), (6)(A).

¶¶ 34-35. FEC RESPONSE: None.

36. Traditionally, all party committee spending has been presumed coordinated with the party's supported candidate. *See, e.g.*, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28-29 n.1 (1981) ("Party committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates."); *see also* FEC Advisory Op. 1985-14 (DCCC), at 7 ("Party political committees are incapable of making independent expenditures.").

FEC RESPONSE: The Commission objects to this fact to the extent it uses the term "traditionally." While the FEC may have presumed that all party committee spending was

coordinated at some point in time, it has not done so for nearly 30 years. *See Colorado I*, 518 U.S. at 613-23 (holding that political party committees may make unlimited independent expenditures).

37. Accordingly, to ensure the independence of their general election public advertising campaigns and therefore avoid making unintended party coordinated communications, the party committees have traditionally used "firewalls" to establish independent expenditure units ("IE units") to operate separately from the party's main operation, and therefore independently of any candidates. Thielman Decl. ¶¶ 19 (Doc. 19- 1, PageID # 179); Winkelman Decl. ¶ 19 (Doc. 19-2, PageID # 189); NRSC Discovery Resps., Interrogs. 7, 8 (Doc. 41-1, PageID # 4036-39); NRCC Discovery Resps., Interrogs. 7, 8 (Doc. 41-2, PageID # 4091-94); La Raja Rep. 6 (Doc. 41-3, PageID # 4127); Exhibit I – Transcript of Deposition of Professor Jonathan S. Krasno (Krasno Dep. Tr.) 63:2-11 (Doc. 41-4, PageID # 4236).

FEC RESPONSE: The Commission objects to this fact as speculative, without foundation, and contrary to the record and the law to the extent that it: (a) purports to describe political party committees other than NRSC and NRCC; and (b) implies that the establishment of "independent expenditure units" are somehow required by the party coordinated expenditure limits. (*E.g.*, FEC Facts ¶ 315 (Doc. 43, PageID 5232-33) (RNC approves a budget for independent expenditures, and then supplies that budget to consulting groups that are not connected with the candidate's campaign).) Commission regulations include three safe harbors, including one providing for the establishment and use of a firewall policy that prohibits the flow of information between the individuals providing services to the party paying for the communication and the individuals providing services to the candidate's committee. 11 C.F.R. §§ 109.21(f)-(h), 109.37(a)(3). The regulations in no way require the establishment of independent expenditure units like that of NRSC and NRCC in order for them to benefit from the regulation's safe harbor provision.

Moreover, an expenditure is not considered coordinated based solely upon nature of the relationship between a political party committee and a candidate. Coordinated expenditures are

only those that are made in "cooperation, consultation or concert with, or at the request or suggestion of" the candidate or candidate's authorized committee. 11 C.F.R. § 109.20; *see also* 52 U.S.C. § 30101(17) (defining "independent expenditure"); *cf. McConnell*, 540 U.S. at 222-23 (holding that "FECA's longstanding definition of coordination delineates its reach in words of common understanding," and rejecting vagueness challenge) (quoting *Cameron v. Johnson*, 390 U.S. 611, 616 (1968)). Under Commission regulations, a party communication is considered to be coordinated with a candidate only if certain specific conduct occurs, such as when the candidate or candidate's committee requests, suggests or assents to the communication; has material involvement in the creation, production or distribution of the communication; or has substantial discussion about the communication with the party. 11 C.F.R. §§ 109.21(d), 109.37(a)(3). In addition, a party's public communication is considered to be coordinated only if it meets specific content standards under Commission regulations; outside of the pre-election windows (90 days before a congressional election and 120 days before a presidential election), such communications are considered coordinated only if they reproduce campaign materials or expressly advocate the election or defeat of a candidate. 11 C.F.R. § 109.37(a)(2).

38. Creating and maintaining an IE unit to avoid a violation of coordination rules and the coordinated party expenditure limits imposes substantial burdens on party committees. The IE unit is a separate entity from the party committee's main operation, meaning committee leadership cannot control the messaging or spending decisions of the IE unit—even though the disclaimers on any advertisements disseminated by the IE unit will merely state that they were paid for by the party committee, 11 C.F.R. § 110.11(d)(3). Moreover, to ensure independence between the IE unit and main operation, the party committee has to use its limited operating funds to retain vendors redundant to the main operation, rent separate office space, and employ additional staff on behalf of the IE unit. Thielman Decl. ¶¶ 20-21 (Doc. 19-1, PageID # 179); Winkelman Decl. ¶¶ 20-21 (Doc. 19-2, PageID # 189); NRSC Discovery Resps., Interrogs. 7, 8 (Doc. 41-1, PageID # 4036-39); NRCC Discovery Resps., Interrogs. 7, 8 (Doc. 41-2, PageID # 4091-94); La Raja Rep. 23, 30; Exhibit J – Transcript of Deposition of Professor Raymond J. La Raja (La Raja Dep. Tr.) 37:14-24 (Doc. 41-5, PageID # 4660); Krasno Dep. Tr. 67:14- 68:12 (Doc. 41-4, PageID # 4240-41).

FEC RESPONSE: The Commission objects to this fact as speculative, without foundation, and contrary to the record and the law for the reasons set forth in response to fact No. 37 above.

In addition, the Commission objects to this fact as speculative, hypothetical, without foundation, and contrary to the record to the extent that it asserts that NRSC and NRCC's independent expenditure units impose a "substantial" burden. While the FEC's expert acknowledged that there may be *some* burden incurred when a political party committee takes steps to ensure the independence of certain expenditures (Pls. Facts ¶ 37 (Doc. 44, Page ID 5251) (citing Krasno Dep. at 67:14-68:12 (Doc. 41-4, PageID 4236))), he nowhere conceded that doing so was a *substantial* burden. Rather, as explained in further detail in the FEC's Proposed Findings, NRSC's and NRCC's claims of substantial burden are wholly unsubstantiated. (FEC Facts ¶¶ 328-33 (Doc. 43, PageID 5238-40).) Plaintiffs' expert admitted that he did not attempt to analyze or quantify the costs involved. (La Raja Dep. 38:11-17, 61:7-62:2, FEC Exh. 102 (Doc. 38-22, PageID 2904, 2927-28).) Both committees claimed that their independent expenditure unit incurred certain costs, such as polling, but neither provided evidence that they would not have incurred these costs even if they did not establish a separate independent expenditure unit, *e.g.,* that they conducted the same poll twice (once by the independent expenditure unit and once by the coordinated expenditure unit so it would only have done the poll once but for the independent expenditure unit). (FEC Facts ¶¶ 330, 332 (Doc. 43, PageID 5238, 5239).) And even under the most generous view of the evidence that NRSC and NRCC did produce, their actual "operational" costs for their independent expenditure units were only 1% of total spending by each organization. (FEC Facts ¶¶ 331, 333 (Doc. 43, PageID 5238,

5239-40); Declaration of Paul Clark, Ph.D. ¶ 14 (describing operational expenses for party committees as reported under FECA), FEC Exh. 13 (Doc. 36-13, PageID 1301).)

¶ 39. FEC RESPONSE: None.

40. In 2014, Congress created three new types of segregated accounts for the national party committees to raise and spend funds for specific designated purposes. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. N, § 101, 128 Stat. 2130, 2772-73 (2014) (codified at 52 U.S.C. § 30116(a)(1)(B), (a)(2)(B), (a)(9)). Party committees may raise funds for these segregated accounts pursuant to contribution limits that are three times higher than the base limits applicable to contributions made to the national committees' operating accounts. 52 U.S.C. § 30116(a)(1)(B), (a)(2)(B). Accordingly, the limit on contributions from individuals to these accounts is currently $123,900. *See id.*; FEC, *Contribution Limits*, https://bit.ly/3ID8W7N (last visited May 16, 2023).

FEC RESPONSE: None except to note that only the party's national committee (but not the parties' national congressional campaign committees) can maintain a separate, segregated account for one of the three categories, namely presidential nominating conventions. 52 U.S.C. § 30116(a)(9).

¶¶ 41-43. FEC RESPONSE: None.

IV. PLAINTIFFS' ACTIVITIES UNDER THIS REGULATORY FRAMEWORK

44. The NRSC desires to make coordinated party expenditures to support Republican Senate candidates across the country, including expenditures in connection with party coordinated communications, in excess of FECA's coordinated party expenditure limits and without any assignment of authority from any other party committee. Thielman Decl.¶ 26 (Doc. 19-1, PageID # 181); NRSC Discovery Resps., Interrog. 10 (Doc. 41-2, PageID # 4039-44).

FEC RESPONSE: The Commission objects to this fact as speculative, hypothetical, and vague.

45. To avoid a violation of coordinated party expenditure limits, each election cycle, the NRSC incurs the expense and inconvenience of establishing a segregated IE unit to make independent expenditures in support of the Republican Party's nominees for the Senate. Thielman Decl. ¶¶ 19-21 (Doc. 19-1, PageID # 179); NRSC Discovery Resps., Interrogs. 7-10 (Doc. 41-1, PageID # 4036-44). The NRSC intends to implement an IE unit again in connection with 2024 general election Senate races if the coordinated party expenditure limits remain in place. *Id.* ¶ 19 (Doc. 19-1, PageID # 179); NRSC Discovery Resps., Interrog. 10 (Doc. 41-1, PageID # 4095-99).

FEC RESPONSE: The Commission objects to this fact as speculative, hypothetical, lacking foundation, and that the terms "expense" and "inconvenience" are not supported by the record. The alleged "burdens" of creating an independent expenditure unit are minimal. NRSC's "operational" costs for its independent expenditure unit would be $2,339,469, which is only 2% of its total operating expenses and only 1% of its total spending. (FEC Facts ¶ 333 (Doc. 43, PageID 5239-40; Clark Decl. ¶¶ 6, 13-14, Tables 5, 21 & 23, FEC Exh. 13 (Doc. 36-13, PageID 1288, 1300-01); RPP_0000199 NRSC Independent Expenditure Data, FEC Exh. 167 (Doc. 40-7, PageID 3888-89).) While plaintiff's expert stated in his report that establishing an independent expenditure unit is administratively costly, when asked at deposition what was the basis this conclusion, he responded "mostly logic" and admitted that he had not actually "compiled those costs." (La Raja Dep. at 61:7-62:2, FEC Exh. 102 (Doc. 38-22, PageID 2927-28).)

46. The NRCC desires to make coordinated party expenditures to support Republican House candidates across the country, including expenditures in connection with party coordinated communications, in excess of FECA's coordinated party expenditure limits and without any assignment of authority from any other party committee. Winkelman Decl. ¶ 26 (Doc. 19-2, PageID # 191); NRCC Discovery Resps., Interrog. 10 (Doc. 41-2, PageID # 4095-99).

FEC RESPONSE: The Commission objects to this fact as speculative, hypothetical, and vague.

47. To avoid a violation of coordinated party expenditure limits, each election cycle, the NRCC also incurs the expense and inconvenience of establishing a segregated IE unit to make independent expenditures in support of the Republican Party's nominees for the House of Representatives. Winkelman Decl. ¶¶ 19-21 (Doc. 19-2, PageID # 189); NRCC Discovery Resps., Interrogs. 7-10 (Doc. 41-2, PageID # 4091-99). The NRCC intends to implement an IE unit again in connection with 2024 general election House races if the coordinated party expenditure limits remain in place. *Id.* ¶ 19 (Doc. 19-2, PageID # 189); NRCC Discovery Resps., Interrog. 10 (Doc. 41-2, PageID # 4095-99).

FEC RESPONSE: The Commission objects to this fact as speculative, hypothetical, and lacking foundation, and because the terms "expense" and "inconvenience" are not supported by the record. The alleged "burdens" of creating an independent expenditure unit are minimal. NRSC's "operational" costs for its independent expenditure unit would be $2,339,469, which is only 2% of its total operating expenses and only 1% of its total spending. (FEC Facts ¶ 333 (Doc. 43, PageID 5239-40); Clark Decl. ¶¶ 6, 13, 14, Tables 5, 21 & 23, FEC Exh. 13 (Doc. 36-13, PageID 1288, 1300-01); RPP_0000199 NRSC Independent Expenditure Data, FEC Exh. 167 (Doc. 40-7, PageID 3888-89).) While plaintiff's expert stated in his report that establishing an independent expenditure unit is administratively costly, when asked at deposition what was the basis this conclusion, he responded "mostly logic" and admitted that he had not actually "compiled those costs." (La Raja Dep. at 61:7-62:2, FEC Exh. 102 (Doc. 38-22, PageID 2927-28).)

48. The executive directors of the NRSC and the NRCC are not aware of any instance where a donor to the NRSC or the NRCC has used contributions to the NRSC or the NRCC as a way to facilitate *quid pro quo* arrangements with any Member of or candidate for the Senate or House of Representatives. Thielman Decl. ¶ 10 (Doc. 19-1, PageID # 176); Winkelman Decl. ¶ 10 (Doc. 19-2, PageID # 186).

FEC RESPONSE: The Commission objects to this fact as not supported by the record. Even if NRSC and NRCC are "not aware" of any instances of quid pro quo arrangements with candidates or members of the Senate or House of Representatives, political parties have consistently been involved in actual and apparent quid pro quo corruption. (*See, e.g.*, FEC Facts ¶ 138 (Doc. 43, PageID 5169).)

49. In a future federal campaign, Senator Vance desires to engage in coordinated party expenditures with his political party beyond the limits set forth in 52 U.S.C. § 30116(d). Senator Vance wants his party's national committees to make coordinated party expenditures, including party coordinated communications, in excess of FECA's coordinated party expenditure limits on behalf of his future candidacy and the candidacies of his fellow Republican nominees. Vance Decl. ¶ 13 (Doc. 19-3, PageID # 196); Exhibit K – Plaintiff James David Vance's First

Objections and Responses to Defendant's First Set of Discovery Requests (Vance Discovery Resps.), Interrogs. 1, 8 (Doc. 41-6, PageID # 4712-14, 4720-21).

FEC RESPONSE: The Commission objects to this fact as speculative and hypothetical.

50. The coordinated party expenditure limits under FECA subject Plaintiffs to civil and criminal penalties for noncompliance, *see* 52 U.S.C. § 30109(d), and therefore prohibit Plaintiffs from engaging in coordinated expenditures, such as for party coordinated communications, that they otherwise would engage in, including coordinated party expenditures in amounts exceeding the statutory limits. Thielman Decl. ¶ 29 (Doc. 19-1, PageID # 181); Winkelman Decl. ¶ 29 (Doc. 19-2, PageID # 191); Vance Decl. ¶ 14 (Doc. 19-3, PageID # 197); NRSC Discovery Resps., Interrogs. 1, 2, 5, 9, 10, 13, 14, 15 (Doc. 41-1, PageID # 4024-30, 4033-34, 4039-44, 4046-4053); NRCC Discovery Resps., Interrogs. 1, 2, 5, 9, 10, 13, 14, 15 (Doc. 41-2, PageID # 4081-86, 4089-90, 4094-99, 4101-4107);Vance Discovery Resps., Interrogs. 1, 8 (Doc. 41-6, PageID # 4712-14, 4720-21).

FEC RESPONSE: The Commission objects to this fact as vague, ambiguous, speculative, and without foundation. The Commission notes that not every communication is considered a party coordinated communication, even if it there is some level of communication with the candidate or candidate's authorized committee. Under the Commission's regulations, whether a particular communication is considered to be a party coordinated communication is based upon both the conduct of those involved and the content of the communication. 11 C.F.R. § 109.37; *see also* FEC Facts ¶ 310 (Doc. 43, PageID 5231). Prior to 90 days before a Congressional or Senate election, a party communication is not deemed coordinated with a candidate unless it "disseminates, distributes, or republishes . . . campaign materials prepared by a candidate, …" or "expressly advocates the election or defeat of a clearly identified candidate." 11 C.F.R. § 109.37(a)(2)(i)-(ii). Moreover, an expenditure is coordinated only if it is made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 11 C.F.R. § 109.20; *see also* 52 U.S.C. § 30101(17). Thus, under Commission regulations, a party communication is considered to be coordinated with a candidate only if certain specific conduct occurs, such as when the candidate or

candidate's committee requests, suggests or assents to the communication; has material involvement in the creation, production or distribution of the communication; or has substantial discussion about the communication with the party. 11 C.F.R. §§ 109.21(d), 109.37(a)(3). The Commission further notes that plaintiffs could avoid a determination that a coordinated communication occurred by establishing a firewall policy prohibiting the flow of information between the individuals providing services to the party paying for the communication and the individuals providing services. 11 C.F.R. § 109.21(h); *see also* FEC Facts ¶¶ 310-15 (Doc. 43, PageID 5231-33).

In addition, the Commission objects to this fact as speculative, hypothetical, without foundation, and contrary to law to the extent it suggests that plaintiffs are at risk of a "civil and criminal penalties." Before the Commission may commence an investigation or enforcement action, at least four of the six Commissioners must find there is reason to believe a violation of the law has occurred. 52 U.S.C. § 30109(a). The Commission has exclusive jurisdiction over the administration, interpretation and *civil* rather than criminal enforcement of FECA. *See generally id*. §§ 30106(b)(1), 30107(a), 30109. Additionally, the Commission does not have the authority to impose civil penalties. The Commission considers whether there is "reason to believe" that FECA has been violated. *Id.* § 30109(a)(2). If at least four of the FEC's Commissioners vote to find such reason to believe, the Commission investigates the alleged violation. *Id.* §§ 30106(c), 30109(a)(2). To continue with enforcement action, the Commission must then determine whether there is "probable cause" to believe FECA has been violated. *Id.* § 30109(a)(3)-(4). If so, FECA then requires the Commission to attempt informal conciliation with the respondent to remedy the apparent violation. Only if conciliation fails, may the FEC institute a de novo civil enforcement action in federal district court, in which a federal court may

impose a civil penalty. *Id.* § 30109(a)(4)(A)(i), (a)(6)(A). Each of these stages requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i), (a)(6)(A).

V. PROCEDURAL BACKGROUND

¶¶ 51-54. FEC RESPONSE: None.

55. Plaintiffs now seek certification of the following constitutional question to the U.S. Court of Appeals for the Sixth Circuit:

> Whether the limits on coordinated party expenditures in 52 U.S.C. § 30116 violate the First Amendment, either on their face or as applied to party spending in connection with "party coordinated communications" as defined in 11 C.F.R. § 109.37.

ECF 20 (Doc. 20, PageID # 215).

FEC RESPONSE: While plaintiffs are in fact seeking certification of this question, the FEC partially opposes the certification of this question as written, for the reasons articulated in its Second Opposition to Plaintiffs' Motion to Certify Question to En Banc Court of Appeals (Doc. 45).

VI. THE DISCOVERY RECORD

¶¶ 56-60. FEC RESPONSE: None.

61. As explained more fully below, the discovery record confirms that FECA's coordinated party expenditure limits at 52 U.S.C. § 30116(d) violate the First Amendment. In particular, the discovery record:

FEC RESPONSE: The Commission objects to this fact as a conclusion of law, not a statement of fact. To the extent this could be construed as a statement of fact, the Commission objects that it is not supported by the record in this case.

a. Confirms that FECA's coordinated party expenditure limits burden political speech and campaign activities by political party committees and their candidates, *see infra* Part VI.A; *see also* Memorandum of Law in Support of Plaintiffs' Motion to Certify Question To The En Banc Court Of Appeals at 7-13, 16-17, 19, 31 ("Mem.") (Doc. 21, PageID # 230-36, 239-40, 242, 254);

FEC RESPONSE: The Commission objects to this fact as a conclusion of law, not a statement of fact. To the extent this could be construed as a statement of fact, the Commission objects that it is not supported by the record in this case.

b. Contains no evidence that coordinated party expenditure limits prevent *quid pro quo* corruption or its appearance, *see infra* Part VI.B; Mem. 19-25 (Doc. 21, PageID # 242-48);

FEC RESPONSE: The Commission objects to this fact as a conclusion of law, not a statement of fact. To the extent this could be construed as a statement of fact, the Commission objects that it is not supported by the record in this case. As Professor Krasno testified, the "lower limits on contributions to candidates have been upheld repeatedly since 1976 because of the protection they provide against potential quid pro quo corruption arising from donors giving extremely large sums of money to the campaigns of present and/or future policymakers in zealous pursuit of dollars to fuel their election efforts." (Krasno Rept. at 4, FEC Exh. 1 (Doc. 36-1, PageID 402).) "Without limits on coordinated expenditures, candidates could and undoubtedly would use LCCs to solicit exceptionally large donations directly from donors so long as the money is directed to a party account over which the candidate exercises complete or large control, effectively destroying the existing campaign finance system. Regardless of how one feels about the status quo, replacing it with a system where individual contribution limits to candidates are multiplied from $6,600 to (at least) $102,600 would clearly create key elements in the sort of quid pro quo corruption scenario that Congress and the Court have agreed that campaign finance law should and must combat." (*Id.* at 7, PageID 405; *see also* FEC Facts ¶¶ 195-216 (Doc. 43, PageID -5190-97).)

c. Shows that better tailored, less intrusive regulatory options to combat *quid pro quo* corruption and its appearance exist and are already in place, *see infra* VI.C; Mem. 25-26 (Doc. 21, PageID # 248-49); and

FEC RESPONSE: The Commission objects to this fact as vague, speculative and not supported by the record in this case. As Professor Krasno testified, the earmarking rule is not a substitute for the contribution limits, as parties have "circumvented that by things like the tally system." (Krasno Dep. 84:4-10, FEC Exh. 178 (Doc. 42-1, PageID 4914; *see also* FEC Facts ¶ 108 (Doc. 43, PageID 5154-55).) Additionally, if parties were given a choice between the status quo and having unlimited coordinated expenditures to candidates but being themselves limited to the individual candidate campaign base limits of $3,300 or $6,600 to temper corruptive potential, parties would never choose the latter. (Krasno Rept. at 16, FEC Exh. 1 (Doc. 36-1, PageID 414).) For "the whole game is predicated on [the parties'] fundraising advantages" providing parties and their donors leverage over candidates and officeholders. (*Id.*) "That, in turn, reveals what is really at stake here: not allowing parties to spend more money, but allowing candidates and parties to work together to raise money outside the statutory limits on candidates that are in place to minimize quid pro quo corruption" and its appearance. (*Id.*; *see also* FEC Facts ¶¶ 231-35 (Doc. 43, PageID 5202-04).)

d. Belies the *Colorado II* majority's assumption that parties are the "dominant" players in federal elections, including because post-*Colorado II* legal and factual developments have significantly weakened political parties, leading to a more fragmented campaign environment, less collective responsibility, accelerated polarization, diminished accountability, and increased campaign costs, *see infra* Part VI.D; Mem. 27-36 (Doc. 21, PageID # 250-59).

FEC RESPONSE: The Commission objects to the heading preceding this paragraph as a conclusion of law, not a statement of fact. To the extent this could be construed as a statement of fact, the Commission objects that it is not supported by the record in this case.

A. The Discovery Record Confirms That FECA's Coordinated Party Expenditure Limits Burden Political Speech And Activities By Political Party Committees And Their Candidates.

62. As even Defendants' expert, Professor Krasno agrees, political parties are vitally important institutions whose health is essential to American democracy. Krasno Dep. Tr. 26:15-

29:13 (Doc. 41-4, PageID # 4199-4202); Krasno Rep. 4 (Doc. 41-8, PageID # 4770) (noting "valuable role parties play in our electoral system"); La Raja Rep. 4-5 (Doc. 41-3, PageID # 4125-26) ("It is an understatement to say that political parties are important to democracy. They are indeed essential. I doubt any political scientist could conceive how our mass democracy could function without them."); La Raja Dep. Tr. 19:8-20:1 (Doc. 41-5, PageID # 4642-43); *accord* Krasno Dep. Tr., Ex. 6 (Doc. 41-4, PageID # 4566-4608) (Ian Vandewalker & Daniel I. Weiner, *Stronger Parties, Stronger Democracy: Rethinking Reform*, Brennan Center for Justice, at 3 (Sept. 16, 2015) ("Parties have long been considered an essential element of our democracy, offering ordinary citizens various avenues to participate in politics, providing informative cues to voters, furnishing a majoritarian counterbalance to narrow special interest groups, and acting as a moderating force responsive to public opinion in their pursuit of broad governing coalitions." (footnotes omitted))).

FEC RESPONSE: The Commission objects to the extent that in the context here the fact suggests that regulation should of financing should turn on the relative moderation or extremity of entities being financed, contrary to the Supreme Court's admonition that the prevention of quid pro quo corruption or its appearance are the only justifications for financing limitations, as explained more fully in response to Paragraph 118. The Commission also objects to the header preceding ¶ 62 as a legal conclusion, argumentative, and contrary to the record in this case, reasons provided in its objection to Paragraphs 64-65 and 73, which it hereby incorporates by reference.

63. In fact, as Professor Krasno has stated, "'any regulation that weakens them, actually could pose a serious threat to democracy itself.'" Krasno Dep. Tr. 28:20-29:13 (Doc. 41-4, PageID # 4201-02); *accord* La Raja Rep. 5, 5 n.5 (Doc. 41-3, PageID # 4126) ("In fact, recent work makes a strong argument that when parties are weak "democracies die." (citing Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (Crown 2018))).

FEC RESPONSE: The Commission objects to the extent that "any regulation that weakens" political parties is intended to include the campaign finance limitations that the Supreme Court has repeatedly upheld as consistent with democratic governance.

64. Political parties serve unique and vital political, organizational, and expressive functions in American democracy. "A party creates a policy agenda with its activists and officials; candidates link themselves to this agenda when bearing the party label; parties mobilize voters based on their policies and candidates; and once in office, the party pursues its agenda. If

the party fails to deliver, they lose seats and majorities. In a two- party system this compels parties to rethink their policies and strategies in response to the preferences of a broad electorate." La Raja Rep. 7 (Doc. 41-3, PageID # 4128); La Raja Dep. Tr. 21:9-16 (Doc. 41-5, PageID # 4644) ("[P]arties are organized to try to take control of government to pursue what they think is in the national interest. That's exactly – that's a democratic system. It would not function if parties didn't perform that.").

FEC RESPONSE: The Commission objects to this fact as contrary to the record to the extent that it overstates the role of political parties in activities that do not have the purpose of influencing elections. The major parties' primary goal is to win elections and elect candidates. (*See* FEC Facts ¶ 219 (Doc. 43, PageID 5198).) In addition, the Commission notes that national and state political parties and federal candidates are inextricably intertwined and that this presents the potential for corruption. *See McConnell v. FEC*, 540 U.S. 93, 155-56, 156 n.51, 161, 164 (2003); FEC Facts ¶ 140-158 (Doc. 43, PageID 5171-79). These close relationships that parties enable between donors and federal candidates and officeholders mean that parties may "act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452; *see also McConnell*, 540 U.S. at 150-52; FEC Facts ¶ 179-194, 217 (Doc. 43, PageID 5185-90, 5197). The "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits . . ." *Id*. at 455; *see also* FEC Facts ¶¶ 101, 220 (Doc. 43, PageID 5151, 5198-99). Professor Krasno further testified that, "the parties have been central players . . . over the long sweep of American history, including to today, in the actual corruption scandals that are quid pro quo corruption scandals." (Krasno Dep. 73:21-25, FEC Exh. 178 (Doc. 42-1, PageID 4903).)

65. As Professor Krasno agrees, political parties play a "valuable role … in our electoral system," Krasno Rep. 4 (Doc. 41-8, PageID # XX 4770); Krasno Dep. Tr. 26:15- 21 (Doc. 41-4, PageID # 4199), because they "help organize electoral competition," "provide an important accountability mechanism," and "make collective action within government possible," Krasno Dep. Tr. 27:17-21 (Doc. 41-4, PageID # 4200).

FEC RESPONSE: The Commission objects to this fact as contrary to the record to the extent that it overstates the role of political parties in activities that do not have the purpose of influencing elections. The major parties' primary goal is to win elections and elect candidates. (*See* FEC Facts ¶ 219 (Doc. 43, PageID 5198).) In addition, the Commission notes that national and state political parties and federal candidates are inextricably intertwined and that this presents the potential for corruption. *See McConnell*, 540 U.S. at 155-56, 156 n.51, 161, 164; FEC Facts ¶ 140 (Doc. 43, PageID 5171). These close relationships that parties enable between donors and federal candidates and officeholders mean that parties may "act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452; *see also McConnell*, 540 U.S. at 150-52; FEC Facts ¶ 179-194, 217 (Doc. 43, PageID 5185-90, 5197). The "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits . . ." *Id*. at 455; *see also* FEC Facts ¶¶ 101, 220 (Doc. 43, PageID 5151, 5198-99). Professor Krasno testified that, "the parties have been central players . . . over the long sweep of American history, including to today, in the actual corruption scandals that are quid pro quo corruption scandals." (Krasno Dep. at 73:21-25, FEC Exh. 178 (Doc. 42-1, PageID 4903).)

¶¶ 66-70. FEC RESPONSE: None.

71. For one thing, coordinated party spending is "'an avenue for party assistance to candidates, far more valuable than other two party options: Contributions or independent spending…. Unlimited coordinated spending would immediately solve the problems inherent in both of these options.'" Krasno Dep. Tr. 65:25-66:22 (Doc. 41-4, PageID # 4688-89).

FEC RESPONSE: The FEC objects to this fact to the extent that it omits professor Krasno's additional point that unlimited coordinated spending poses a danger of quid pro quo

corruption or its appearance. (Krasno Rept. at 16, FEC Exh. 1 (Doc. 36-1, PageID 414); *see also* FEC Facts ¶¶ 140-235 (Doc. 43, PageID 5171-5204).)

¶ 72. FEC RESPONSE: None.

73. FECA's coordinated party expenditure limits—and the resulting requirement that political party committees engage in independent expenditures to support their own candidates—deprive party committees of these benefits and impose substantial burdens on the political, organizational, and expressive activities of political parties and their candidates.

FEC RESPONSE: The Commission objects to this fact as a conclusion of law, not a statement of fact. To the extent this could be construed as a statement of fact, the Commission objects that it is vague, ambiguous, speculative, and not supported by the record in this case. In *Colorado II*, the Supreme Court addressed this very issue in the context of party coordinated expenditures, which are functionally the same as direct party contributions, and the Court "reject[ed] the Party's claim to suffer a burden unique in any way that should make a categorical difference under the First Amendment." 533 U.S. at 447, 464. In so concluding, the Court "reject[ed] the Party's claim to suffer a burden unique in any way that should make a categorical difference under the First Amendment," *id*. at 447, 464, and observed that the coordinated spending limits have not rendered parties useless, *id.* at 455 ("In reality, parties continue to organize to elect candidates, and also function for the benefit of donors whose object is to place candidates under obligation…."). Plaintiffs have presented no evidence showing that the expenditure limits create a constitutionally significant burden. The record demonstrates both that today's parties are financially strong and that the party contribution limits Congress established serve vital interests. (FEC Facts ¶¶ 251- 339 (Doc. 43, PageID 5210-41).)

a. Because of the limits on coordinated party expenditures, "[t]he parties are limited to investing only a small fraction of funds in efficient and effective coordinated advocacy with their candidates, even in the most competitive races." La Raja Rep. 14 (Doc. 41-3, PageID # 4135).

FEC RESPONSE: The Commission objects to this fact as without foundation and contrary to the record and the law. As an initial matter, parties make no coordinated expenditures at all in the vast majority of federal elections. (FEC Facts ¶ 323 (Doc. 43, PageID 5236-37).) Rather, parties tend to focus their efforts on only competitive races. (*Id.* ¶¶ 316-24 (Doc. 43, PageID 5233-37).) But even then, party committees spend 95% or more of the coordinated expenditures available to them under the Act in only a small fraction of races. (*Id.* ¶ 320 (Doc. 43, PageID 5234).) Republican committees only reached the 95% threshold in coordinated expenditures in 74 congressional races (15%) in 2022, and in 36 (8%) in 2020; Democratic committees only reached the 95% standard in five congressional races (1%) in 2022 and 10 (2%) in 2020. (*Id.*) While it is undisputed that independent expenditures are not always as effective at electing candidates as coordinated ones, plaintiffs have also failed to adduce evidence that independent expenditures are completely not "effective." While occasionally a particular party independent expenditure might not be well-received in a jurisdiction, this by no means establishes that party independent expenditures themselves are entirely ineffective. If that were the case, then presumably the parties would not make independent expenditures at all, yet during each of the last five two-year election cycles, both major parties' national committees have spent over $100 million in independent campaign expenditures. (FEC Facts ¶ 289 (Doc. 43, PageID 5223).) Moreover, parties can and do fund communications in favor of a candidate's campaign that are made by the candidate by making contributions directly to the candidate. 52 U.S.C. 30116(a)(2), (h); FEC Facts ¶¶ 285-86, 292-93 (Doc. 43, PageID 5222, 5224-25). Candidates can receive contributions from each of the major parties' three national committees, as well as state and local committees (including state committees outside the state in which the candidate is running), so the total party contributions to a candidate in an election can

be substantial. (FEC Facts ¶ 293 (Doc. 43, PageID 5224-25).) Since money is fungible, parties can also indirectly fund communications in favor of a candidate's campaign that are made by the candidate. (*E.g.*, FEC Facts ¶ 294 (Doc. 43, PageID 5225) (discussing how NRCC and NRSC effectively each made hundreds of thousands of dollars in additional contributions to candidates beyond their direct contributions and party coordinated expenditures through coordinated spending on legal proceedings).)

b. "To compensate for this, [political parties] must operate independently from their own candidates – or sit back and watch unaccountable outside groups do so – which is detrimental to a well-functioned party system." La Raja Rep. 14 (Doc. 41-3, PageID # 4135); La Raja Dep. Tr. 33:16-24 (Doc. 41-5, PageID # 4656) (explaining that, because of the coordinated party expenditure limits, parties must "think of innovative ways to support their candidates, … which … are very suboptimal for the entire political system, and that includes spending money independently").

FEC RESPONSE: The Commission objects to this fact as not supported by the record in this case. The Supreme Court has noted, parties today "perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452. Echoing the concerns of the Framers, the Court found that the "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players." *Id*. at 455. Thus, parties' distinctive and important role is precisely why the contribution limits Congress established serve as an essential bulwark against quid pro quo corruption. As Professor La Raja acknowledged, political parties target specific congressional races they deem to be closest, allocating money to be spent on competitive races, where it can make the most impact over winning and losing power, over races less competitive races. (La Raja Dep. at 23-24, FEC Exh. 102 (Doc. 38-22, PageID 2889-90).) According to Professor La Raja, "there is party-

concentrated spending on the races that they feel would be most likely to be competitive." (*Id*. at 24, PageID 2890.) In addition, this fact relies in part on the impermissible motivations Professor La Raja suggests to level the playing field between political parties and outside groups and address concerns beyond quid pro corruption like extremism and polarization and as such should be disregarded as explained more fully in response to Paragraphs 118 and 120.

c. Even Professor Krasno acknowledges that making independent expenditures is "less than ideal for [party] committees for many reasons," Krasno Dep. Tr. 67:17-18 (Doc. 41-4, PageID # 4240), because it "is inefficient (adding at least another layer of organization), inconvenient, frustrating to party leadership that desires more input into their organization's activities, and potentially counterproductive if a party committee, usually located in Washington, mistakenly chooses a theme that offends local sentiment,'" Krasno Dep. Tr. 67:3-25 (Doc. 41-4, PageID # 4240).

FEC RESPONSE: While it is undisputed that independent expenditures are not always as effective at electing candidates as coordinated ones, the Commission objects to this fact to the extents it limits the context of Professor Krasno's statement. Professor Krasno explained that "if the party has the ability to give unlimited coordinated expenditures, then there would be such an enormous pressure to raise money, and to just put enormous amounts of money into . . . whatever set of races they think are important, and whatever set of candidates they think are important." (Krasno Dep. 132:1-6, FEC Exh. 178 (Doc. 42-1, PageID 4962).)

d. Thus, "[r]estricting the parties' ability to coordinate with their candidates is not only 'a parody of what parties are about in most democracies, but encourages inefficient use of resources (hence ever-more money is needed), legal gamesmanship, and diminished political accountability.'" La Raja Rep. 14, 14 n.22 (Doc. 41-3, PageID # 4135) (quoting Raymond J. La Raja, *Why Super PACs: How the American Party System Outgrew the Campaign Finance System*, 10 The Forum 91 (2013)).

FEC RESPONSE: The Commission objects to this fact as speculative and lacking foundation. Furthermore, as professor La Raja admitted, courts should not look to other countries' democracies when interpreting the First Amendment in this country. (La Raja Dep. 27:4-8, FEC Exh. 102 (Doc. 38-22, PageID 2892).) In addition, this fact relies in part on the

impermissible motivations Professor La Raja suggests to level the playing field between political parties and outside groups and address concerns beyond quid pro corruption like extremism and polarization and as such should be disregarded as explained more fully in response to Paragraphs 118 and 120.

e. Moreover, because "[p]olitical parties and candidates are inextricably bound together in ways that promote collective action and mutual accountability … [s]eparating them through such a highly unusual arrangement" as requiring independent expenditures "defies common sense and undermines coherent electoral politics." La Raja Rep. 6 (Doc. 41-3, PageID # 4127).

FEC RESPONSE: The Commission objects to this fact as vague, ambiguous, speculative, and lacking foundation. In addition, this fact relies in part on the impermissible motivations Professor La Raja suggests to level the playing field between political parties and outside groups and address concerns beyond quid pro corruption like extremism and polarization and as such should be disregarded as explained more fully in response to Paragraphs 118 and 120.

f. Indeed, requiring party committees to engage in independent expenditures "causes an unnatural and inefficient separation in party activity from candidate campaigns: the parties are forced to operate like interest groups, disrupting their natural association and identity of interests with their own candidates and losing out on the strategically effective benefits of close communications with them – not to mention, lower costs available for candidate-sponsored advertising." La Raja Rep. 6 (Doc. 41-3, PageID # 4127); *see also id.* at 30 (Doc. 41-3, PageID # 4151) ("I do not agree … with placing parties in the same regulatory context as other groups because of their unique role in the political system. And by compelling party committees to spend independently if they want to robustly advocate for their candidates means that the parties must sacrifice advantages, such as lower cost advertising.").

FEC RESPONSE: While it is undisputed that independent expenditures are not always as effective at electing candidates as coordinated ones, the Commission objects to this fact as vague, ambiguous, speculative, and lacking foundation.

g. In other words, "having to spend independently from candidates … loosens the candidate-party linkages that are naturally part of this association, and creates unnecessary inefficiencies and additional administrative and compliance costs." La Raja Rep. 23 (Doc. 41-3, PageID # 4144). But "most critically, spending independently to advocate for their candidates means parties must work inefficiently to win elections, without direct

communications with their own candidates about plans, strategies, or messaging." La Raja Rep. 30 (Doc. 41-3, PageID # 4151); La Raja Dep. Tr. 37:14-24 (Doc. 41-5, PageID # 4660) (describing burdens and inefficiencies).

FEC RESPONSE: While it is undisputed that independent expenditures are not always as effective at electing candidates as coordinated ones, the Commission objects to this fact as speculative, vague, ambiguous, speculative and lacking foundation.

74. FECA imposes substantial burdens even on party committees it permits to make coordinated party expenditures subject to the limits, and it obviously also imposes these burdens—and more—on party committees, such as the NRSC and NRCC, that it prohibits from making coordinated party expenditures absent an assignment. Notably, for such committees, "[t]he assignment rules – and the need to ask another committee for permission to coordinate with their candidates – obviously add a layer of complexity to making coordinated party expenditures for committees." La Raja Rep. 17 (Doc. 41-3, PageID # 4138).

FEC RESPONSE: While it is undisputed that independent expenditures are not always as effective at electing candidates as coordinated ones, the Commission objects to this fact as without foundation and contrary to the record and the law for the reasons set forth in the Commission's response to Facts 37 and 38, which it hereby incorporates by reference.

The Commission also objects to this fact as without foundation and contrary to the record to the extent that it states that the requesting of assignment authority is a substantial burden. To the contrary, the record demonstrates that NRSC and NRCC regularly request and obtain assignment of coordinated party expenditure authority from the RNC and Republican state committees. (FEC Facts ¶¶ 300-03 (Doc. 43, PageID 5227-29).) And when asked to identify the expenses incurred related to seeking and obtaining assignment, both NRSC and NRCC stated no expenses were incurred. (FEC Facts ¶¶ 304-05 (Doc. 43, PageID 5229-30).)

75. Plaintiffs' responses to the FEC's extensive discovery requests further illustrate these substantial burdens imposed on party committees' fundamental activities:

FEC RESPONSE: The Commission objects to this fact as speculative, hypothetical, lacking foundation. Plaintiffs have produced no evidence establishing a "substantial" burden imposed by the coordinated party expenditure limits.

a. But for FECA's coordinated party expenditure limits and real threat of FEC enforcement action, investigation, and liability, and potential criminal prosecution for violating the limits, the NRSC would work in greater cooperation with its Republican Senate nominees to make more efficient and effective use of party resources in support of their Senate campaigns, with a particular emphasis on coordinated public communication advertisements supporting their candidates' campaigns. NRSC Discovery Resps., Interrogs. 5, 13 and 15 (Doc. 41-1, PageID # 4033-34, 4046-48, 4051-53).

FEC RESPONSE: While it is undisputed that independent expenditures are not always as effective at electing candidates as coordinated ones, the Commission objects to this fact as speculative, hypothetical, lacking foundation and contrary to the law. Before the Commission may commence an investigation or enforcement action, at least four of the six Commissioners must find there is reason to believe a violation of the law has occurred. 52 U.S.C. § 30109(a). The Commission has exclusive jurisdiction over the administration, interpretation and *civil* rather than criminal enforcement of FECA. *See generally id*. §§ 30106(b)(1), 30107(a), 30109. Additionally, the Commission does not have the authority to impose civil penalties. The Commission considers whether there is "reason to believe" that FECA has been violated. *Id.* § 30109(a)(2). If at least four of the FEC's Commissioners vote to find such reason to believe, the Commission investigates the alleged violation. *Id.* §§ 30106(c), 30109(a)(2). To continue with enforcement action, the Commission must then determine whether there is "probable cause" to believe FECA has been violated. *Id.* § 30109(a)(3)-(4). If so, FECA then requires the Commission to attempt informal conciliation with the respondent to remedy the apparent violation. Only if conciliation fails, may the FEC institute a de novo civil enforcement action in federal district court, in which a federal court may impose a civil penalty. *Id.* §

30109(a)(4)(A)(i), (a)(6)(A). Each of these stages requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i), (a)(6)(A).

b. But for FECA's coordinated party expenditure limits and enforcement threat, the NRCC also would work in greater cooperation with its Republican House nominees to make more efficient and effective use of party resources in support of their House campaigns, with a particular emphasis on coordinated public communication advertisements supporting their candidates' campaigns. *See* NRCC Discovery Resps., Interrogs. 1, 5, 13 and 15 (Doc. 41-2, PageID # 4081-83, 4089-90, 4101-02, 4105-07).

FEC RESPONSE: While it is undisputed that independent expenditures are not always as effective at electing candidates as coordinated ones, the Commission objects to this fact as hypothetical and speculative.

c. The NRSC and NRCC each explain that when "the party and candidate can work together, the party's speech becomes more focused, understandable, and effective, based on the known goals of the candidate on the ground." NRSC Discovery Resps., Interrog. 8 (Doc. 41-1, PageID # 4037-39); NRCC Discovery Resps., Interrog. 8 (Doc. 41-2, PageID # 4093-94). FECA's coordinated party expenditure limits deprive the NRSC and NRCC of these benefits. NRSC Discovery Resps.,Interrog. 8 (Doc. 41-1, PageID # 4037-39); NRCC Discovery Resps., Interrog. 8 (Doc. 41-2, PageID # 4093-94).

FEC RESPONSE: None.

d. Because of FECA's coordinated party expenditure limits, a lack of clarity as to what conduct may result in "coordination" under the FEC's regulations, and the desire to avoid becoming entangled in an enforcement action, the NRSC and NRCC have created and maintained IE units, including for the 2021-2022 cycle elections. NRSC Discovery Resps., Interrogs. 7, 10 (Doc. 41-1, PageID # 4036-37, 4039-44); NRCC Discovery Resps., Interrogs. 7, 10 (Doc. 41-2, PageID #4091-93, 4095-99).

FEC RESPONSE: The Commission objects to this fact on the grounds that it is contrary to the record and the law to the extent that it asserts that the meaning of "coordination" is unclear. As the Supreme Court held: "FECA's longstanding definition of coordination delineates its reach in words of common understanding." *McConnell*, 540 U.S. at 222-23; *see also id.* at 223 ("We conclude that FECA's definition of coordination gives fair notice to those to whom [it] is directed[.]" (internal quotation marks omitted)). Plaintiffs have not adduced any

evidence to the contrary. Indeed, NRSC and NRCC have been determining which expenditures are coordinated (and thus contributions or party coordinated expenditures) and which are independent for decades. *See McConnell*, 540 U.S. at 219-23; *Colorado I*, 518 U.S. at 618; *Buckley*, 424 U.S. at 46-47.

The Commission objects to this fact as speculative, without foundation, and contrary to the record and the law to the extent that it states that the establishment of "independent expenditure units" are somehow required by the party coordinated expenditure limits. An expenditure is not deemed coordinated based solely upon the nature of the relationship between a political party committee and a candidate, *Colorado I*, 518 U.S. at 619-623, but rather applies only to specific conduct, content, and timing, 11 C.F.R. §§ 109.20, 109.21(d), 109.37(a). And as discussed above, the meaning of "coordination" is clear. Moreover, Commission regulations include three safe harbors, including one providing for the establishment and use of a firewall policy that prohibits the flow of information between the individuals providing services to the party paying for the communication and the individuals providing services to the candidate's committee. 11 C.F.R. §§ 109.21(f)-(h), 109.37(a)(3). The regulation in no way requires the establishment of independent expenditure units like that of NRSC and NRCC in order for them to benefit from the regulation's safe harbor provision.

In addition, the Commission objects to this fact as speculative, hypothetical, and without foundation to the extent it states that plaintiffs are so fearful of an FEC enforcement action that establishment of independent expenditure units is necessary. Not only is the meaning of coordination clear (and, in any event, the regulations nonetheless provide a safe harbor), but before the Commission may commence an investigation, at least four of the six Commissioners must find there is reason to believe a violation of the law has occurred. 52 U.S.C. § 30109(a)(2).

The Commission does not have the authority to impose civil penalties; rather, it may only encourage a voluntary conciliation. *Id.* § 30109(a)(4)(A), (6)(A). If conciliation fails, and at least four Commissioners have determined that there is probable cause to believe a violation has occurred, then, if at least four Commissioners have voted to authorize it, the Commission can file a *de novo* civil suit. *Id.* § 30109(a)(4)(A)(i), (6)(A).

e. In connection with the 2021-2022 cycle elections for Senate, the NRSC spent nearly $38 million in total to operate its IE unit, including spending over $34 million on independent expenditures—mostly for television advertising—in support of Republican Senate nominees. The NRSC also spent $1.5 million on polling for the IE unit, over $1 million on IE unit staff and consultants, and more than $164,000 on rent and furnishings for a separate office space to maintain independence from the main party operation. NRSC Discovery Resps., Interrogs. 5, 7, 13, 15 (Doc. 41-1, PageID # 4033-34, 4036-37, 4046-48, 4051-53).

FEC RESPONSE: The Commission objects to this fact as without foundation and contrary to the record. NRSC incorrectly claims that it spent $38 million to "operate" its independent expenditure unit during the 2022 election cycle. As an initial matter, the document NRSC produced during discovery detailing the disbursements incurred by its independent expenditure unit shows only $36,401,107 in disbursements. (RPP_0000199 NRSC Independent Expenditure Data, FEC Exh. 167 (Doc. 40-7, PageID 3930); *see also* RPP_0000131 NRSC Independent Expenditures 2022 Budget, FEC Exh. 171 (Doc. 40-11, PageID 3930) (listing 2022 actual expenses totaling $37,379,382).) Over $34 million of this was on the advertisements themselves, which are not treated as operational expenses by party committees under FECA. (Clark Decl. ¶¶ 6, 14, Table 5, FEC Exh. 13 (Doc. 36-13, PageID 1288, 1301).) Rather, operating expenses for party committes are the day-to-day costs of running the independent expenditure unit. (Clark Decl. ¶ 14, FEC Exh. 13 Doc. 36-13, PageID 1301.)

f. In connection with the 2021-2022 cycle elections for the House of Representatives, the NRCC spent $92.4 million to operate its IE unit, including spending over $87 million on independent expenditures—mostly for television advertising—in support of Republican House nominees. The NRCC also spent $4.4 million on polling and research for

the IE unit, over $1.9 million on IE unit staff and consultants, and more than $265,000 on rent and furnishings for a separate office space to maintain independence from the main party operation. NRCC Discovery Resps., Interrogs. 5, 7, 13, 15 (Doc. 41-2, PageID # 4089-90, 4091-93, 4101-02, 4105-07).

FEC RESPONSE: The Commission objects to this fact as without foundation and contrary to the record. Plaintiffs' evidence does not establish that equivalent costs would not have been required if the spending had been coordinated. NRCC incorrectly claims that it spent $92.4 million to "operate" its independent expenditure unit during the 2022 election cycle. In fact, as NRCC even admits, over $87 million of this was on the advertisements themselves, which typically are not treated as operational expenses by party committees when FECA reports are analyzed. (Clark Decl. ¶¶ 6, 14, Table 5, FEC Exh. 13 (Doc. 36-13, PageID 1288, 1301).) Rather, operating expenses for party committees are the day-to-day costs of running the independent expenditure unit. (Clark Decl. ¶ 14, FEC Exh. 13 (Doc. 36-13, PageID 1301).)

g. If FECA's coordinated party expenditure limits were not in place, those resources would have been allocated by the NRSC and the NRCC toward other party activities, primarily more coordinated party communications. NRSC Discovery Resps., Interrogs. 5, 9, 13, 15 (Doc. 41-1, PageID # 4033-34, 4039, 4046-48, 4051-53); NRCC Discovery Resps., Interrogs. 5, 9, 13, 15 (Doc. 41-2, PageID # 4089-90, 4094-95, 4101-02, 4105-07).

FEC RESPONSE: As explained in response to the preceding paragraph, plaintiffs have not established that additional resources would be available.

h. Making such coordinated communications would have allowed the NRSC and the NRCC not only to receive their candidates' input on how best to utilize the party's resources to win elections in their home states, but also to save millions in additional costs through qualification for the lowest-unit rates that are available to candidate-sponsored advertisements but not the NRSC's and the NRCC's independent expenditure advertisements. NRSC Discovery Resps., Interrogs. 5, 13, 15 (Doc. 41-1, PageID # 4033-34, 4046-48, 4051-53); NRCC Discovery Resps., Interrogs. 5, 13, 15 ((Doc. 41-2, PageID # 4089-90, 4101-02, 4105-07).

FEC RESPONSE: The Commission objects to this fact as speculative, hypothetical, and without foundation to the extent plaintiffs claim that NRSC and NRCC would have been able to

"save millions" under the lowest unit rate rule. Other than self-serving statements, plaintiffs did not produce *any* evidence to substantiate or quantify the alleged burden even though such documents were specifically requested in discovery. (*See* NRSC Discovery Resp. at 50 (Request for Production No. 3), 54 (Request for Production No. 9), FEC Exh. 10 (Doc. 36-10, PageID 1170, 1174); NRCC Discovery Resp. at 48 (Request for Production No. 3), 52 (Request for Production No. 9), FEC Exh. 9 (Doc. 36-9, PageID 1113, 1117).) While the Commission acknowledges that broadcast stations were not legally obligated to provide NRSC and NRCC with the lowest unit rate for their independent expenditures, 47 U.S.C. § 315(b)(1), NRSC and NRCC have provided *no evidence* as to what they were in fact charged for such advertisements and how those prices compared what the lowest unit cost for those advertisements would have been. Accordingly, NRSC and NRCC's claim that they would have saved "millions" is wholly unsubstantiated and must be disregarded.

i. The need to seek assignments from other party committees in order to spend money in coordination with their candidates harms the NRSC and the NRCC. It diverts time and resources away from other NRSC and NRCC activities, the assignments sought are not always granted, and at times the assignment process becomes so protracted that it can interfere with the NRSC's or the NRCC's budgeting and other general election planning. And even when assignments are made, the assigning committee often withholds some portion of its coordinated party expenditure authority to ensure compliance with the strict coordinated party expenditure limits and avoid entanglement in an FEC enforcement action. NRSC Discovery Resps., Interrogs. 10, 11, 12 (Doc. 41-1, PageID # 4039-46); NRCC Discovery Resps., Interrogs. 10, 11, 12 (Doc. 41-2, PageID #4095-99).

FEC RESPONSE: The Commission objects to this fact as speculative and without foundation to the extent that it states the assigning committee's reasons for withholding a portion of its coordinated party expenditure authority. The only record evidence cited in support of this proposed fact is NRSC and NRCC's discovery responses, but those do not provide any foundation for the otherwise unsupported claim about the reasons for the withholding decisions of party committees that are not a part of this litigation. (*Cf.* FEC Facts ¶ 301 (Doc. 43, PageID

5228) (including examples where the committee assigned its coordinated party expenditure authority for the maximum amount).)

j. As long as the coordinated party expenditure limits remain in force, the NRSC will not make coordinated party expenditures, including for party coordinated communications, in excess of FECA's coordinated party expenditure limits, and will be compelled to spend in accordance with those limits, seek assignments of coordinated spending authority, and establish IE units to engage in express advocacy beyond those limits. NRSC Discovery Resps., Interrogs. 10, 15 (Doc. 41-1, PageID # 4039-44, 4051-53); NRCC Discovery Resps., Interrogs. 10, 15 (Doc. 41-2, PageID # 4095-99, 4105-07).

FEC RESPONSE: The Commission objects to this fact as speculative, without foundation, and contrary to the record and the law to the extent that it states NRSC is "compelled" to establish an independent expenditure unit for the reasons set forth in the Commission's responses to plaintiffs' proposed facts numbers 37 and 75(d).

k. The coordinated party expenditure limits also have placed the NRSC and NRCC at a substantial disadvantage in securing contributions from donors compared to Super PACs. NRSC Discovery Resps., Interrogs. 10, 16 (Doc. 41-1, PageID # 4039-44, 4053-54); NRCC Discovery Resps., Interrogs. 10, 16 (Doc. 41-2, PageID # 4095-99, 4107-09).

FEC RESPONSE: The Commission objects to this fact as speculative and without foundation, as NRSC and NRCC's discovery responses do not provide any foundation for the otherwise unsupported claim that these committees are at a "substantial disadvantage" relative to Super PACs. It is also contrary to record evidence, including reports by Professor Krasno explaining that political parties enjoy substantial and unique legal advantages in this space. (FEC Facts ¶¶ 199, 220, 251-69 (Doc. 43, PageID 5191-92, 5210-17) (citing, *inter alia*, Krasno Rept., FEC Exh. 1 (Doc. 36-1, PageID 402-414); Krasno *Cao* Rept., FEC Exh. 3 (Doc. 36-3, PageID 480-81)).) Other record evidence explains that parties have raised substantial amounts of money and have in fact thrived under the current legal regime. (*Id.* ¶¶ 270-89 (Doc. 43, PageID 5217-23) (citing, *inter alia*, Clark Decl., FEC Exh. 13 (Doc. 36-13, PageID 1284-87, 1304-07)).) In addition, this fact relies in part on the impermissible motivation to level the playing field

between political parties and outside groups and as such should be disregarded as explained more fully in response to Paragraphs 120.

l. If not for FECA's coordinated party expenditure limits, Senator Vance and former Congressman Steve Chabot would have looked to engage in greater coordination with the NRSC and the NRCC, respectively, as well as with other Republican party committees in connection with their 2022 campaigns. Vance Discovery Resps., Interrogs. 1 (Doc. 41-6, PageID # 4712-14); Chabot Discovery Resps., Interrogs. 1, 6 (Doc. 41-7, PageID # 4745-46, 4749-50).

FEC RESPONSE: The Commission objects to this fact as speculative, hypothetical, and without foundation to the extent plaintiffs claim that plaintiffs "would have looked to engage in greater coordination with" other plaintiffs and unidentified "other Republican party committees[.]"

m. Yet FECA's coordinated party expenditure limits caused Vance's and Chabot's 2022 campaigns to limit their interactions with their party committees. Vance Discovery Resps., Interrogs. 1, 8 (Doc. 41-6, PageID # 4712-14, 4720-21); Chabot Discovery Resps., Interrogs. 1, 6 (Doc. 41-7, PageID # 4745-46, 4749-50).

FEC RESPONSE: The Commission objects to this fact as speculative, hypothetical, and without foundation to the extent plaintiffs claim that the referenced limits "caused" plaintiffs to limit their interactions with various party committees.

n. Senator Vance understands from his campaign staff that the NRSC did not impose any conditions on its making of coordinated party expenditures in support of his 2022 campaign, other than with respect to the general timing for making any coordinated communications consistent with the NRSC's budgeting for the 2022 election cycle. The NRSC also required that it have ultimate control over its funds and authority to decide whether and how to spend its money in support of Vance's 2022 candidacy, including final review and approval of any advertisements. Vance Discovery Resps., Interrog. 6 (Doc. 41-6, PageID # 4718-19).

FEC RESPONSE: The Commission objects to this fact because it is an adjudicative fact based on hearsay derived from unidentified "campaign staff."

o. Former Congressman Chabot is not aware of any requirements or conditions the NRCC placed on the making of coordinated party expenditures, beyond compliance with the applicable limits and the NRCC retaining ultimate control over its funds and authority to decide whether and how to spend its money in support of Chabot's candidacy,

including final review and approval of any advertisements. Chabot Discovery Resps., Interrog. 8 (Doc. 41-7, PageID # 4751).

FEC RESPONSE: The Commission objects to this fact because there has been no foundation established for the adjudicative fact that Congressman Chabot would be aware of any requirements or conditions the NRCC placed on its making of coordinated party expenditures, if such conditions existed.

¶¶ 75p-r. FEC RESPONSE: None.

¶ 76. FEC RESPONSE: None.

B. The Record Contains No Evidence That The Coordinated Party Expenditure Limits Prevent Quid Pro Quo Corruption Or Its Appearance.

77. The only governmental interest that justifies campaign finance regulation is the prevention of *quid pro quo* corruption—meaning an explicit exchange of official action for money—or its appearance. *FEC v. Cruz*, 596 U.S. 289, 305 (2022); Krasno Rep. (Doc. 41-8, PageID # 4769); Krasno Dep. Tr. 69:6-73:2 (Doc. 41-4, PageID # 4242-46);La Raja Rep. 14, 34 (Doc. 41-3, PageID # 4135, 4155).

FEC RESPONSE: The Commission objects to the preceding heading as contrary to the evidence in the record. As supported by the FEC's Proposed Findings of Fact and following responses to Paragraphs 77-107, coordinated party expenditures are supported by an interest of preventing quid pro quo corruption in the political process prompted by unlimited party spending in coordination with candidates and those limits effectively further that aim.

As to Paragraph 77, the Commission objects to this fact's definition of quid pro quo corruption as requiring as an "explicit exchange" as a legal conclusion, to the extent it suggests a formal, express agreement to exchange official action or inaction for money to accompany a contribution must be present to constitute a *quid pro quo*. Further, plaintiff's definition is contrary to the record, as Professor Krasno rejected the idea that quid pro quo arrangements in this context would always be "specific" or "explicit" and noted that "there could be a kind of

implicit expectation that this [contribution] is what this is for." (Krasno Dep. 123:20-124:17, FEC Exh. 178 (Doc. 42-1, PageID 4953-54).) "The word, direct . . . is farther than I am willing to go. There is an implicit understanding how this [exchange] works." (*Id*. at 147:12-149:14 (Doc. 42-1, PageID 4977-79).)

78. There is no evidence in the record that in 1974, when Congress enacted the limits on party committee expenditures now codified at 52 U.S.C. § 30116(d), Congress did so to address *quid pro quo* corruption. *See* Krasno Dep. Tr. 57:4-14 (Doc. 41-4, PageID # 4230) (acknowledging he did not review the 1974 legislative record in preparing his report in this case or in *Colorado II*); *id.* at 58:15-59:16 (Doc. 41-4, PageID # 4231-32) (explaining Professor Krasno has not examined whether there were examples of expenditures by political parties being used to achieve any *quid pro quo* corruption prior to 1974); *see also* Mem. 22 (Doc. 21, PageID # 245).

FEC RESPONSE: The Commission objects to this fact as contrary to the evidence in the record, and further, to the use of Professor Krasno's testimony as support for this fact. Members of Congress expressed concerns about end-runs around an earlier contribution limit and the Supreme Court pointed to examples of apparent quid pro quos that were being reported and investigated at the time. (FEC Facts 77-84 (Doc. 43, Page ID 5141-43.) Professor Krasno testified that corruption was "top of mind for that Congress – in amending federal statutes." (Krasno Dep. at 57, FEC Exh. 178 (Doc. 42-1, PageID 4887).) That Sorauf, his *Colorado II* report co-author, would have consulted the legislative record having been studying these issues at the time. (*Id*.) Prior to 1974, "there were some scandals, but we were dealing with a . . . lawless environment." (*Id*. at 59 (Doc. 42-1, PageID 4889).) It "would have been impossible" to specifically examine examples of expenditures by political parties being used to employ quid pro quo corruption prior to 1974 "because there is no comprehensive record of campaign finance having been collected" and no collected data to review. (*Id*. at 58-59 (Doc. 42-1, PageID 4888-89).) Because of the broader context in which parties operated at the time "there would have been no real need to use parties in that way [to carry out quid pro quo arrangements through

coordinated expenditures] but there are plenty of examples. . . of parties being at the center of political corruption scandals." (*Id*. at 59 (Doc. 42-1, PageID 4889).)

79. To the contrary, the Supreme Court has previously recognized that "Congress wrote [§ 30116(d)] not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (*Colorado I*).

FEC RESPONSE: The Commission objects to this fact as it overstates the scope of the Court's finding in *Colorado I*, which was concerned with legislative history in the context of independent expenditures made by political parties. The cited paragraphs begins, "[t]he government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to *independent* party expenditures." *Colorado I*, 518 U.S. at 618 (emphasis added). The Court did not extend this finding to coordinated expenditures when it decided *Colorado II* only a few years later. 533 U.S. 431 (2001).

80. "In fact, rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." *Id.*

FEC RESPONSE: The Commission objects to this fact for the reasons provided in its objection to Paragraph 79, which it hereby incorporates by reference.

81. After nearly 50 years since their enactment, there also is no evidence in the record that § 30116(d)'s limits on coordinated party expenditures have prevented *quid pro quo* corruption or its appearance—whether involving a political party or individual donors. Mem. 22-25 (Doc. 21, PageID # 245-48).

FEC RESPONSE: The Commission objects to this fact as a legal conclusion to the extent it contemplates that coordinated party expenditure limits must outright "prevent" quid pro quo corruption to withstand First Amendment scrutiny. "The question is whether the Government has demonstrated both that coordinated expenditures by parties give rise to

corruption and that the restriction is 'closely drawn' to curb this corruption." *Colorado II*, 533 U.S. at 474 (Thomas, J., dissenting).

Further, this fact is contrary to the record in stating the limits do not curb, deter, or prevent quid pro quo corruption. (*See* FEC Facts ¶ 216 (Doc. 43, PageID 5197) ("[t]he limits on coordinated expenditures 'serve to instill confidence in the system by minimizing, if not completely preventing, this type of corruption. The success of this prophylaxis is evident in the dearth of campaign-finance scandals involving coordinated expenditures over the past few decades.' (quoting Krasno *Cao* Rept. at 3, FEC Exh. 3 (Doc. 36-3, PageID 482)); *id.* ("[W]e know that parties display no natural resistance to quid pro quo corruption and that under the current system big donors can make contributions to party committees that policymakers control. The fact that scandals specifically involving coordinated federal expenditures have not been more common suggests that the current regulations are working as intended." (quoting (Krasno Rept. at 13, FEC Exh. 1 (Doc. 36-1, PageID 411)).)

Because base limits on contributions to parties are substantially higher than base limits on contributions to candidates' campaigns, coordinated party expenditure limits prevent candidates from amassing funds from donors in amounts impermissible if raised directly through their campaigns. (*See* FEC Facts ¶¶ 195-216 (Doc. 43, PageID 5190-5197).) "Without limits on coordinated expenditures, candidates could and undoubtedly would use LCCs to solicit exceptionally large donations directly from donors so long as the money is directed to a party account over which the candidate exercises complete or large control." (Krasno Rept. at 7, FEC Exh. 1 (Doc. 36-1, PageID 405).) And funds raised in excess of candidate campaign base limits have repeatedly been found to raise a risk of quid pro quo corruption. (*See* FEC Facts ¶ 202 (Doc. 43, PageID 5192) (citing *McCutcheon* and *Cruz*).)

1. The record establishes that political parties cannot corrupt their own candidates.

82. Professor Krasno and Professor La Raja agree that a political party and its candidates cannot engage in *quid pro quo* corruption with themselves or each other. *See* Krasno Dep. Tr. 97:16-19 (Doc. 41-4, PageID # 4270) (agreeing that *quid pro quo* corruption through a party committee would require donor encumbrances on contributions made to the party); La Raja Rep. 7-9 (Doc. 41-3, PageID # 4128-30) (describing role of party in building coalitions).

FEC RESPONSE: The Commission objects to the preceding header as a conclusion of law, not a statement of fact. To the extent this could be construed as a statement of fact, the Commission objects that it is not supported by the record in this case.

As to Paragraph 82, the Commission objects to the fact as a conclusion of law. To the extent it could be considered a statement of fact, it is contrary to the evidence in the record. According to Professor Krasno, donors placing encumbrances on party contributions is just one avenue of potential corruption of coordinated party expenditures. But a party could also corrupt its own candidates by conditioning funding on members' official action. (*See* Krasno Dep. at 93:21-22, 151:7-152:1, FEC Exh. 178 (Doc. 42-1, PageID 4923, 4981-82).) Professor La Raja argues unlimited coordinated expenditures would permit parties to use "its financial ability to punish problem makers and enforce coalitions" in inducing members to support a particular nominee for Speaker of the House, as one prominent example. (*See* Krasno Dep. at 92:4-12, 93-95, 128-29, 148-49, 151-52, FEC Exh. 178 (Doc. 42-1, PageID 4922, 4978-79, 4981-82).) This is similar to the Chvala case in Wisconsin, where "the party leader used . . . that ability to sell policy favors . . . in exchange for larger contributions so that he could distribute more money to other Democrats in the caucus in order to win more seats. (*See* Krasno Dep. at 92-93, 117-18, 125, 145-46, 162-63, FEC Exh. 178 (Doc. 42-1, PageID 4922-23, 4947-48, 4955, 4975-76, 4992-93); FEC Facts ¶¶ 117-18 (Doc. 43, PageID 5159-60).) "That is quid pro quo corruption." (Krasno Dep. at 93, FEC Exh. 178 (Doc. 42-1, PageID 4923).)

83. Indeed, it is the very nature of the party-candidate relationship that the party will play a role in the policy positions of its candidate; "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes." *Colorado II*, 533 U.S. at 476 (Thomas, J., dissenting).

FEC RESPONSE: The Commission objects to this fact as contrary to the evidence in the record. While parties might generally influence candidates' positions or votes in a permissible fashion, conditioning coordinated expenditure funds by demanding members and officeholders take particular positions and votes "use[s] party accounts in ways that are essentially quid pro quo corruption." (Krasno Dep. at 179, FEC Exh. 178 (Doc. 42-1, PageID 5009).) For the same reasons as outlined in response to Paragraph 83, expert testimony of Professor Krasno in this case illustrates that enabling a party to "raise money and then spend it to get the kind of people elected to do the things [it] needs to have done" can constitute clear quid pro quo corruption about which we should be concerned. (*Id*. at 93 (Doc. 42-1, PageID 4923).)

84. As Professor La Raja explains it, "'[t]he only way collective responsibility has ever existed, and can exist given our institutions, is through the agency of the political party; in American politics, responsibility requires cohesive parties.'" La Raja Rep. 7-8, 8 n.10 (Doc. 41-3, PageID # 4128-29) (alteration in original) (quoting Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, 109 Daedalus 25, 26 (1980)).

FEC RESPONSE: The Commission objects to this fact as vague and ambiguous in its use of the term "agency," which has no clear and precise meaning in this context. In addition, this fact relies in part on the impermissible motivations Professor La Raja suggests to address concerns beyond quid pro corruption like extremism and polarization and as such should be disregarded as explained more fully in response to Paragraphs 118.

85. Because a political party's primary goal is to win elections and maintain majorities, La Raja Dep. Tr. 47:1-2 (Doc. 41-5, PageID # 4670); Krasno Dep. Tr. 29:22- 30:1 (Doc. 41-4, PageID # 4202-03), it spends its money consistent with that objective. La Raja Dep. Tr. 47:7-10 (Doc. 41-5, PageID # 4670). It is thus natural for political party leaders to leverage party resources in an effort to "keep their coalition intact and to keep on the party brand message that they think will win elections." La Raja Dep. Tr. 59:20- 22 (Doc. 41-5, PageID # 4682); *see also* La Raja Rep. 7 (Doc. 41-3, PageID # 4128) ("A political party can only act responsibly

when legislative leaders have the resources necessary to punish and reward party members to help forge coalitions on legislation that supports the party's brand."); *accord Colorado I*, 518 U.S. at 646 (Thomas, J., concurring in judgment and dissenting in part) ("The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes."); *Democratic Senatorial Campaign Committee*, 454 U.S. at 42 (recognizing that "effective use of party resources in support of party candidates may encourage candidate loyalty and responsiveness to the party").

FEC RESPONSE: The Commission objects to this fact for the reasons described in its response to Paragraphs 82 and 83, explaining that while a political party may permissibly venture to influence members of their coalition in the course of attempting to win elections and maintain majorities, leveraging its ability to spend unlimited coordinated expenditures can constitute a quid pro quo arrangement with candidates and officeholders.

86. Relatedly, the record undercuts any notion that coordinated party expenditures raise the "appearance" of *quid pro quo* corruption. To the contrary, the record reveals that the American public is generally unaware there are any limits at all on party committee financial support for candidates.

FEC RESPONSE: The Commission objects to this fact as a conclusion of law, not a statement of fact. To the extent this could be construed as a statement of fact, the Commission objects that it is not supported by the record in this case, as detailed below in responses to a.-d.

a. Even in Professor Krasno's experience, the American public generally does not recognize there being any differences between political parties and the parties' candidates, Krasno Dep. Tr. 35:22-36:5 (Doc. 41-4, PageID # 4208-09), and generally does not know that political parties are limited in how much they can work directly with their candidates to win elections, Krasno Dep. Tr. 37:6-38:4 (Doc. 41-4, PageID # 4210-11).

FEC RESPONSE: The Commission objects to this fact as contrary to the record. Professor Krasno's testimony only provided that the American public may not be aware of specific restrictions on interactions between parties and candidates but did not address whether the public perceives a notable difference between parties and candidates. (Krasno Dep. at 35:22-36:5, FEC Exh. 178 (Doc. 42-1, PageID 4865-66).) The Commission does not object that

legislative campaign committees are composed and managed by officeholders and inseparable from them. (FEC Facts ¶¶ 140-59 (Doc. 43, PageID 5171-79).)

b. Consistent with this experience, Professor Krasno testified that "it comes as no surprise" to him that in a recent book, *Campaign Finance and The American Democracy: What the Public Really Thinks and Why It Matters* (Univ. of Chicago Press 2020), Professors David Primo and Jeffrey Milyo found that only 30.3% of American voters they surveyed between 2015 and 2016 knew that political party financial support to candidates is limited. Krasno Dep. Tr. 39:4-10 (Doc. 41-4, PageID # 4212); *see also* David Primo & Jeffrey Milyo, *Campaign Finance and The American Democracy: What the Public Really Thinks and Why It Matters* 45 (Univ. of Chicago Press 2020).

FEC RESPONSE: The Commission objects to the inclusion of a citation to a book in this proposed finding of fact when the publication itself has not been introduced as evidence in this matter and does not itself evidence what Professor Krasno did or did not testify to.

c. Professor La Raja's report relatedly explains that, in his own research, Professor La Raja has "found that citizens, in fact, are much more likely to allow parties to support their candidates with high or no limits than other groups." La Raja Rep. 36 (Doc. 41-3, PageID # 4157); *accord* Primo & Milyo, *supra*, at 110 (finding that only 45.8% of surveyed participants supported any limits on party financial support to candidates).

FEC RESPONSE: None.

d. In fact, Professor La Raja notes, "'*[t]here is no scientific evidence that campaign finance reforms actually increases public trust in government.*'" La Raja Rep. 35 n.58 (Doc. 41-3, PageID # 4156) (emphasis in original) (quoting Primo & Milyo,*supra*, at 160). There is no evidence that FECA's coordinated party expenditure limits prevent *quid pro quo* corruption or its appearance effectuated through donor circumvention of base contribution limits.

FEC RESPONSE: The Commission objects to this fact as contrary to the record. When asked about this particular study in his deposition, Professor Krasno later testified that, in his view it would be difficult to identify any variable in particular that increased public trust in government. (*See* Krasno Dep. at 190:20-193:20, FEC Exh. 178 (Doc. 42-1, PageID 5020-22).) "The idea that campaign finance by itself would be the cause, let alone the cure [of low public trust in government] . . . is not reasonable." (*Id*. at 192:1-14 (Doc. 42-1, PageID 5022).)

2. There is no evidence that FECA's coordinate party expenditure limits prevent *quid pro quo* corruption or its appearance effectuated through donor circumvention of base contribution limits.

87. The record contains no evidence that coordinated party expenditures have ever been the source of actual instances of *quid pro quo* corruption between a donor and a federal candidate or officeholder. *See* Krasno Rep. 10-13 (Doc. 41-8, PageID # 4776-79); Krasno Dep. Tr. 82:5-10, 106:6-107:15 (Doc. 41-4, PageID # 4255, 4279-80); La Raja Rep. 33 (Doc. 41-3, PageID # 4154); La Raja Dep. Tr. 44:1-45:11 (Doc. 41-5, PageID # 4667-68).

FEC RESPONSE: The Commission objects to the preceding header as a conclusion of law, not a statement of fact. To the extent this could be construed as a statement of fact, the Commission objects that it is not supported by the record in this case.

As to Paragraph 87, the Commission objects to this fact as contrary to evidence in the record. Defendants provide various examples of actual and apparent quid pro quo corruption arrangements stemming from party committee funds. (*See* FEC Facts ¶¶ 67-139 (Doc. 43, PageID 5138-71).) In these examples, contributors received or appeared to receive favorable government action or inaction resulting from their contribution. *Id*. Professor Krasno referenced some of these examples, including the 2017 Tax Bill, the prosecution of Representative Bob Ney, and the 2015 indictment of Senator Menendez. (Krasno Dep. at 82-83, 95-97, 106-07, 142, FEC Exh. 178 (Doc. 42-1, PageID 4912-13, 4925-27, 4936-37, 4972).) Those examples included coordinated advertisements with funding through a party-affiliated committee, as in the case of former Wisconsin Senate Majority Leader Charles Chvala. (FEC Facts 117-18 (Doc. 43, PageID 5159-60.)

Determining whether coordinated expenditures themselves can presently be used to extract a quid pro quo arrangement is made difficult by the fact there is often not public access to conversations, if one occurs, where candidates make an agreement based on a particular contribution; and any examples of corruption we know about are often "because people have

been really bad at hiding their activities." (*Id*. at 106-07, 108-09, 160-61 (Doc. 42-1, PageID 4936-37, 4938-39, 4990-91).) Further, "the combination of the [party] base limits with the limits on coordinated expenditures provides some level of braking" on quid pro quo arrangements arising out of contributions to parties, limiting the extent of donor contributions that could be used through coordinated expenditures as a quid to extract a quo. (*Id.* at 115:6-18 (Doc. 42-1, PageID 4945).) Without limits on coordinated expenditures, there would be no mechanism to inhibit the entirety of these party contributions, raised in much larger sums than candidate contributions, to be spent on behalf of candidates in exchange for the performance of official duties. (*See* FEC Facts ¶¶ 195-216 (Doc. 43, PageID 5190-97).)

88. In fact, according to Professor La Raja, "[a]t the federal level there is little evidence of *quid pro quo* corruption for campaign finance, especially in the face of FECA's already restrictive base contribution limits," La Raja Rep. 33 (Doc. 41-3, PageID # 4154), and he notably has not "seen an example involving the party committees accused of quid pro quo corruption," La Raja Dep. Tr. 44:1-45:11 (Doc. 41-5, PageID # 4667-68).

FEC RESPONSE: The Commission objects to this fact as contrary to evidence in the record, for the reasons provided in its response to Paragraph 87, which it hereby incorporates by reference.

89. Professor La Raja explains that "[t]he fact that the party committee must raise money in small increments" subject to the base contribution limits "is alone a prophylactic against *quid pro quo* corruption (which is rare through party committees to begin with)." La Raja Rep. 24-25 (Doc. 41-3, PageID # 4145-46).

FEC RESPONSE: The Commission objects to this fact as contrary to evidence in the record. While party base limits may be understood to guard against corruption arrangement between party donors over the party itself, coordinated expenditure limits in combination with party base limits guard against corruption as to candidates. (*See* Krasno Dep. at 115:6-18, FEC Exh. 178 (Doc. 42-1, PageID 4945).) It is both limits, working "in concert" which protects against the quid pro quo corruption about which we are concerned. (*Id*. at 91, 159-60 (Doc. 42-

1, PageID 4921, 4989).) Further, the increments that parties raise money in exceed limits on contributions individual candidates by many times, where all money raised by the parties could be used in coordination with, and on behalf of, candidates. (*See* FEC Facts ¶¶ 195-216 (Doc. 43, PageID 5190-97).)

90. Even Professor Krasno concurs that FECA's base "contribution limits are designed to be a prophylaxis against *quid pro quo* corruption." Krasno Dep. Tr. 88:21-24 (Doc. 41-4, PageID # 4261).

FEC RESPONSE: The Commission objects to this fact as contrary to evidence in the record. First, while Professor Krasno recognized party base contribution limits operate as a prophylaxis of some type of corruption when the party takes in funds, he maintains that the variant(s) of quid pro quo corruption at issue in this case—stemming from the parties' use expenditure of funds for the benefit of candidates—are only mitigated by the "combination" of party base limits and coordinated expenditures limits or, *i.e.*, those limits working "in concert." (*See* Krasno Dep. at 91, 115, 159-60, FEC Exh. 178 (Doc. 42-1, PageID 4921, 4945, 4989-90).) Further, the Commission objects to the substance of the quotation as contrary to the evidence in the record above for the reasons provided in its response to Paragraph 89, which it hereby incorporates by reference.

91. Professor La Raja's report in fact shows that this "prophylactic against so-called corruption and earmarking to candidates has rarely been tighter." La Raja Rep. 31 (Doc. 41-3, PageID # 4152). In current inflation-adjusted dollars, the "contribution limits on political parties for election funds are lower today than in 1974 when Congress passed the FECA amendments." La Raja Rep. 31, Fig. 4 (Doc. 41-3, PageID # 4152). (Professor Krasno performed no such analyses in connection with his report.)

FEC RESPONSE: The Commission objects to this fact as contrary to the evidence in the record, especially to the extent it suggests parties experience a diminished capacity to utilize general account funds to engage in expenditures. First, the base limits on contributions to political parties are adjusted for inflation. (FEC Facts ¶ 254 (Doc. 43, Page ID 5211).) Second,

plaintiffs fail to account for the establishment of three special purpose funds since 2015, with much higher limits than the contribution base limits, that permit party committees to defray large costs for nominating conventions, election recounts and litigation and party headquarters buildings, and therefore frees up a greater portion of the parties' general funds to engage in other expenditures. (*See* FEC Facts ¶ 199 (citing Krasno Dep. at 60-61, FEC Exh. 178 (Doc. 42-1, PageID 4890)); *id.* ¶ 255 (Doc. 43, PageID 5211).)

92. Moreover, Professor La Raja references a "widely cited meta-analysis of PAC contributions [that] found that 'the evidence that campaign contributions lead to a substantial influence on [legislators'] votes is rather thin.'" La Raja Rep. 33-34, 34 n.55 (Doc. 41-3, PageID # 4154-55) (quoting Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, *Why Is There So Little Money in U.S. Politics?*, 17 The Journal of Economic Perspectives 105, 116 (2003)). To the contrary, that study shows, "'[l]egislators' votes depend almost entirely on their own beliefs, and the preferences of their voters and their party. Contributions explain a miniscule fraction of the variation in voting behavior in the U.S. Congress. Members of Congress care foremost about winning re-election.'" *Id.*

FEC RESPONSE: The Commission does not object to this fact to the extent it suggests "that campaign contributions lead to a substantial influence on [legislators'] votes" in every instance or even for most officeholders. However, it does otherwise object to this fact, as evidence in the record supplies multiple examples of quid pro quo corruption stemming from campaign contributions, specifically through political party contributions, which demonstrates that campaign contributions can be exchanged to directly affect legislators' votes or actions in various instances. (*See* FEC Facts ¶¶ 67-139 (Doc. 43, Page ID 5138-71).)

93. Professor Krasno could not identify, in either his report or his deposition testimony, even a single example of *quid pro quo* corruption in the context of coordinated party expenditures subject to the limits at 52 U.S.C. § 30116(d). Krasno Rep. 13 (Doc. 41-8, PageID # 4779); Krasno Dep. Tr. 107:16-109:25 (Doc. 41-4, PageID # 4282).

FEC RESPONSE: The Commission objects to this fact as contrary to evidence in the record, for the reasons provided in its response to Paragraph 87, which it hereby incorporates by reference.

94. Professor Krasno also is not aware of any examples of *quid pro quo* corruption through coordinated party spending in any other context.

FEC RESPONSE: The Commission objects to this fact as contrary to evidence in the record, for the reasons provided in its response to Paragraph 87, which it hereby incorporates by reference.

a. Professor Krasno could not offer any example of *quid pro quo* corruption in the context of coordinated party spending related to a campaign for state office, including from any of the several states which allow political parties to support their candidates financially without limit, such as Professor Krasno's home state of New York. Krasno Dep. Tr. 164:2-165:11(Doc. 41-4, PageID # 4337-38); *see also* La Raja Rep. 35 (Doc. 41-3, PageID # 4156) ("I am not aware of there being any evidence of greater occurrences of *quid pro quo* corruption through the party system (which, to repeat myself, is rare in all events) from the several American states that allow parties to support their candidates without limit."); *see also* Mem. 24 n.3 (Doc. 21, PageID # 247) (discussing and citing state laws).

FEC RESPONSE: The Commission objects to this fact as contrary to evidence in the record, for the reasons provided in its response to Paragraph 87, which it hereby incorporates by reference.

b. Professor Krasno also could not identify any example of *quid pro quo* corruption effectuated through contributions to the national party committee's segregated accounts (discussed *supra* ¶¶ 40-43). Krasno Dep. Tr. 59:9-60:14, 161:17-162:1 (Doc. 41-4, PageID # 4232-33, 4334-35). For almost a decade now, Congress has allowed donors to contribute *three times* as much money to these accounts as they can give to the national parties' general operating accounts—more than $100,000 annually. Krasno Dep. Tr. 161:12-16 (Doc. 41-4, PageID # 4334-35). Yet Congress has exempted all authorized spending out of the accounts from the coordinated party expenditure limits, 52 U.S.C. § 30116(d)(5). This means that funds contributed to these accounts can be—and, as Professor Krasno acknowledges, have been—freely spent in coordination with candidates, including to defray a candidate's legal bills. Krasno Dep. Tr. 62:8-13 (Doc. 41-4, PageID # 4235). Yet Professor Krasno knows of no examples of *quid pro quo* corruption involving contributions made to these accounts. *See* Krasno Dep. Tr. 161:17-162:1 (Doc. 41-4, PageID # 4334-35); *see also* Mem. 23 (Doc. 21, PageID # 246).

FEC RESPONSE: The Commission objects to this fact, as Professor Krasno's testimony makes clear considering this question was "beyond the context of this engagement" as an expert witness in this case. (Krasno Dep. at 161, FEC Exh. 178 (Doc. 42-1, Page ID 4991).) This is

because segregated accounts do not "really go down to the benefit of specific candidates" in most instances in the way coordinated campaign expenditures do. (*Id*. at 60-61 (Doc. 42-1, Page ID 4890-91).) As confirmed by plaintiffs' counsel, the segregated accounts are not part of coordinated campaign expenditures. (*Id*. at 61:18-21 (Doc. 42-1, Page ID 4891).)

95. Professor Krasno's report points to some historical examples of (real or alleged) political scandals, Krasno Rep. 10-12 (Doc. 41-8, PageID # 4776-78), but he openly admits those matters did not involve *quid pro quo* corruption in the context of coordinated party expenditures, *see* Krasno Rep. 13 (Doc. 41-8, PageID # 4779) (acknowledging "coordinated expenditures do not feature prominently in the examples of (quid pro quo) corruption to which I have quickly alluded."); Krasno Dep. Tr. 82:5-10, 106:6-107:15 (Doc. 41-4, PageID # 4255, 4279-80).

FEC RESPONSE: The Commission objects to this fact as contrary to evidence in the record, for the reasons provided in its response to Paragraph 87, which it hereby incorporates by reference.

96. Moreover, Professor Krasno did not even know why he had included some of his chosen examples in the first place—since they had no apparent connection to political parties whatsoever. *See* Krasno Dep. Tr. 100:7-20 (Doc. 41-4, PageID # 4273) ("Well, I don't know about Teapot Dome … I don't know why I put Teapot Dome in there [Professor Krasno's report] … Teapot Dome is one of the things that sort of is a part of the lore of campaign finance regulation.").

FEC RESPONSE: The Commission objects to this fact to the extent it suggests that any historical examples cited by Professor Krasno did not in fact have a relation to political parties. Professor Krasno's momentary recollection notwithstanding, the Teapot Dome scandal did relate to payment of $1.5 million in Republican Party debt by two individuals, one of whom appeared to receive in return the decision by the Interior Department to lease the Teapot Dome oil reserve to his corporation. (FEC Fact 72 (Doc. 43, PasgeID 5139-40.) The Daley Machine, Nassau County, and Tammany Hall similarly "are all party issues" that demonstrate the corruptive potential that can accompany parties. (Krasno Dep. at 99-100, FEC Exh. 178 (Doc. 42-1, PageID 4929-30).)

97. Indeed, in the words of Professor La Raja, none of Professor Krasno's examples "have anything to do with coordinated expenditures." La Raja Dep. Tr. 44:14-45:1 (Doc. 41-5, PageID # 4667-68) ("I haven't seen an example involving the party committees accused of quid pro quo corruption. And for that matter, Professor Krasno did not give an example of where it happens."); *see also* La Raja Rep. 27 (Doc. 41-3, PageID # 4148) ("[Professor Krasno] prefers to unearth well-known – but tired – narratives of party malfeasance, drawing on the long-gone patronage days of Tammany Hall in the manner of a Frank Capra classic.").

FEC RESPONSE: The Commission objects to this fact as contrary to evidence in the record for the reasons provided in its response to Paragraph 87, which it hereby incorporates by reference.

98. Professor Krasno nonetheless seeks to defend his chosen examples by pointing toward an evidentiary negative: "The fact that scandals specifically involving coordinated federal expenditures have not been more common suggests that the current regulations are working as intended." Krasno Rep. 13 (Doc. 41-8, PageID # 4779). Yet Professor Krasno admittedly did not examine the effects of other limitations, such as the base limits and the earmarking rule, in preventing *quid pro quo* corruption in this context. Krasno Dep. Tr. 105:18-21,110:1-5 (Doc. 41-4, PageID # 4278, 4283).

FEC RESPONSE: The Commission objects to this fact as contrary to evidence in the record for the reasons provided in its response to Paragraph 87 as it relates to the examples of quid pro quo corruption entered in the record and/or considered by Professor Krasno. Further, the Commission objects to this fact as contrary to the evidence in the record for the reasons provided in its response to Paragraphs 89-90 as they relate to the operation of the base limits, which Professor Krasno did consider in his testimony, particularly in conjunction with coordinated party expenditure limits. The Commission also objects to this fact as it relates to the earmarking rule, as such considerations require legal conclusions about the applicability of such a rule, which evades Professor Krasno's expertise. (Krasno Rept. at 1-2, FEC Exh. 1 (Doc. 36-1, PageID 399-400 (Qualifications).)

99. Professor La Raja explains that Professor Krasno's conclusion about the efficacy of the coordinated party expenditure limits in preventing *quid pro quo* corruption "entirely ignores that other, less restrictive campaign finance rules already combat corruption, including the base contribution limits and anti-earmarking rule," La Raja Rep. 34-35 (Doc. 41-3,

PageID # 4155-56). Professor La Raja further states that he is "dubious that the coordinated limits make any difference" given these other limitations. La Raja Rep. 35 (Doc. 41-3, PageID # 4156); La Raja Dep. Tr. 44:18-19 ("I don't see how raising the coordinated spending limits increases corruption.") (Doc. 41-5, PageID # 4667); *see also infra* Part VI.C.

FEC RESPONSE: The Commission objects to this fact as contrary to the evidence in the record for the reasons provided in its response to Paragraphs 89-90 as they relate to the operation of the base limits, which he did consider in his testimony, particularly in conjunction with coordinated party expenditure limits. The Commission also objects to this fact as it relates to the earmarking rule, as such considerations require legal conclusions about the applicability of such a rule, which evades Professor Krasno's expertise.

The evidence in the record, including but not limited to Professor Krasno's testimony, demonstrates how removing limits on coordinated party expenditures would permit candidates to raise money in sums impermissible if raised by their individual campaigns. (*See* FEC Facts ¶¶ 195-216 (Doc. 43, Page ID 5190-97).) This raises the risk of quid pro quo corruption that is mitigated by the "combination" of party base limits and coordinated expenditures limits or, *i.e.*, those limits working "in concert." (*See* Krasno Dep. at 91, 115, 159-60, FEC Exh. 178 (Doc. 42-1, PageID 4921, 4945, 4989-90).)

100. Professor Krasno's report also freely references his co-authored report in *Colorado II*. Krasno Rep. 3-7 (Doc. 41-8, PageID # 4769-73). But he acknowledges that his *Colorado II* report was not "narrowly focused on quid pro quo corruption," Krasno Dep. Tr. 77:17-19 (Doc. 41-4, PageID # 4250), and he cannot recall uncovering any examples of such corruption at the federal level in connection with preparing that earlier expert report, Krasno Dep. Tr. 81:7-12, 82:5-10 (Doc. 41-4, PageID # 4254, 4255).

FEC RESPONSE: The Commission objects to this fact as it misstates Professor Krasno's testimony in the record on the scope of his *Colorado II* report. The *Colorado II* report reviewed evidence "under a broader meaning of corruption," under "the kind of understanding of what corruption meant at that point" under the Court's contemporary jurisprudence. (Krasno Dep. at

74, FEC Exh. 178 (Doc. 42-1, PageID 4904).) Quid pro quo corruption was certainly encompassed within that broader view of corruption, as evaluating campaign finance regulations through the prism of quid pro quo corruption stems from *Buckley*. 424 U.S. at 26-28, 45-47. "We thought of it as quid pro quo corruption being at the center of . . . the most focused part of a web of . . . [the] sort of corruptive types of arrangements that then extended on." (Krasno Dep. at 77, FEC Exh. 178 (Doc. 42-1, PageID 4907).)

Looking back on the *Colorado II* report's conclusion under a "more focused version of corruption, it doesn't really change [those conclusions]." (Krasno Dep at 74 (Doc. 42-1, PageID 4904); *see also* Krasno Rept. 3 (Doc. 36-1, PageID 401) (explaining that "[r]eexamination of my 1997 report with Sorauf reveals two key elements of that analysis that remain equally relevant today as applied toward quid pro corruption rather than corruption without adjectives. Indeed, I reach the same conclusion today that I reached in 1997 that eliminating the now nearly 50-year-old limits on coordinated expenditures would introduce exactly the sort of risks of corruption that today's Court has agreed may be combatted."); *id.* at 3-7 (Doc. 36-1, PageID 401-05).) If corruption had been understood differently in 1997, "we would have . . . been more focused on this notion of quid pro quo corruption, and we would have found it." (Krasno Dep. at 77-78, FEC Exh. 178 (Doc. 42-1, PageID 4907-08).)

101. Instead, Professor Krasno admittedly viewed the available record evidence in *Colorado II* under a far broader conception of "corruption"—"access and opportunity," Krasno Rep. 3 (Doc. 41-8, PageID # 4769); Krasno Dep. Tr. 73:13-20 (Doc. 41-4, PageID # 4246). In other words, the mere "'opportunity for undue influence'" through donors receiving "'unequal access to policy makers,'" by way of "'meetings, briefings, retreats, weekends, dinners, receptions and coffee klatches'" was, in Professor Krasno's opinion in his *Colorado II* report, sufficient to constitute "corruption"—but Professor Krasno agrees that such "access" activities are not *quid pro quo* corruption. Krasno Rep. 3 (Doc. 41-8, PageID # 4769); Krasno Dep. Tr. 78:13-79:11 (Doc. 41-4, PageID # 4251-52).

FEC RESPONSE: The Commission objects to this fact to the extent it suggests Professor Krasno's analysis of corruption in this case remains unchanged from his report in *Colorado II* for the reasons described in its response to Paragraph 100, which it hereby incorporates by reference.

¶ 102. FEC RESPONSE: None.

103. Yet, even without any evidence (either old or new) of actual *quid pro quo* corruption effectuated through coordinated party expenditures, Professor Krasno states that he "reach[es] the same conclusion" in this case "that [he] reached in 1997 [in his *Colorado II* report] that eliminating the now nearly 50-year-old limits on coordinated [party] expenditures would introduce exactly the sort of risks of corruption that today's [Supreme] Court has agreed may be combatted." Krasno Rep. 3 (Doc. 41-8, PageID # 4769).

FEC RESPONSE: The Commission objects to this fact as contrary to the evidence in the record for the reasons described in its response to Paragraph 87, which it hereby incorporates by reference. Further, The Commission objects to this fact to as it misstates Professor Krasno's testimony as to the import of his *Colorado II* report's analysis in this case for the reasons described in its response to Paragraph 100, which it hereby incorporates by reference.

104. Professor Krasno bases this conclusion solely on "two key features of the status quo" of federal campaign finance regulation: "the much higher [base] limits on contributions to parties and the practices of how parties and candidates / officeholders work together to raise funds for parties," primarily through the vehicle of "joint fundraising committees" authorized under 11 C.F.R. § 102.17. Krasno Rep. 10 (Doc. 41- 8, PageID # 4776) (emphasis added). Professor Krasno claims that these two aspects of the legal "status quo" "make unlimited coordinated expenditures dangerous for *their potential to create the opportunities* for quid pro quo corruption." Krasno Rep. 10 (Doc. 41-8, PageID # 4776) (emphasis added).

FEC RESPONSE: The Commission objects to this fact as it mischaracterizes Professor Krasno's conclusion that coordinated party expenditure limits guard against quid pro quo corruption based "solely" on the features described above. While these are "two key elements" or "features" in his analysis, various other observations about how parties and candidates operate support his findings, including but not limited: to the history of political parties, the role of political parties today and over time, how coordinated expenditures function, and examples of

corruption. (*See* Krasno Rept. at 2-13, FEC Exh. 1 (Doc. 36-1, PageID 400-411).) Further, the expert report itself—not plaintiffs' brief and incomplete recitation of some of its contents—is the best evidence of all elements or features that underlie Professor Krasno's conclusions.

105. In essence, Professor Krasno's view is that political parties and candidates doing what he agrees is legal for them to do under FECA, Krasno Dep. Tr. 88:21-89:6, 91:16- 20 (Doc. 41-4, PageID # 4261-62)—*i.e.*, raising hard-money contributions subject to the base limits and engaging in joint fundraising activities—in and of itself leads to donors circumventing FECA's base limits to candidates and thereby creates "opportunity" for *quid pro quo* corruption through coordinated party expenditures. This, Professor Krasno claims, renders the coordinated party expenditure limits necessary. Krasno Rep. 6 (Doc. 41-8, PageID # 4772). Professor Krasno, however, provides no evidence or support for this view, and it is contradicted by the record.

FEC RESPONSE: The Commission objects to this finding because it mischaracterizes the testimony of Professor Krasno. Professor Krasno's testimony speaks for itself, and is the best evidence of its contents. In addition, it is incorrect to state that Professor Krasno "provides no evidence or support for this view" or other views, as he is an expert who has conducted extensive research that forms the basis for his opinions. (*See* Krasno Rept. at 1-2, FEC Exh. 1 (Doc. 36-1, PageID 399-400) (Qualifications).) Finally, the Commission has introduced extensive evidence proving that the higher hard-money contribution limits enjoyed by political party committees are a way for candidates to effectively access funds beyond what the candidates could raise themselves (FEC Facts ¶¶ 195-216 (Doc. 43, PageID 5190-97)), and that national party committees have been critical to apparently corrupt exchanges between contributors and federal candidates (FEC Facts ¶¶ 217-35 (Doc. 43, PageID 5197-5203)).

a. First, as Professor Krasno agrees, under FECA candidates have always been able to fundraise with and for their party—which can raise at higher limits—and parties have been able to make coordinated party expenditures for their candidates, yet Professor Krasno still cannot identify a single example of quid pro quo corruption in this context.

FEC RESPONSE: The Commission objects to this finding as a mischaracterization of Professor Krasno's testimony and the factual record in this matter more broadly, for the reasons set forth in the Commission's response to Fact 105, which it hereby incorporates by reference.

b. Second, Professor Krasno assumes that through the mere operation of legal and commonplace joint fundraising committees, contributions raised by party committees are being *illegally* "earmarked" to candidates in circumvention of the base limits. Krasno Rep. 10 (Doc. 41-8, PageID # 4776). In his view, "[j]oint fundraising committees … are direct ways in which you would circumvent" base limits. Krasno Dep. Tr. 84:6-10 (Doc. 41-4, PageID # 4257).

FEC RESPONSE: The Commission objects to this finding as a mischaracterization of Professor Krasno's testimony and the factual record in this matter more broadly, for the reasons set forth in the Commission's response to Fact 105, which it hereby incorporates by reference.

i. His view contradicts the governing law on joint fundraising committees, and assumes donors are routinely violating the earmarking rule and FECA's contribution limits. A joint fundraising committee is nothing more than an administrative convenience, for both the participating political committees and donors. "Lest there be any confusion, a joint fundraising committee is simply a mechanism for individual committees to raise funds collectively, not to circumvent base limits or earmarking rules." *McCutcheon*, 572 U.S. at 215 (plurality opinion) (citing 11 C.F.R. § 102.17(c)(5)). Indeed, "[u]nder no circumstances may a contribution to a joint fundraising committee result in an allocation that exceeds the contribution limits applicable to its constituent parts; the committee is in fact required to return any excess funds to the contributor." *Id.* (citing 11 C.F.R. § 102.17(c)(6)(i)).

FEC RESPONSE: The Commission objects to this finding as a mischaracterization of Professor Krasno's testimony and the factual record in this matter more broadly, for the reasons set forth in the Commission's response to Fact 105, which it hereby incorporates by reference. The Commission further objects to this fact as a legal conclusion, namely the assumption that "[a] joint fundraising committee is nothing more than an administrative convenience[.]" The Commission further objects to this fact as without foundation, as the cited legal authority assumes compliance with earmarking rules, and in no way contradicts the testimony of Professor Krasno that such rules have been repeatedly violated.

ii. Moreover, Professor Krasno can point to no real-world examples of any donors actually illegally "earmarking" contributions to a party committee for use in coordinated party expenditures for a particular federal candidate through a joint fundraising committee. Krasno Dep. Tr. 158:15-18 (Doc. 41-4, PageID # 4331).

FEC RESPONSE: The Commission objects to this finding as a mischaracterization of Professor Krasno's testimony and the factual record in this matter more broadly, for the reasons set forth in the Commission's response to Fact 105, which it hereby incorporates by reference.

c. Third, Professor Krasno similarly hypothesizes that individuals who contribute to a joint fundraising committee involving a federal candidate and a party committee have an "implicit expectation" that all of their contributed funds will be used to support that candidate. Krasno Dep. Tr. 116:13-117:14, 121:10-124:25 (Doc. 41- 4, PageID # 4289-90, 4294-97). Yet, contradicting this supposition, he also agrees that it is not *quid pro quo* corruption if a donor simply gives money to the general operations of a party committee with the aspirational hope the party will spend those funds for a candidate. Krasno Dep. Tr. 126:20-127:3 (Doc. 41-4, PageID # 4299-4300).

FEC RESPONSE: The Commission objects to this finding as a mischaracterization of Professor Krasno's testimony for the reasons set forth in the Commission's response to Fact 105, which it hereby incorporates by reference. The referenced testimony of Professor Krasno is not contradictory.

d. Fourth, Professor Krasno further assumes that a candidate only would engage in joint fundraising committees with the party if the candidate knew going in that all money raised through the joint fundraising committee would be used to support the candidate. Krasno Dep. Tr. 155:1-158:18 (Doc. 41-4, PageID # 4328-31); *see also* Krasno Dep. Tr. 117:15-19 (Doc. 41-4, PageID # 4290). Yet Professor Krasno points to no real-world example of a candidate participating in a joint fundraising committee with a party committee on the condition that the funds raised by the party be solely directed toward the candidate's campaign. *See* Krasno Rep. 10 (Doc. 41-8, PageID # 4776); Krasno Dep. Tr. 155:1-158:18 (Doc. 41-4, PageID # 4328-31); *see also* Krasno Dep. Tr. 117:15-19 (Doc. 41-4, PageID # 4290). Professor Krasno also points to no real-world example of a political party agreeing to any such condition. *See* Krasno Rep. 10 (Doc. 41-8, PageID # XX); Krasno Dep. Tr. 155:1-158:18 (Doc. 41-4, PageID # 4328-31); *see also* Krasno Dep. Tr. 117:15-19 (Doc. 41-4, PageID # 4290).

FEC RESPONSE: The Commission objects to this finding as a mischaracterization of Professor Krasno's testimony and the factual record in this matter more broadly, for the reasons set forth in the Commission's response to Fact 105, which it hereby incorporates by reference.

i. In fact, Professor Krasno admittedly did not research any relevant examples of joint fundraising committees in drafting his report, Krasno Dep. Tr. 157:15-17 (Doc. 41-4, PageID # 4330), and he demonstrated a lack of understanding of their purpose—*i.e.*, efficiencies, Krasno Dep. Tr. 156:2-157:5 (Doc. 41-4, PageID # 4329-30). Through a joint fundraising committee, candidates and party committees that participate may host fundraising events or engage in fundraising campaigns (such as direct mail) together, thereby achieving cost savings and other efficiencies, while donors may make a single contribution, to be split among the participants, without the burden of attending multiple events or making several separate contributions to each participant. 11 C.F.R. § 102.17. Moreover, party committees get to utilize the candidate as a "draw" for contributors, while the candidate and campaign get to benefit from the party committee's fundraising resources, staff, and contacts. Krasno Dep. Tr. 156:13-157:2 (Doc. 41-4, PageID # 4329-30).

FEC RESPONSE: The Commission objects to this finding as a mischaracterization of Professor Krasno's testimony and the factual record in this matter more broadly, for the reasons set forth in the Commission's response to Fact 105, which it hereby incorporates by reference. Plaintiffs' implied assertion that the sole purpose of joint fundraising committees is "efficiencies" is unfounded, and is contradicted by both the expert opinion of Professor Krasno and record evidence demonstrating how such committees can give rise to corruption and its appearance. (FEC Facts ¶¶ 122, 179-91 (Doc. 43, PageID 5162-63, 5185-90).)

ii. There is no better illustration of Professor Krasno's lack of knowledge in this regard than his testimony that he believes a candidate who is "not in any kind of electoral danger," such as Congresswoman Nancy Pelosi, would have no "point" in participating in a joint fundraising committee with her party, since the party would not spend to support her candidacy. *See* Krasno Dep. Tr. 157:15-158:18 (Doc. 41-4, PageID # 4330-31) ("So, for example, Nancy Pelosi, when she was raising money for the democrats, probably wasn't doing it with a joint fundraising committee because she doesn't need the money in her campaign.").

FEC RESPONSE: The Commission objects to this finding as a mischaracterization of Professor Krasno's testimony and the factual record in this matter more broadly, for the reasons set forth in the Commission's response to Fact 105, which it hereby incorporates by reference. Professor Krasno did not state that there would be no point in Nancy Pelosi participating in a joint fundraising committee "since the party would not spend to support her candidacy," and instead said that "she doesn't need the money in her campaign," which is accurate.

iii. Reality contradicts Professor Krasno's speculation. Since 2011, Congresswoman Pelosi's authorized campaign committee has indeed participated in Nancy Pelosi Victory Fund, a joint fundraising committee with the Democratic Congressional Campaign Committee (DCCC), *see* FEC Committee Profile, Nancy Pelosi Victory Committee, https://www.fec.gov/data/committee/C00492421 (last visited Nov. 16, 2023), yet the DCCC has not made any coordinated party expenditures in support of Congresswoman Pelosi since 2002, *see* Exhibit N – Federal Election Commission, Party Coordinated Expenditure Search (DCCC-Nancy Pelosi), https://www.fec.gov/data/party-coordinated-expenditures (Nov. 16, 2023) (Doc. 41-9, PageID # 4791-96). And, to take another example, Senator Mitch McConnell's campaign has participated in a joint fundraising committee with the NRSC since 2017, *see* FEC Committee Profile, McConnell Victory Committee, https://www.fec.gov/data/committee/C0 0638007 (last visited Nov. 16, 2023), but the NRSC has not made any coordinated party expenditures in support of Senator McConnell since 2013, Exhibit O – Federal Election Commission, Party Coordinated Expenditure Search (NRSC-Mitch McConnell), https://www.fec.gov/data/party-coordinated-expenditures (Nov. 16, 2023) (Doc. 41-10, PageID # 4798-4804).

FEC RESPONSE: The Commission objects to this finding as a mischaracterization of Professor Krasno's testimony and the factual record in this matter more broadly, for the reasons set forth in the Commission's response to Fact 105, which it hereby incorporates by reference. None of the evidence provided in this proposed finding supports the contention that "[r]eality contradicts Professor Krasno's speculation" because plaintiffs have mischaracterized the Professor's testimony. Professor Krasno did not testify that the only reason for a candidate to employ a joint fundraising committee would be to enable the party to make coordinated expenditures for that candidate's campaign.

106. In his report, Professor Krasno also alludes in passing to the "tally system" used at the Democratic Senatorial Campaign Committee (DSCC) discussed in *Colorado II*. Krasno Rep. 6 (Doc. 41-8, PageID # 4772); *see also Colorado II*, 533 U.S. at 459. There is no evidence in the record of such "tallying" by the parties in this case, but notably, since *Colorado II* was decided, the FEC has explained that tallying arrangements are legitimate and the funds are utilized at the party's discretion:

> *Tallying is not synonymous with earmarking.* Tallying is the practice of tracking funds raised by specific candidates. In making its decision on the level of financial support it will provide candidates, the DSCC considers the tally along with other factors, such as the closeness of the race, the financial ability of the candidate to raise his own funds and the candidate's support for DSCC fundraising in the past.

Exhibit P – Seventh General Counsel's Report, Matters Under Review 4831/5274, 3 n.2 (Doc. 41-11, PageID # 4806-10) (emphasis added); *accord Colorado II*, 533 U.S. at 478 (Thomas, J., dissenting) ("[T]he DSCC is not acting as a mere conduit, allowing donors to contribute money in excess of the legal limits. The DSCC instead has allocated money based on a number of factors, including the financial strength of the campaign, what the candidate's poll numbers looked like, and who had the best chance of winning or who needed the money most." (cleaned up)).

FEC RESPONSE: The Commission objects to this finding as a mischaracterization of Professor Krasno's testimony and the factual record. Professor Krasno does not contend that tallying systems are unlawful, as plaintiffs suggest. Rather, he explains that the tally system can operate as a mechanism by which candidates become aware of donor funds contributed to party committees that may be used in coordination with the candidate if he or she helped raise those funds. (Krasno Rept. at 5-7, FEC Exh. 1 (Doc. 36-1, PageID 404)._ Thus, while tallying arrangements themselves may be proper as a means for parties to allocate funds in support of certain candidates, their existence permits them to be utilized to facilitate a quid pro quo arrangement between donors and candidates would not be. (FEC Facts ¶ 108 (Doc. 43, PageID 5154-55).)

107. Lastly, Plaintiffs' responses to the FEC's discovery requests also directly undermine Professor Krasno's faulty assumptions about party fundraising activities.

FEC RESPONSE: The Commission objects to this finding because it is purely subjective argument and not verifiable fact.

a. In response to interrogatories, Senator Vance and former Congressman Chabot stated that they had "no knowledge" of the party's "sources of funding used to engage in coordinated expenditures in support of" their campaigns. Vance Discovery Resps., Interrog. 7 (Doc. 41-6, PageID # 4719-20); Chabot Discovery Resps., Interrog. 9 (Doc. 41-7, PageID # 4751-52).

FEC RESPONSE: The Commission objects to this finding to the extent plaintiffs assert these interrogatory responses "directly undermine" Professor Krasno's testimony. Plaintiffs have not identified which "assumptions" the interrogatory responses address. Professor Krasno

is an expert who has conducted extensive research that forms the basis for his opinions. (*See* Krasno Rept. at 1-2, FEC Exh. 1 (Doc. 36-1, PageID 399-400) (Qualifications).) The Commission has introduced extensive evidence that is more germane to the Professor's testimony than self-serving discovery responses, including that the higher hard-money contribution limits enjoyed by political party committees are a way for candidates to effectively access funds beyond what the candidates could raise themselves (FEC Facts ¶¶ 195-216 (Doc. 43, PageID 5190-97)), and that national party committees have been critical to apparently corrupt exchanges between contributors and federal candidates (FEC Facts ¶¶ 217-35 (Doc. 43, PageID 5197-5203).)

b. Similarly, neither Senator Vance nor former Congressman Chabot or their agents identified any information responsive to the FEC's various requests for the production of documents reflecting knowledge of the sources of funding for coordinated party expenditures or communications with party donors concerning expectations of "legislative action or inaction." Vance Discovery Resps., Reqs. for Prod. 3-5 (Doc. 41-6, PageID # 4726-28); Chabot Discovery Resps., Reqs. for Prod. 3-5 (Doc. 41-7, PageID # 4757-59).

FEC RESPONSE: The Commission objects to this finding to the extent plaintiffs assert these interrogatory responses "directly undermine" Professor Krasno's testimony, and for the reasons set forth in the Commission's response to Fact 107(a), which it hereby incorporates by reference.

c. Likewise, the NRSC and the NRCC identified no documents responsive to the FEC's requests for the production of documents evidencing a connection between: (i) contributions to the party committee and "an expectation by contributors of legislative activity or refraining from specific potential legislative activity," NRSC Discovery Resps., Reqs. for Prod. 1-2 (Doc. 41-1, PageID # 4057-58); NRCC Discovery Resps., Reqs. for Prod. 1-2 (Doc. 41-2, PageID # 4112-13); (ii) "the amount of money spent" by the party committee in support of a candidate or officeholder and "the amount of money [that] candidate or officeholder has raised for" the party committee, NRSC Discovery Resps., Req. for Prod. 6 (Doc. 41-1, PageID # 4061); NRCC Discovery Resps., Req. for Prod. 6 (Doc. 41-2, PageID # 4116); or (iii) "the amount raised by [that] candidate or officeholder to the" party committee "and a seat on a legislative committee," NRSC Discovery Resps., Req. for Prod. 7 (Doc. 41-1, PageID # 4061-62); NRCC Discovery Resps., Req. for Prod. 7 (Doc. 41-2, PageID # 4116-17).

FEC RESPONSE: The Commission objects to this finding to the extent plaintiffs assert these interrogatory responses "directly undermine" Professor Krasno's testimony, and for the reasons set forth in the Commission's response to Fact 107(a), which it hereby incorporates by reference.

C. The Record Shows That Better-Tailored, Less-Intrusive Regulatory Options To Combat Any Potential For Quid Pro Quo Exist And Are In Place Already.

108. Professor Krasno and Professor La Raja both acknowledge that other legislative or regulatory options—targeting the donor—are available to address any potential concerns regarding *quid pro quo* corruption or its appearance through party fundraising, without restricting the parties' fundamental activities. *See* Krasno Rep. 16 (Doc. 41-8, PageID # 4782); Krasno Dep. Tr. 159:20-160:6 (Doc. 41-4, PageID # 4332-33); La Raja Rep. 24-26 (Doc. 41-3, PageID # 4145-47); La Raja Dep. Tr. 45:5-22 (Doc. 41-5, PageID # 4668).

FEC RESPONSE: The Commission objects to this fact and the preceding heading because it is contrary to the record. Neither Professor Krasno nor Professor La Raja suggest other options could "address *any* potential concerns" and it is inaccurate to suggest that the experts agreed that undefined other options would address quid pro quo corruption or its appearance. The Commission also objects to this fact as vague, ambiguous, speculative, and without foundation because it vaguely references "concerns regarding quid pro quo corruption," with "concerns" undefined and is contrary to Professor Krasno's conclusion that unlimited expenditures create an environment for quid pro quo corruption. (Krasno Rept. at 15-16, FEC Exh. 1 (Doc. 36-1, PageID 413-14).)

109. Professor Krasno focuses on donor base contribution limits and concedes that, even in his view, changing those limits might obviate any basis for the coordinated party expenditure limits. *See* Krasno Rep. 16 (Doc. 41-8, PageID # 4782) ("[I]f parties lived by the same rules as do candidates – no donations above $6,600 from an individual, etc. – then it would be easier to view their spending, even their coordinated expenditures, as posing less danger of quid pro quo corruption."); Krasno Dep. Tr. 159:25-160:4 (Doc. 41-4, PageID # 4332-33) ("If we were to change the base limits on parties to make them equal to the base limits on candidates, then I would have to rethink that position because I am not sure I would have the same concerns.").

FEC RESPONSE: The Commission objects to this fact because it is contrary to the record. Professor Krasno, in the portion of the report cited by the plaintiffs, describes a hypothetical world where parties are subject to the lower contribution limits that apply to candidates. (Krasno Rept. at 16, FEC Exh. 1 (Doc. 36-1, PageID 414).) In such a hypothetical, where parties and candidates are subject to the same limits, Professor Krasno unremarkably stated that he would reevaluate his views. (Krasno Dep. at 159-60, FEC Exh. 178 (Doc. 421-1, PageID 4990-91).) The record does not support the proposition that "changing those limits might obviate any basis for the coordinated party expenditure limits." (*Id.*) Professor Krasno only discussed hypothetically a regime where candidates and parties had the same limits, but not any other level of limits. The Commission also objects to this fact as speculative, and without foundation because it claims the need for the coordinated spending limit "might [be] obviated" within an undefined legal framework.

110. While Professor La Raja believes the parties' base contribution limits already more than address any concern regarding *quid pro quo* corruption or its appearance, *supra* ¶¶ 88-89, 91-92, he further notes that the government "can monitor against potential corruption through party financing by enforcing FECA's anti-earmarking rules." La Raja Rep. 25 (Doc. 41-3, PageID # 4146); *see also id.* (Doc. 41-3, PageID # 4146) ("'The anti- circumvention approach leads to a "whack-a-mole" dynamic in which regulators keep adding new statutes in a vain attempt to close new loopholes as they crop up. We think a better strategy would be to simply enforce rules that prohibit donors from earmarking contributions to the party.'" (quoting Raymond J. La Raja & Brian F. Schaffner, *Campaign Finance and Political Polarization: When Purists Prevail* (Univ. of Michigan Press 2015))).

FEC RESPONSE: The Commission objects to this fact because it is contrary to the record. Professor Krasno explained, based on the long history of scandals, that existing base limits have not fully addressed quid pro quo corruption or its appearance. (Krasno Dep. at 106, FEC Exh. 178 (Doc. 42-1, PageID 4936).) Krasno relied on "examples of where candidates — where officials who have, in fact, pled guilty to corruption, quid pro quo corruption, have admitted to using party committees for their larger contribution limits to route money as part of

their corrupt schemes." (*Id.* at 109 (Doc. 42-1, PageID 4939).) Moreover, Professor La Raja did not have any thoughts or guidance on how the earmarking provision, which implicates private communications between candidates, donors, and parties, could be better enforced. (La Raja Dep. at 48:22-49:13 (Doc. 38-22, PageID 2914-15.)

111. As Professor La Raja explained:

> I do think there's an interest in preventing corruption and having people behave in ways that induce trust as much as possible. I don't think the campaign finance laws with coordinated expenditure limits does that… Because I don't see what the problem is. I mean, there's ways other than a limit on coordinated expenditures to prevent what folks like Professor Krasno worry about. And that's contribution limits of the parties. It's preventing earmarking. I think it's way overdone to also limit how they can coordinate with their candidates. And as I said in my report, I think the problem with weak parties is more dangerous to the republic than Professor Krasno's speculations about corruption being prevented.

La Raja Dep. Tr. 45:7-22 (Doc. 41-5, PageID # 4668).

FEC RESPONSE: No response to Professor La Raja's statement that he thinks "there's an interest in preventing corruption and having people behave in ways that induce trust as much as possible." The Commission objects to the remainder of this fact as vague, ambiguous, speculative, and without foundation because it vaguely references "not seeing what the problem is" and speculates about undefined other "contribution limits" in a way that is unclear whether it is referencing further or existing limits. In addition, the Commission notes that national and state political parties and federal candidates are inextricably intertwined and that this presents the potential for corruption. *See McConnell*, 540 U.S. at 155-56, 156 n.51, 161, 164. The close relationships between major donors, parties, and federal candidates and officeholders means that parties may "act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452; *see also* McConnell 54 U.S. at 150-52.

112. Professor Krasno's report never even mentions FECA's earmarking rule. He suggests that this was purposeful, as he dismisses the earmarking rule as "virtually unenforceable, and unenforced," Krasno Dep. Tr. 83:19-84:1 (Doc. 41-4, PageID # 4256- 57), claiming "there is no reason to believe that [earmarking rules] work because they have never

worked," Krasno Dep. Tr. 140:20-24 (Doc. 41-4, PageID # 4313). But even basic research of publicly available information reveals that this is not true. *See, e.g.*, Exhibit Q – Conciliation Agreement, Matters Under Review 5274/4831 (Missouri Democratic State Committee) (Doc. 41-12, PageID # 4812-16); *see also FEC v. NRSC*, 966 F.2d 1471, 1477 n.7 (D.C. Cir. 1992).

FEC RESPONSE: The Commission objects to this fact because it is contrary to the record. Professor Krasno discusses within the record at length the earmarking rules and offers a critique in his deposition. (Krasno Dep. at 83-85, FEC Exh. 178 (explaining problems with enforcement of earmarking rules and ways to circumvent earmarking rules) (Doc. 42-1, PageID 4913-15).) The two examples plaintiffs cite do not controvert his testimony. For example, plaintiffs cite *FEC v. NRSC*, 966 F.2d 1471, 1474 n.4 (D.C. Cir. 1992), as an example of earmarking enforcement, but the footnote it cited in that case involved a contribution designated "not for the candidates" and not enforcement of 11 C.F.R. § 110.6. The citation to a single enforcement matter from more than twenty years ago equally supports the opposite conclusion than the one plaintiffs urge here.

113. Professor Krasno and Professor La Raja agree that the federal campaign finance system has undergone significant changes since Congress amended FECA in 1974, when the party expenditure limits were enacted—and especially since 2001, when the Supreme Court decided *Colorado II*. Krasno Dep. Tr. 166:8-19 (Doc. 41-4, PageID # 4339); La Raja Rep. 9-12 (Doc. 41-3, PageID # 4130-33).

FEC RESPONSE: The FEC objects to this fact to the extent that it limits the context of Professor Krasno's statement on the impact of post-BCRA changes on political parties. While the system may have changed after 2001, as Professor Krasno explained, parties have not necessarily waned in their ability to compete in the political market since 2001. He notes that parties "face different sets of competitors, but they haven't really waned[,]" and are "still massively important." (Krasno Dep. 129:22-24, FEC Exh. 178 (Doc. 42-1, PageID 4959).) Moreover, while "they have less money relative to other players than they did in 2001," they are

not "weaker," and "are more salient than they were in 2001." (*Id.* at 167:12-15, FEC Exh. 178 (Doc. 42-1, PageID 4997).)

¶ 114. FEC RESPONSE: None.

115. Professor Krasno and Professor La Raja agree that these changes have had "negative repercussions" for the party committees. Krasno Dep. Tr. 167:4-8 (Doc. 41-4, PageID # 4340); La Raja Rep. 9-12 (Doc. 41-3, PageID # 4130-33).

FEC RESPONSE: The FEC objects to this fact to the extent it omits the context of this fact that parties are not weaker since the post-*Colorado* enactment of BCRA. In fact, "[i]n the electorate, parties are much stronger," "party unity scores and parties in government are much stronger," and "[b]y any measure [party] organizations are stronger today than they were before." (*See* Krasno Dep. 167:4-169:23, FEC Exh. 178 (Doc. 42-1, PageID 4997-99).)

116. Nonetheless, Professor Krasno suggests that party committees like the NRSC and the NRCC "have prospered." Krasno Rep. 15 (Doc. 41-8, PageID # 4781). The only facts he cites to support this suggestion as to the present day are the amounts of money the parties reported raising and spending in the most recent election cycle (unadjusted for inflation). *Id.* Professor Krasno, however, does not examine how the rise of Super PACs has affected party committees and their fundraising or look at any comparative analyses of the campaign spending of parties versus Super PACs and other groups. Krasno Dep. Tr. 25:20-26:2, 166:20-167:3 (Doc. 41-4, PageID # 4198-99, 4339-40).

FEC RESPONSE: The FEC objects to this fact to the extent it implies a connection to the rise of Super PACs to the coordinated party expenditure limits, when such connection does not have a connection in the record. This fact further lacks foundation to the extent it seeks to assert without foundation that removing the coordinated party expenditure limit would limit the rise of super PACs. As professor Krasno testified, "parties have less money relative to super PACs, which didn't exist in 2001, but they also have continue[d] to raise money." (Krasno Dep. 168:23-25, FEC Exh. 178 (Doc. 42-1, PageID 4998).) Furthermore, Professor La Raja's testimony suggests "a gripe with the way superior PACs have risen in power, or risen in prominence relative to parties, and less of a gripe about how political partes --- what has

happened in political parties." (Krasno Dep. 174:21-25, FEC Exh. 178 (Doc. 42-1, PageID 5004).) "That is, you could double or triple the money that parties raise and spend, but that doesn't mean the super PACs are going to go away, or that they couldn't respond by doubling or tripling the amount of money that they raise." (Krasno Dep. 175:18-22, FEC Exh. 178 (Doc. 42-1, PageID 5005).)

117. Professor La Raja disagrees. He believes that "since the 1974 campaign finance reforms," and especially in the two decades after *Colorado II*, "political parties (including plaintiffs NRSC and NRCC) have done anything but 'prosper[].'" La Raja Rep. 7 (Doc. 41-3, PageID # 4128); La Raja Dep. Tr. 30:12-31:1 (Doc. 41-5, PageID # 4653-54) (explaining changes in electoral landscape since *Colorado II*). In fact, Professor La Raja's report concludes that "American political parties have become very weak." La Raja Rep. 5 (Doc. 41-3, PageID # 4126).

FEC RESPONSE: The Commission objects to this fact as lacking foundation and contrary to the record. Professor La Raja admitted that since *Colorado II* parties have still been able to amass the resources necessary for effective advocacy. (La Raja Dep. 30:1-4, FEC Exh. 102 (Doc. 38-22, PageID 2896).) Additionally, Professor Krasno explained that parties continue to succeed in organizational capacity, which is not measured versus a Super PAC, but rather "what a party was able to do in the last election cycle, or next election cycle." (Krasno Dep. 173:22-24, FEC Exh. 178 (Doc. 42-1, PageID 5003).)

118. As Professor La Raja's report reflects, his view on the state of America's political parties—not that of Professor Krasno—is the leading perspective among political scientists, legal scholars, and practitioners. *See* La Raja Rep. 9 (Doc. 41-3, PageID # 4130) ("[S]cholars overwhelming believe the political parties need to be strengthened in the U.S. system, ranging from changes to candidate nominations to campaign finance, in addition to other institutional shifts."); *id.* at 6 n.2 (collecting citations); *see also, e.g.*, Robert F. Bauer, *The Parties' Struggles in the Political "Market": Can Regulation Solve This Problem—Should It, and If So, How?*, 54 Hous. L. Rev. 881, 899 (2017) (stating that "it is widely accepted" that the rise of Super PACs "has been damaging to the political parties"); Gerald F. Seib, *For Saner Politics, Try Stronger Parties*, Wall St. J. (Apr. 20, 2023), https://on.wsj.com/3o2DWKc ("'The party organizations are so damn weak,' laments Frank Fahrenkopf, former chairman of the Republican National Committee.").

FEC RESPONSE: The Commission objects to this fact as speculative, lacking foundation, and based on improper considerations. The "scholars" to which professor La Raja is referring were part of a self-selected group comprised of only 10 members, including professor La Raja, seven of whom favored removing coordinated party expenditure limits. (*See* La Raja Dep. at 49:15-54:11, FEC Exh. 102 (Doc. 36-38, PageID 2915-20).) The group did not spend time analyzing the risk of quid pro quo corruption. (*Id.* at 55:24-56:4 (Page ID 2921-22).) Instead, the group "was considering two aspects primarily," "political extremism" and "polarization," notably that "lots of money [was] going to outside groups that very, relative to the electorate, more extreme positions and not accountable." (*Id.* at 54:9-55:16 (PageID 2920-21).) The Supreme Court has consistently held, however, that the only proper purpose for contribution limits is the prevention of quid pro quo corruption and its appearance. *McCutcheon*, 572 U.S. at 191-92. Because Professor La Raja's opinion and the others above related to other considerations, they should be disregarded. Additionally, as professor Krasno explained, "there is a bit of selection bias that I suspect" in the groups Professor La Raja referenced. (Krasno Dep. 174:4-7, FEC Exh. 178 (Doc. 42-1, PageID 5004).)

119. Moreover, unlike Professor Krasno, Professor La Raja supports his conclusions about the decline and weakness of American political parties with references to his substantial prior research, writings, and books on the topic; his work on committees studying the effects of campaign finance laws on governing; and citations to numerous articles and comparative studies by other leading academics. *See* La Raja Rpt. 4-37 (Doc. 41-3, PageID # 4125-58).

FEC RESPONSE: The FEC objects to this fact as lacking foundation and contrary to the record. Professor Krasno's conclusions are supported by substantial prior research and expert findings in several prior cases concerning coordinated party expenditures. Professor Krasno also co-wrote an expert report that was explicitly relied upon by the Supreme Court in *Colorado II*, 533 U.S. at 470 (citing Expert Report of Frank J. Sorauf & Jonathan S. Krasno in *Colorado II*,

Political Parties and Coordinated Spending, FEC Exh. 2 (Doc. 36-2, PageID 423-474)). Professor Krasno's expert report, Political Party Committees and Coordinated Expenditures, was relied upon by both the district and appellate courts in the *Cao v. FEC* litigation. (FEC Exh. 3 (Doc. 36-3, PageID 478-511).) *See generally In re Cao*, 619 F.3d 410 (5th Cir. 2010); *Cao v. FEC*, 688 F. Supp. 2d 498 (E.D. La. 2010).

120. Professor La Raja also conducted the analysis that Professor Krasno failed to conduct: he presents several comparative analyses of party committee campaign spending drawn from publicly available campaign finance reporting data. Those analyses demonstrate that party committees account for only a small percentage of spending on campaigns for federal office, and that party committee spending amounts to only a fraction of the total spending on campaigns for federal office by Super PACs. *See* La Raja Rpt. 14-36 (Doc. 41-3, PageID # 4135-57)

FEC RESPONSE: The Commission objects to this fact as irrelevant to the issues presented in this case and contrary to the law. Professor Krasno's report focused on the corruptive potential on parties in removing the coordinated party expenditure limits. The differences between what parties and other actors spend in part stems from contribution base limits, which are not challenged here. Additionally, the Supreme Court has repeatedly stated that "[n]o matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.'" *McCutcheon*, 572 U.S. at 207 (quoting Ariz. *Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011); *Davis v. FEC*, 554 U.S. 724, 741-42 (2008); *Buckley*, 424 U.S. at 56. Professor La Raja explicitly indicated in his report that he wanted to "put parties on more of a level playing field with nonparty groups." (La Raja Rept. at 24, FEC Exh. 38 (Doc. 36-38, PageID 1614) (internal quotation omitted.) In order to further explain why he "believes leveling the playing field with non-party groups is a reason that the coordinated party limits should be struck down," he stated that "somewhat more leveling the playing field with these non-party groups would be [to] significantly raise or remove the coordinated spending limits." (La

Raja Dep. at 39:13-40:6, FEC Exh. 102 (Doc. 38-22, PageID #2905-06.) Because Professor La Raja's conclusion derived from that impermissible consideration, it should be disregarded.

121. Based on his comprehensive review and analysis, Professor La Raja explains that political parties have become "diminished actors in the campaign environment, competing with an array of lightly regulated single-issue groups that lack the accountability of parties because they are neither transparent nor rooted in institutions of government." La Raja Rep. 5-6 (Doc. 41-3, PageID # 4126-27); La Raja Dep. Tr. 29:17- 19 (Doc. 41-5, PageID # 4652) ("[T]he campaign finance system has changed and the parties cannot participate robustly in competing with these non-party groups.").

FEC RESPONSE: The Commission objects to this fact as vague, ambiguous, speculative, without foundation, and contrary to the record. The argument that "political parties themselves are losing their central place in US politics . . . is categorically false and based on a very selective reading of just some of the evidence." (Krasno Rept. at 13, FEC Exh. 1 (Doc. 36-1, PageID 411); *see also id.* at 13-15 (Doc. 36-1, PageID 411-13); FEC Facts ¶¶ 270-82 (Doc. 43, PageID 5217-21).) Unlike non-party groups, national political parties are "inextricably intertwined with federal officeholders and candidates." *McConnell*, 540 U.S. at 155 (quoting 148 Cong. Rec. H409 (Feb. 13, 2002)). And "[p]olitical parties and their candidates are 'inextricably intertwined' in the conduct of an election." *Colorado II*, 533 U.S. at 469; *see also* FEC Facts ¶¶ 141-59 (Doc. 43, PageID 5171-79). Parties directly assist federal candidates in numerous, vital ways that non-party groups do not or cannot. (*E.g.*, FEC Facts ¶¶ 147-55, 171-74, (Doc. 43, PageID 5147-77, 5182-83).) For example, unlike political parties, "[o]ther entities are not entitled to organize the slate of candidates presented to voters." (FEC Facts ¶ 264 (Doc. 43, PageID 5215) (quoting Rebuttal Expert Report of Donald P. Green in McConnell v. FEC, The Impact of BCRA on Political Parties: A Reply to LaRaja, Lott, Keller, and Milkis, at 8, FEC Exh. 5 (Doc. 36-5, PageID 655); *see also* FEC Facts ¶ 219 (Doc. 43, PageID 5198) (quoting McConnell, 540 U.S. at 188 ("[P]arty affiliation is the primary way . . . voters identify

candidates.")).) Moreover, since each party committee has a separate contribution limit, the amount that parties can contribute directly to candidates is much higher than non-party groups; in addition, senate candidates can receive additional contributions from certain party committees. (FEC Facts ¶¶ 285-86, 292-93 (Doc. 43, PageID 5222, 5224).) Unlike non-party groups, party committees can make party coordinated expenditures, which are the functional equivalent of contributions to a candidate. (FEC Facts ¶¶ 201, 204-09, 222-23, 267-68, 283-84, 287-88, 295, 297-303, 306 (Doc. 43, PageID 5192, 5193-95, 5199-5200, 5216, 5221-23, 5225-29, 5230).) And since money is fungible, parties can also indirectly fund communications in favor of a candidate's campaign that are made by the candidate. (*E.g.*, FEC Facts ¶ 294 (Doc. 43, PageID 5225) (discussing how NRCC and NRSC effectively each made hundreds of thousands of dollars in additional contributions to candidates beyond their direct contributions and party coordinated expenditures through coordinated spending on legal proceedings); *id.* ¶ 262 (Doc. 43, PageID 52113-14) (discussing exemptions from the definitions of contributions and expenditures).) Finally, non-party groups "do not select slates of candidates for elections," "determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses," but these activities count among the parties' core responsibilities. (FEC Facts ¶ 219 (Doc. 43, PageID 5198) (quoting *McConnell*, 540 U.S. at 188); *see also* FEC Facts ¶¶ 156, 218-19 (Doc. 43, PageID 5177, 5197-98).) In addition, this fact relies in part on the impermissible motivations Professor La Raja suggests to level the playing field between political parties and outside groups and address concerns beyond quid pro corruption like extremism and polarization and as such should be disregarded as explained more fully in response to Paragraphs 118 and 120.

122. Starting in 1974, the "combination of … anti-party reforms and court decisions has pushed money and clout away from political parties and into non-transparent, unaccountable venues, increased the influence of wealthy interests, and rendered the situation more difficult for

parties to manage their brand by providing robust support to their candidates." La Raja Rep. 6-7 (Doc. 41-3, PageID # 4127-28); La Raja Dep. Tr. 56:12-57:13 (Doc. 41-5, PageID # 4679-80).

FEC RESPONSE: The FEC objects to this fact as speculative, vague, lacking foundation and not supported by the record. Political parties have thrived financially under the current campaign finance system and continue to enjoy significant advantages in raising and spending money in federal elections, including higher contribution limits. (FEC Facts ¶¶ 251-89 (Doc. 43, PageID 5210-23).) In addition, this fact relies in part on the impermissible motivations Professor La Raja suggests to level the playing field between political parties and outside groups and address concerns beyond quid pro corruption like extremism and polarization and as such should be disregarded as explained more fully in response to Paragraphs 118 and 120.

123. As Professor La Raja explains, "[t]his has become increasingly true over the last two decades, following Congress's enactment of [BCRA]," and these "anti-party reforms have institutionalized pathologies in the electoral system, in which parties must set up independent operations to robustly advocate for their candidates." La Raja Rep. 7 (Doc. 41-3, PageID # 4128); La Raja Dep. Tr. 30:12-31:1 (Doc. 41-5, PageID # 4653-54) ("[T]he entire terrain of elections has changed since [2001]. Now Congress is on a knife edge between who is going to win. The stakes for elections are much higher. And non- party groups have advantages that the parties don't have. And what I'm seeing is that the parties are either treading water or going under. So that's my concern compared to what was going on during Colorado [II].").

FEC RESPONSE: The FEC objects to this fact as contrary to the record. Political parties have thrived financially under the current campaign finance system. As professor Krasno testified, "parties have less money relative to super PACs, which didn't exist in 2001, but they also have continue[d] to raise money." Furthermore, Professor La Raja's testimony suggests "a gripe with the way super PACs have risen in power, or risen in prominence relative to parties, and less of a gripe about how political partes --- what has happened in political parties." (Krasno Dep. 174:21-25, FEC Exh. 178 (Doc. 42-1, PageID 5004).) Indeed, Professor La Raja admits that parties have been able to amass the resources necessary for effective advocacy. (La Raja Dep. 30:1-4, FEC Exh. 102 (Doc. 38-22, PageID 2896).) Further, "if the party had the ability to

give unlimited coordinated expenditures, then there would be such an enormous pressure to raise more money, and to just put enormous amounts of money into . . . whatever set of races they think are important, and whatever set of candidates they think are important." (Krasno Dep. 132:1-6, FEC Exh. 178 (Doc. 42-1, PageID 4962).) Thus, post *Colorado II*, parties have started "limiting the number of races in which they spend significant amounts of money in because they now have this ability to spend more money in fewer races." (*Id.* at 132:11-14 (Doc. 42-1, PageID 5004).) In addition, this fact relies in part on the impermissible motivations Professor La Raja suggests to level the playing field between political parties and outside groups and address concerns beyond quid pro corruption like extremism and polarization and as such should be disregarded as explained more fully in response to Paragraphs 118 and 120.

124. After "*Citizens United* … and *Speechnow.org* …, the significant restrictions on the political parties – both the base limits on contributions to parties and on the parties' financial support of their candidates through contributions and party coordinated expenditures – incentivized partisans to create Super PACs, which lack the fundraising constraints" applicable to parties. La Raja Rep. 12 (Doc. 41-3, PageID # 4133); *see also* Seib, *supra* ("Donna Brazile, a former Democratic national chairwoman, says that 'over the years, the parties have been weakened by the new landscape where super PACs … have a stranglehold.'").

FEC RESPONSE: The FEC objects to this fact to the extent that it refers to the coordinated party expenditure limits as imposing "significant restrictions" on political parties, which is unsupported by the record. In addition, this fact relies in part on the impermissible motivation Professor La Raja suggests to level the playing field between political parties and outside groups and as such should be disregarded as explained more fully in response to Paragraphs 120.

125. Indeed, "unlike Super PACs, the parties cannot raise money in unlimited sums, even for their independent expenditures, putting them at a substantial fundraising disadvantage with Super PACs and other non-party groups that have no such restrictions." La Raja Rep. 23 (Doc. 41-3, PageID # 4144); La Raja Dep. Tr. 64:10-17 (Doc. 41-5, PageID # 4687) ("Those other groups can raise and spend as much as they want. The parties face contribution restrictions. They face restrictions on how much their state parties can spend in federal elections. They face

coordinated expenditure limits. The list goes on and on. And these other groups don't face these kinds of fundraising and spending limits.").

FEC RESPONSE: The FEC objects to this fact to the extent that it refers to the coordinated party expenditure limits place parties in a "substantial" fundraising disadvantage, which is unsupported by the record. In addition, this fact relies in part on the impermissible motivation Professor La Raja suggests to level the playing field between political parties and outside groups and as such should be disregarded as explained more fully in response to Paragraphs 120.

126. This fundraising "disadvantage is all the more heightened when the parties' true competitive advantage over Super PACs – the ability coordinate with campaigns – is restricted." La Raja Rep. 23 (Doc. 41-3, PageID # 4144); *see also* La Raja Dep. Tr. 39:17- 23 (Doc. 41-5, PageID # 4662) ("[T]hese non-party groups do not face contribution limits, they do not face spending limits. The shackles are mostly off for these groups. And the parties face a lot more constraints even though they play a more central role in our political system. So, at the very least, allow the parties to support their candidates."); La Raja Dep. Tr. 32:2-6 (Doc. 41-5, PageID # 4655) (explaining that if political parties could coordinate their expenditures with their candidates without limit, as naturally intended, "it would make the parties … a more important player.").

FEC RESPONSE: The FEC objects to this fact as contrary to the record. Political parties have thrived financially under the current campaign finance system. As professor Krasno testified, "parties have less money relative to super PACs, which didn't exist in 2001, but they also have continue[d] to raise money." (Krasno Dep. 168:23-25, FEC Exh. 178 (Doc. 42-1, PageID 4998).) Furthermore, Professor La Raja's testimony suggests a "gripe with the way super PACs have risen in power, or risen in prominence relative to parties, and less of a gripe about . . . what has happened in political parties." (*Id.* at 174:21-25, FEC Exh. 178 (Doc. 42-1, PageID 5004).) Indeed, Professor La Raja admits that parties have been able to amass the resources necessary for effective advocacy. (La Raja Dep. 30:1-4, FEC Exh. 102 (Doc. 38-22, PageID 2896).) Further, "if the party has the ability to give unlimited coordinated expenditures, then there would be such an enormous pressure to raise more money, and to just put enormous

amounts of money into . . . whatever set of races they think are important, and whatever set of candidates they think are important." (Krasno Dep. 132:1-6, FEC Exh. 178 (Doc. 42-1, PageID 4962).) Thus, post *Colorado II*, parties have started "limiting the number of races in which they spend significant amounts of money in because they now have this ability to spend more money in fewer races." (*Id.* at 132:10-14 (Doc. 42-1, PageID 4962).) In addition, this fact relies in part on the impermissible motivation Professor La Raja suggests to level the playing field between political parties and outside groups and as such should be disregarded as explained more fully in response to Paragraphs 120.

127. This shift has brought about a massive rise in electoral spending by "non-party entities," while "the amount that parties can spend in coordination with their candidates has … been small in comparison and getting smaller." La Raja Dep. Tr. 29:8-13 (Doc. 41-5, PageID # 4652); *accord* Vandewalker & Weiner, *supra*, at 6 ("[W]hile outside spending has skyrocketed, traditional party committee spending has remained mostly flat."); *see also* NRSC Discovery Resps., Interrogs. 2, 14 (Doc. 41-1, PageID # 4027-30, 4048-51); NRCC Discovery Resps., Interrogs. 2, 14 (Doc. 41-2, PageID # 4083-86, 4102-05).

FEC RESPONSE: The FEC objects to this fact as contrary to the record. Political parties have thrived financially under the current campaign finance system. (FEC Facts ¶¶ 270-89 (Doc. 43, PageID 5217-23).) As professor Krasno testified, "parties have less money relative to super PACs, which didn't exist in 2001, but they also have continue[d] to raise money." (Krasno Dep. 168:23-25, FEC Exh. 178 (Doc. 42-1, PageID 4998).) Furthermore, Professor La Raja's testimony suggests a "gripe with the way superior PACs have risen in power, or risen in prominence relative to parties, and less of a gripe . . . what has happened in political parties." (*Id.* at 174:21-25, FEC Exh. 178 (Doc. 42-1, PageID 5004).) Indeed, Professor La Raja admits that parties have been able to amass the resources necessary for effective advocacy. (La Raja Dep. 30:1-4, FEC Exh. 102 (Doc. 38-22, PageID 2896).) Further, "if the party had the ability to give unlimited coordinated expenditures, then there would be such an enormous pressure to raise

more money, and to just put enormous amounts of money into . . . whatever set of races they think are important, and whatever set of candidates they think are important." (Krasno Dep. 132:1-6, FEC Exh. 178 (Doc. 42-1, Page ID 4692).) Thus, post *Colorado II*, parties have started "limiting the number of races in which they spend significant amounts of money in because they now have this ability to spend more money in fewer races." (*Id.* at 132:9-14, Page ID 3962.) In addition, this fact relies in part on the impermissible motivation Professor La Raja suggests to level the playing field between political parties and outside groups and as such should be disregarded as explained more fully in response to Paragraphs 120.

128. In fact, Professor La Raja's report includes a chart showing that "non-party independent expenditures [have gone] from $14.7 million in 2004 to $1.678 billion in 2020 – *or more than 114 times the amount that existed 16 years earlier.*" La Raja Rep. 29, Fig. 3 (Doc. 41-3, PageID # 4150) (emphasis added).

FEC RESPONSE: This fact relies in part on the impermissible motivation Professor La Raja suggests to level the playing field between political parties and outside groups and as such should be disregarded as explained more fully in response to Paragraphs 120.

129. Moreover, in 2020, as in prior years, Super PACs spent far more money in support of federal candidates than political parties did. La Raja Rep. 29, Fig. 3 (Doc. 41-3, PageID # 4150).

FEC RESPONSE: The FEC objects to this fact to the extent it minimizes the ability of political parties to raise and spend money. In fact, parties have continued to raise and spend hundreds of millions of dollars each election cycle to elect their favored candidates. (FEC Facts ¶¶ 277-89 (Doc. 43, PageID 5219-23).) In addition, this fact relies in part on the impermissible motivation Professor La Raja suggests to level the playing field between political parties and outside groups and as such should be disregarded as explained more fully in response to Paragraphs 120.

¶¶ 130-134. FEC RESPONSE: The Commission objects to these facts for the reasons set forth in the Commission's response to Facts 118, 120, and 129, which it hereby incorporates by reference.

135. In short, "financially strong party committees, unfettered from restrictions on candidate financial support, are able to temper excessive polarization and help their party build broader coalitions to win elections." La Raja Rep. 11 (Doc. 41-3, PageID # 4132).

FEC RESPONSE: The Commission objects to this fact as vague, ambiguous, speculative, lacking foundation, and not supported by the record in this case. Professor La Raja admitted that he was not asked to address "polarization" in the context of this case. (La Raja Dep. 18:21-25, FEC Exh. 102 (Doc. 38-22, PageID 2884).) Furthermore, contrary to the suggestion that the current environment of polarization is due to the contribution limits purportedly weakening parties, parties continue to raise massive sums and retain influence in the process. (*See* FEC Facts ¶¶ 251-306 (Doc 43, PageID 5210-5230).) In addition, this fact relies in part on the impermissible motivations Professor La Raja suggests to level the playing field between political parties and outside groups and address concerns beyond quid pro corruption like extremism and polarization and as such should be disregarded as explained more fully in response to Paragraphs 118 and 120.

136. Thus, "[t]he burdens imposed on political parties in supporting their candidates through coordinated party expenditures" have shown themselves to be "detrimental to a well-functioning party system and associational rights," and "[t]he constraints on parties for working closely with their candidates imperil their vitality in the current moment." La Raja Rep. 37 (Doc. 41-3, PageID # 4158).

FEC RESPONSE: The Commission objects to this fact as a conclusion of law as to whether the coordinated expenditure limits can be considered an unconstitutional burden under the First Amendment, not a statement of fact. To the extent this could be construed as a statement of fact, the Commission objects that it is vague, ambiguous, speculative and not

supported by the record in this case. In *Colorado II*, the Supreme Court addressed this very issue in the context of party coordinated expenditures, which are functionally the same as direct party contributions, and the Court "reject[ed] the Party's claim to suffer a burden unique in any way that should make a categorical difference under the First Amendment." 533 U.S. at 447. Plaintiffs have presented no evidence showing that the coordinated expenditure limits impose "burdens" that are "detrimental" to the party system and associational rights or that alleged "constraints on parties . . . imperil their vitality in the current moment." In fact, as Professor La Raja testified, the parties are able to amass the resources necessary for effective advocacy. (La Raja Dep. 30:1-4, FEC Exh. 102 (Doc. 38-22, PageID 2896).) Indeed, as Professor Krasno notes, under the current regime, "US parties are faring historically well." (Krasno Rept. at 14, FEC Exh. 1 (Doc. 36-1, PageID 412); *see also* FEC Facts ¶¶ 251-306 (Doc. 43, PageID 5210-30).) Moreover, political parties have enjoyed significant advantages in raising and spending money in federal elections, including higher contribution limits. (*See* FEC Facts ¶¶ 253-69, 291-301, 306 (Doc. 43, PageID5210-17, 5224-28, 5230).) In addition, this fact relies in part on the impermissible motivations Professor La Raja suggests to level the playing field between political parties and outside groups and address concerns beyond quid pro corruption like extremism and polarization and as such should be disregarded as explained more fully in response to Paragraphs 118 and 120.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley (Mass. Bar No. 644486)
Associate General Counsel
kdeeley@fec.gov

December 15, 2023

Greg J. Mueller (D.C. Bar No. 462840)
gmueller@fec.gov

<u>/s/ Shaina Ward</u>
Shaina Ward (D.C. Bar No. 1002801)
(Trial Attorney)
sward@fec.gov

Christopher H. Bell (D.C. Bar No. 1643526)
chbell@fec.gov

Sophia H. Golvach (D.C. Bar No. 1656365)
sgolvach@fec.gov

Blake L. Weiman (D.C. Bar No. 1725165)
bweiman@fec.gov

Attorneys

COUNSEL FOR DEFENDANTS
FEDERAL ELECTION COMMISSION
1050 First Street, N.E.
Washington, D.C. 20463
(202) 694-1650

CERTIFICATE OF SERVICE

I hereby certify that, on December 15, 2023, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

<u>/s/ Shaina Ward</u>
Shaina Ward (D.C. Bar No. 1002801)
Attorney
sward@fec.gov