No. 24-621

IN THE

Supreme Court of the United States

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, ET AL.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Respondents,

AND

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,

Intervenor-Respondents.

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

BRIEF OF AMICI CURIAE U.S. SENATORS SHELDON WHITEHOUSE, CHRIS VAN HOLLEN, RICHARD BLUMENTHAL, ADAM B. SCHIFF, MAZIE K. HIRONO, AND CORY BOOKER IN SUPPORT OF INTERVENOR-RESPONDENTS

GERSON H. SMOGER
Counsel of Record
SMOGER & ASSOCIATES
4228 Hallmark Drive
Dallas, TX 75229
(510) 531-4529
gerson@texasinjurylaw.com

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STATEMENT OF INTEREST[1]

Amici curiae are U.S. Senators Sheldon Whitehouse of Rhode Island, Chris Van Hollen of Maryland, Richard Blumenthal of Connecticut, Adam B. Schiff of California, Mazie K. Hirono of Hawaii, and Cory Booker of New Jersey. Amici share with this Court a strong interest in ensuring free and fair elections, as well as preventing corrupting influences from undermining our democracy.

SUMMARY OF THE ARGUMENT

Petitioners and respondents seek to invalidate coordinated party expenditure limits under the Federal Election Campaign Act, asking the Court to overturn *FEC v. Colorado Republican Federal Campaign Committee* (*Colorado II*). Congress enacted coordinated party expenditure limits to prevent wealthy donors from circumventing candidate contribution limits and curb the heightened risk of corruption. These limits, supported by a substantial legislative record, were part of a campaign finance system regulating the flow of money from donors to campaigns to protect against corruption.

Should the Court overrule *Colorado II*, it would be contrary to Congress's considered judgment, further paving the way for corporate interests and the mega-wealthy to exert disproportionate influence on our democracy. We have already seen how this

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in any part, and no person or entity other than *amici* or *amici*'s counsel made a monetary contribution to fund its preparation or submission.

Court's holding in *Citizens United* opened the floodgates to billions in dark money, allowing novelties like super PACs to emerge. These consequences distorted our political process while exalting the wealthiest voices at the expense of ordinary voters. In the years since, rulings by this Court have continued to erode commonsense campaign finance laws meant to prevent corruption, such as aggregate limits and post-election loan repayment limits.

This Court's past decisions weakened Congress's ability to regulate the corrupting influence of money in politics, and wreaked havoc on our political system, causing genuine irreparable harm.

Take, for example, the prospect of legislation to combat the dangers of climate change. Before the fossil fuel industry was able to spend unlimited amounts in our elections, popularly supported, bipartisan proposals to combat climate change flourished. Since *Citizens United,* barrages of fossil-fuel dark money have killed any prospect of advancing such legislation. What's more, this erosion of campaign finance regulation has fundamentally disrupted the cadence of our elections by enabling ever longer barrages of anonymous political attacks backed by unlimited funding sources.

These results should be a cautionary tale against the further erosion petitioners and respondents request now.

Worse, many of petitioners' and respondents' arguments rely upon a foundation of fact-finding by the Court that has been proven to be demonstrably wrong. They point to facts that have become

obsolete—such as perceived party dominance—as a reason this Court should consider overturning *Colorado II*.

If any decision should be reconsidered, it is *Citizens United*. *Citizens United's* central reasoning, which declared that unlimited corporate political expenditures would not give rise to the reality or appearance of corruption, was founded on two fact-finding conclusions made by this Court, contrary to Congress's voluminous legislative record. The two conclusions were that such expenditures would be: (a) independent of political campaigns; and (b) transparent to the public regarding their sources (hereinafter "independence" and "transparency"). Fifteen years later, it is now plain that this Court's fact-finding has proven to be incorrect. Further, the Court's erroneous conclusions of fact had no factual record from the courts below supporting its conclusion that unlimited corporate political spending would not have a corrupting effect. Indeed, the decision recognized the corrupting effect of dark money in its insistence that the newly unlimited political funding would be transparent.

This Court should heed the lessons learned in the aftermath of *Citizens United* and decline the request to further distort our political process by undermining Congress's ability to regulate campaign finance. Rather than considering the reversal of *Colorado II*, the Court should reconsider *Citizens United* at the first possible opportunity.

ARGUMENT

I. JUDICIAL DECISIONS WEAKENING CAMPAIGN FINANCE LAWS HAVE UNLEASHED UNPRECEDENTED SPECIAL INTEREST INFLUENCE IN U.S. ELECTIONS

A. Striking Down Limits on Coordinated Party Expenditures Would Continue a Harmful Trend of Weakening Basic Campaign Finance Laws

In this case, the petitioners and respondents ask the Court to strike down coordinated party expenditure limits that this Court previously upheld in *Colorado II*. In affirming the constitutionality of the limits, this Court in *Colorado II* reasoned that without such limits, donors could circumvent candidate contribution limits by availing themselves of the higher contribution limit for political parties, which could then be passed on to the candidates, heightening the danger of corruption.[2]

Coordinated party expenditure limits, which range in the tens of thousands to a few million dollars, may seem quaint in the current age of super PACs. Therein lies the problem. The limits at issue appear quaint only because so many other guardrails to prevent corruption in our democracy have been cut down.

In 2010, with *Citizens United*, the Court empowered corporations and donor-obfuscating nonprofits to pour unlimited amounts of money into

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[2] *See Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 464-65 (2001).

our elections,[3] changing the scale of donations from any single entity from thousands to millions. In 2014, with *McCutcheon*, the Court struck down the aggregate limits on the amount an individual may contribute,[4] further expanding the influence of mega-wealthy individuals. In *Ted Cruz for Senate*, the Court invalidated the post-election loan repayment limit, allowing donors to fill the personal coffers of someone already elected into office.[5] Now, petitioners and respondents point to these same decisions, and the reality created by these decisions as reasons to overturn *Colorado II*.[6] However, eliminating limits on coordinated party expenditures would only exacerbate the harms that decades of eroding checks on money in politics have inflicted on our body politic and further diminish Congress's responsiveness to the public.

B. Petitioners' and Respondents' Goal Is to Find Another Way to Increase the Unregulated Use of Money in Political Campaigns

There can be little question that money is legendarily corrupting in politics, with particular danger from concentrations of money, often in corporate form. Presidents, justices, judges, and historians over many decades have warned of "the

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[3] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365-66 (2010).

[4] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192-93 (2014).

[5] *Fed. Election Comm'n v. Ted Cruz for Senate*, 596 U.S. 289, 311-13 (2022).

[6] *See, e.g.*, Brief for the Federal Respondents in Support of Petitioners at 3-5, No. 24-621 (Aug. 21, 2025); Brief for Petitioners at 43, No. 24-621 (Aug. 21, 2025).

distinctive corrupting potential of corporate electioneering,"[7] calling it a "resolute enemy within our gates,"[8] "an invisible government,"[9] a "sinister influence,"[10] an "overshadowing influence,"[11] a "force devoted to wresting government from the people,"[12] a "real danger,"[13] an "insidious menace,"[14] a "web of

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[7] *Citizens United*, 558 U.S. at 479 (Stevens, J., concurring in part and dissenting in part).

[8] President Franklin Delano Roosevelt, Acceptance Speech for the Renomination for the Presidency (June 27, 1936), https://www.presidency.ucsb.edu/documents/acceptance-speech-for-the-renomination-for-the-presidency-philadelphia-pa [hereinafter Roosevelt, Acceptance Speech].

[9] *Progressive Party Platform of 1912*, Am. Presidency Project (Nov. 5, 1912), https://www.presidency.ucsb.edu/documents/progressive-party-platform-1912.

[10] President Theodore Roosevelt, Speech on the New Nationalism (Aug. 31, 1910), *in* 33 Theodore Roosevelt Ass'n J. 54, 56 (2012), https://theodorerooseveltcenter.org/Research/Digital-Library/Record?libID=o308460.

[11] *Appendix: Speech of Charles J. Ingersoll*, U.S. Mag. & Democratic Rev., January 1839, at 99, 105.

[12] Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* 28 (2014) (emphasis omitted) (quoting Edward A. Ross, *Political Decay—An Interpretation*, 61 Independent 123, 124 (1906)).

[13] *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 83 (1911) (Harlan, J., concurring in part and dissenting in part).

[14] *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting in part).

corruption,"[15] "a constantly growing evil,"[16] and "a dictatorship by . . . the over-privileged."[17]

It is worse, as *Citizens United* recognized, when the concentrations of money are shrouded in anonymity.[18] Money being the "mother's milk of politics," huge concentrations of anonymized money naturally shift the attention of the political class away from regular voters and toward big donors. Academic studies have confirmed this: "economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence."[19]

With the Federal Election Campaign Act of 1971 (FECA) and the McCain-Feingold Bipartisan Campaign Reform Act of 2002 (BCRA), Congress tried to stem the tide of special interest influence in our political system by setting bipartisan, commonsense, fact-based limits on election spending. The members of Congress who passed these bills had firsthand knowledge of how money flows between campaigns and donors, how susceptible members of Congress may become to donor influence, and

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[15] Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism* 372 (2013).

[16] Elihu Root, Address on the Political Use of Money (Sept. 3, 1894), *in Addresses on Government and Citizenship* 141, 143 (Robert Bacon & James Brown Scott eds., 1916).

[17] Roosevelt, Acceptance Speech, *supra* note 8.

[18] *See Citizens United*, 558 U.S. at 370-71.

[19] Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Persps. on Pol. 564, 565 (2014).

consequently how important it is to set appropriate rules and limits for the system. But they did not rely solely on their own experiences. For both FECA and BCRA, Congress compiled "a virtual mountain of research" supporting why the bills were necessary to curb corruption.[20]

Despite this extensive record and the bipartisanship of the reforms, a series of this Court's rulings have made it easier for corporations and wealthy individual megadonors to unleash their corporate wealth in U.S. elections. These rulings have eroded our most fundamental campaign finance rules, unbalancing our efforts to limit corruption in our democracy against the power of corporations and the mega-wealthy to drown out everyone else.

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[20] *Citizens United*, 558 U.S. at 400 (Stevens, J., concurring in part and dissenting in part); *see also* H.R. Rep. No. 93-1239, at 3 (1974) ("The unchecked rise in campaign expenditures, coupled with the absence of limitations on contributions and expenditures, has increased the dependence of candidates on special interest groups and large contributors. Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign."); 119 Cong. Rec. 26,321 (1973) (debating a predecessor bill to the Federal Election Campaign Act Amendments of 1974, which amended FECA, Senator Mathias stated, "An [individual] who could contribute $100,000 to a party could well envision that that money, by some arrangement, would be directed to a candidate. Such arrangements are not unknown."); *Buckley v. Valeo*, 519 F.2d 821, 836-40 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

C. For One Example, Judicial Undermining of Campaign Finance Laws Has Enabled Massive Fossil Fuel Spending, Blocking Legislative Progress and Promoting Climate Denialism

One obvious example of how vast contributions by well-heeled corporate and private entities have had malignant practical effect is in the corrupting efforts of the fossil fuel industry. Through the use of their vast resources, they have been able to drown out the public's voice and thwart extremely popular attempts at reform.

The presence of enormous anonymous political spending degrades the quality of political speech, and the damage since *Citizens United* in particular has been profound. Stripping political advertising of accountability by allowing speech through shell entities washed a "tsunami of slime"[21] over voters. Novel anonymizing creatures like super PACs (which need only reveal the immediate, not the actual, donor), emerged to stalk our political landscape. Anonymizing schemes have grown like weeds.[22]

Before *Citizens United*, there was lively and popularly supported bipartisan Senate activity to

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[21] Joe Hagan, *The Coming Tsunami of Slime*, N.Y. Mag. (Jan. 20, 2012), https://nymag.com/news/features/negative-campaigning-2012-1.

[22] *See* Anna Massoglia, *Dark Money Hit a Record High of $1.9 Billion in 2024 Federal Races*, Brennan Ctr. for Just. (May 7, 2025), https://www.brennancenter.org/our-work/research-reports/dark-money-hit-record-high-19-billion-2024-federal-races.

address fossil-fuel-induced climate change.[23] Republican Senator John Warner of Virginia had a climate bill with Independent Joe Lieberman of Connecticut (who caucused with Democrats);[24] Democratic Senator Maria Cantwell of Washington had a climate bill with Republican Senator Susan Collins of Maine.[25] The bipartisan climate work of Senator John Kerry of Massachusetts and Senator Lindsey Graham of South Carolina was widely reported.[26] John McCain ultimately ran for President in 2008 on a Republican party platform with a sound and sturdy climate change plank.[27]

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[23] *See, e.g.*, Senator Sheldon Whitehouse, How *Citizens United* Altered the Climate Debate (July 25, 2014), https://www.whitehouse.senate.gov/news/speeches/how-citizens-united-altered-the-climate-debate; *Congress Climate History*, Ctr. for Climate & Energy Sols., https://www.c2es.org/content/congress-climate-history (last visited Sept. 4, 2025).

[24] America's Climate Security Act of 2007, S. 2191, 110th Cong. (2007).

[25] Carbon Limits and Energy for America's Renewal (CLEAR) Act, S. 2877, 111th Cong. (2009).

[26] *See, e.g.*, John Kerry & Lindsey Graham, *Yes We Can (Pass Climate Change Legislation)*, N.Y. Times (Oct. 10, 2009), https://www.nytimes.com/2009/10/11/opinion/11kerrygraham.html; Press Release, Senate Foreign Rels. Comm., Kerry, Lieberman, Graham Release Framework for Climate Change and Energy Independence Legislation (Dec. 10, 2009), https://www.foreign.senate.gov/press/rep/release/kerry-lieberman-graham-release-framework-for-climate-change-and-energy-independence-legislation.

[27] *See* Amber Phillips, *Congress's Long History of Doing Nothing on Climate Change, In 6 Acts*, Wash. Post (Dec. 1, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/12/01/congresss-long-history-of-inaction-on-climate-change-in-6-parts.

After *Citizens United* in January of 2010, this bipartisan activity ended—instantly. Since *Citizens United*, the number of serious bipartisan bills in the Senate on climate change, over a period of now more than fifteen years, is zero.[28] The before-and-after of dark money's power could not be more stark.

This about-face happened because the fossil fuel industry could go to Senate leadership and credibly assert that they could funnel unlimited money into elections, and further credibly assert that they could hide that it was them. All they needed in return was an immediate end to bipartisanship on any significant legislation directed at reducing fossil-fuel emissions.[29]

To put this fossil-fuel campaign in scale: Economics 101 teaches that the harms of a product, what economists call "negative externalities," are a cost of production and belong in the price of the product. Even uber-conservative economist Milton Friedman believed that.[30] Getting to pollute for free is a subsidy, in economic terms, and the pollute-for-free subsidy of the fossil fuel industry in the United

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[28] *See, e.g.*, Elizabeth Kolbert, *How Did Fighting Climate Change Become a Partisan Issue?*, New Yorker (Aug. 14, 2022), https://www.newyorker.com/magazine/2022/08/22/how-did-fighting-climate-change-become-a-partisan-issue; *Inextricably Linked: How* Citizens United *Halted Climate Action*, Common Cause (July 1, 2019), https://www.commoncause.org/articles/inextricably-linked-how-citizens-united-halted-climate-action.

[29] *See* Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* 275-76 (2016).

[30] *See* Spencer Banzhaf, *The Conservative Roots of Carbon Pricing*, Nat'l Affs. (2020), https://nationalaffairs.com/publications/detail/the-conservative-roots-of-carbon-pricing.

States has been calculated at $700 billion every year.[31] A $700 billion annual subsidy is a lot of motive for the fossil fuel industry to exert political influence.[32]

Experts who examine the climate denial apparatus describe it as "a complex network of think tanks, foundations, public relations firms, trade associations, and *ad hoc* groups" whose "complex counter-movement efforts . . . foster intractable uncertainty"[33] about real climate science, "to create

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[31] *See* Simon Black et al., *IMF Fossil Fuel Subsidies Data: 2023 Update* 18 (Int'l Monetary Fund, Working Paper No. 2023/169, 2023); *Fossil Fuel Subsidies*, IMF (Nov. 28, 2024), https://climatedata.imf.org/datasets/d48cfd2124954fb0900cef95f2db2724_0/about.

[32] It has not just been election spending, either. There has been a full, often covert, campaign of disinformation and influence. Front groups by the dozen were established to communicate the disinformation. Existing political advocacy groups were enlisted into the fossil-fuel effort. Deregulatory doctrines that would help fossil-fuel polluters were seeded, watered and fertilized in fossil-fuel-funded legal-theory hothouses. Poll-tested messaging was developed and propagated by fossil-fuel-funded public relations shops. An entire ecosystem of disinformation and secretive influence emerged. *See generally* Mayer, *supra* note 29, at 243-77; U.S. S. Comm. on the Budget & U.S. H. Comm. on Oversight & Accountability Democrats, 118th Cong., *Denial, Disinformation, and Doublespeak: Big Oil's Evolving Efforts to Avoid Accountability for Climate Change* 5-6 (2024); Naomi Oreskes & Erik M. Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* 169-215 (2010).

[33] Justin Farrell, *Network Structure and Influence of the Climate Change Counter-Movement*, 6 Nature Climate Change 370, 370, 373 (2016), https://cssn.org/wp-content/uploads/2020/12/Farrell_Nature_climate2875.pdf.

ideological polarization around climate change"[34] because it is "well understood that polarization is an effective strategy for creating controversy and delaying policy progress, especially around environmental issues."[35] This "deliberate and organized effort to misdirect the public discussion and distort the public's understanding of climate change"[36] spans "a wide range of activities, including political lobbying, contributions to political candidates, and a large number of communication and media efforts that aim at undermining climate science."[37]

When "vested economic interests sense a potentially lethal blow to their production systems," they "fight the proposed changes by denying the environmental effects, maligning and impeaching witnesses, questioning the science, attacking or impugning the scientists, and/or arguing that other factors are causing the mounting disaster."[38] They do this using an

> industry and public-relations front, financed by corporations and conducted by PR experts, shills, and front groups, who take advantage

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[34] Justin Farrell, *Corporate Funding and Ideological Polarization About Climate Change*, 113 PNAS 92, 93 (2016), https://www.pnas.org/doi/full/10.1073/pnas.1509433112.

[35] *Id.* at 96-97.

[36] Robert J. Brulle, *Institutionalizing Delay: Foundation Funding and the Creation of U.S. Climate Change Counter-Movement Organizations*, 122 Climatic Change 681, 682 (2014), https://www.researchgate.net/publication/263114280_Institutionalizing_Delay_Foundation_Funding_and_the_Creation_of_US_Climate_Change_Counter-Movement_Organizations.

[37] *Id.*

[38] Shawn Otto, *The War on Science: Who's Waging It, Why It Matters, What Can We Do About It* 130 (2016).

> of journalists' naivety about objectivity and truth in order to manipulate the media, thereby shaping public opinion using "uncertainties," deception, personal attacks, and outrage to move public policy toward an antiscience position that supports the funders' business objectives.[39]

The loosening of campaign restrictions has empowered this anti-democratic apparatus.

The machine that has developed is enormous. As much as $750 million has been redistributed through the identity-scrubbing DonorsTrust,[40] an entity which has provided about a quarter of the funding for the climate denial operation.[41] Other front groups routinely hide the source of their funding, getting over 90 percent of their money from hidden sources.[42]

Exxon, for instance, worked through

> a kaleidoscope of overlapping and competing influence campaigns, some open, some conducted by front organizations, and some entirely clandestine. Strategists created layers of disguise, subtlety, and subterfuge—corporate-funded "grassroots" programs and purpose-built think tanks, as fingerprint-free as possible. In such an opaque and untrustworthy atmosphere, the ultimate advantage lay with any lobbyist whose goal was to manufacture confusion and perpetual

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[39] *Id.* at 342.
[40] Mayer, *supra* note 29, at 253.
[41] *Id.* at 254.
[42] Brulle, *supra* note 36, at 685.

> controversy. On climate, this happened to be the oil industry's position.[43]

The Koch political operation, representing Koch Industries fossil fuel operations and fossil fuel generally, had as its primary political dreadnought Americans for Prosperity. That group is happy to brag about its influence, touting its message to candidates that if you support clean energy, "you do so at your political peril," and crowing about its success: "The vast majority of people who are involved in the [Republican] nominating process—the conventions and the primaries—are suspect of the science. And that's our influence. Groups like Americans for Prosperity have done it."[44]

The situation has become so dire that the current president himself made an ask to a roomful of fossil-fuel executives for a billion dollars in campaign support.[45] Upon election, he then redefined "energy" in an executive order as not including solar *energy* or wind *energy*,[46] even though they constitute, together with batteries, 95 percent of the new energy added to

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[43] Steve Coll, *Private Empire: ExxonMobil and American Power* 86 (2012).

[44] Mayer, *supra* note 29, at 342.

[45] *See* Lisa Friedman et al., *At a Dinner, Trump Assailed Climate Rules and Asked $1 Billion from Big Oil*, N.Y. Times (May 9, 2024), https://www.nytimes.com/2024/05/09/climate/trump-oil-gas-mar-a-lago.html.

[46] *See, e.g.*, Exec. Order No. 14,154, 90 Fed Reg. 8353, 8354 (Jan. 29, 2025); Carrie Jenks & Sara Dewey, *Environmental and Energy Executive Orders: Initial Insights and What We're Watching* 3 (2025), https://eelp.law.harvard.edu/wp-content/uploads/2025/01/EELP-Environmental-and-Energy-Executive-Orders-Jan.-2025.pdf.

the grid last year.[47] Instead, the administration launched a barrage of policies favoring fossil fuel.[48] Unlimited anonymous political money has thus created a parallel political universe unhinged from reality, in which climate science is a "hoax" despite having a universal scientific consensus; wind and solar energy are not "energy" (at this level of climate denial, even the dictionary no longer pertains); and in which it is now routine that fossil fuel executives will be expected to produce for political candidates hundreds of millions of dollars in return for influence.

When we face dangers to Earth's natural systems driven by the laws of physics, chemistry, and biology, this parallel political universe is a very dangerous place. Natural laws of science cannot be repealed or amended. To paraphrase Pope Francis, "Nature does not forgive. You slap her, and she will slap you back."[49]

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[47] *See* U.S. Energy Info. Admin., *U.S. Developers Report Half of New Electric Generating Capacity Will Come from Solar* (2025), https://www.eia.gov/todayinenergy/detail.php?id=65964; Dan McCarthy, *Chart: 96 Percent of New US Power Capacity Was Carbon-free in 2024*, Canary Media (Jan. 10, 2025), https://www.canarymedia.com/articles/clean-energy/chart-96-percent-of-new-us-power-capacity-was-carbon-free-in-2024.

[48] *See, e.g.*, Repeal of Greenhouse Gas Emissions Standards for Fossil Fuel-Fired Electric Generating Units, 90 Fed. Reg. 25,752 (proposed June 17, 2025) (to be codified at 40 C.F.R. pt. 60); Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, 90 Fed. Reg. 36,288 (proposed Aug. 1, 2025) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037 & 1039); Exec. Order No. 14,261, 90 Fed. Reg. 15,517 (Apr. 8, 2025).

[49] Taryn Salinas, *Nature Never Forgives: 7 of Pope Francis's Greenest Quotes*, Nat'l Geographic (Sept. 20, 2015), https://www.nationalgeographic.com/science/article/120150920-pope-francis-environment-climate-quotes.

Since *Citizens United*, a science question has been torqued into a political litmus test in the culture wars by a special interest with a multi-hundred-billion-dollar motive to wreak political mischief. The one consistent message to Republican politicians has been that you participate in bipartisanship on climate pollution at your electoral peril. And the result after *Citizens United* is that bipartisanship has been snuffed out.

D. Judicial Dismantling of Campaign Finance Laws Has Distorted Our Elections

To political observers, another notable effect in the Senate has been the disruption of the customary cadence of our elections. Ordinarily, a candidate would declare candidacy, begin raising money, and the race for money would become an interim proxy for how well the candidate is doing. Cash on hand is closely watched as a sign of strength. Unless an unknown candidate needs to spend money early for name recognition, election money is usually husbanded for the final surge before Election Day when voters are tuned in. At this point, campaigns tend to saturate the media with ads, and gear up fully with staff, volunteers, and phone-bankers. This was our customary cadence. Spending money too early, outside this customary cadence, rarely made sense.

Almost immediately, *Citizens United* upended this usual cadence. Money began to pour in earlier in the cycle and in unprecedented amounts. In 2014, candidates running for the Senate began to be attacked with paid media as early as May the *year*

before the election;[50] by that August *all* the major contests were being blanketed with political advertisements.[51] That early-spending tactic would not make sense unless one knew that there would be unlimited monetary support all the way through the election; that political money was now a non-scarce resource; that money no longer had to be husbanded until the closing surge, because it was unlimited—at least for those candidates with big-money backers who had assured the campaigns that they were willing to spend whatever, whenever.

Indeed, at over $480 million, outside spending on the 2014 Senate elections more than doubled that of 2010.[52] Outside groups actually outspent the candidates—sometimes by more than double—in 80 percent of competitive 2014 Senate races.[53] Billionaires and corporate entities were catching on

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[50] *See* Michael A. Memoli, *Senate Democrat Defends Background Check Vote in First Ad*, L.A. Times (May 31, 2013), https://www.latimes.com/politics/la-xpm-2013-may-31-la-pn-democrat-defends-background-check-vote-20130531-story.html.

[51] *See, e.g.*, Ashley Parker, *Outside Money Drives a Deluge of Political Ads*, N.Y. Times (July 27, 2014), https://www.nytimes.com/2014/07/28/us/politics/deluge-of-political-ads-is-driven-by-outside-money.html; Erika Franklin Fowler & Travis N. Ridout, *Political Advertising in 2014: The Year of the Outside Group* 10 (2014), https://mediaproject.wesleyan.edu/wp-content/uploads/2015/04/2014-Forum-FowlerRidout_FINAL2.pdf.

[52] *See* Ian Vandewalker, *Election Spending 2014: Outside Spending in Senate Races Since* Citizens United 1 (2015), https://www.brennancenter.org/media/353/download/Report_Outside%20Spending%20Since%20Citizens%20United.pdf?inline=1.

[53] *See id.*

to the fact that they could make a political donation in any amount, launder it through one or more 501(c)(4) organizations, which do not have to disclose donors, and land it in a super PAC to launch full-scale attack campaigns. With this new construct in place, the prospects of meaningful, bipartisan climate legislation, and many other reforms that could be done on a bipartisan basis, were buried. Among political practitioners, the lesson has been learned.

History will report harshly on how Congress has been disabled in so many areas by industry pressure, made possible by the combined threat and actuality of unlimited anonymous special-interest spending. This Court should reject the invitation to venture further down this road here.

II. IF ANY CASE WARRANTS RECONSIDERATION DUE TO A DEBUNKED FACTUAL PREDICATE, IT IS *CITIZENS UNITED*

A. *Citizens United* Is Responsible for the Changed Circumstances the Petitioners and Respondents Cite to Justify Overruling *Colorado II*

Urging the Court to overrule *Colorado II*, petitioners and respondents point to "factual presuppositions" that have "become obsolete"[54] and "eroded the foundations"[55] of the Court's judgment in that case.[56] The petitioners point out how, although *Colorado II* assumed that political parties would remain dominant players in federal elections, the

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[54] Brief for the Federal Respondents in Support of Petitioners, *supra* note 6, at 4.
[55] *Id.* at 12.
[56] *Id.* at 4, 35; Brief for Petitioners, *supra* note 6, at 44-45.

"official arrival of Super PACs . . . made them a 'far better vehicle' for donors," with "non-party independent expenditures . . . [having] shot up by over 114 times."[57] The respondents also argue, "*Colorado II* assumed that donors would try to circumvent contribution limits by giving money to political parties, but donors now have ample alternative avenues to make contributions for political speech, such as giving to Super PACs."[58]

The argument in a nutshell is "we have made the system rotten, make it rotten all the way." The appropriate remedy is not to further dismantle Congress's anti-corruption protections, but to reconsider *Citizens United*. It is that decision that unleashed brazen coordination between super PACs and candidates, belying the supposed "independence" of the newly unlimited funding. Billions in dark money, where the true source of a political donation is obscured from the public, has been spent since *Citizens United*, belying the supposed "transparency" of the unlimited spending.

Our present reality explodes the factual presuppositions underlying the Court's central reasoning in *Citizens United*. This Court should take the first possible opportunity to revisit and correct those false facts. And the resulting holding in *Citizens United*, which lies at the heart of our crumbling anti-corruption efforts, should be reconsidered—not *Colorado II*.

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[57] Brief for Petitioners, *supra* note 6, at 45.

[58] Brief for the Federal Respondents in Support of Petitioners, *supra* note 6, at 4.

B. The *Citizens United* Decision Was Based on Improper and Incorrect Appellate Fact-Finding

It has long been the Court's assertion that it is its "province and duty . . . to say what the law is."[59] Other branches have long given deference to that state of affairs. It has never, however, been the role of the Supreme Court to conduct independent fact-finding.

This Court's private deliberations may actually be the worst venue in all of government for fact-finding to take place. The judicial fact-finding function belongs in lower courts, where facts are informed by the disclosures of discovery, challenged in the contest between adversaries, tested by the rigor of trial, subject (often) to the scrutiny of experts, and ultimately reviewable on appeal (albeit protected by the daunting "clearly erroneous" standard of review).[60] That most deferential standard of review reflects that fact-finding belongs in lower courts; indeed, it is commonplace for appellate courts to send decisions back to the trial court for further fact-finding consistent with the appellate opinion. As Justice Jackson has explained, "[d]istrict courts are

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[59] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[60] *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 394 (2018) ("By well-settled rule . . . factual findings are reviewable only for clear error . . . ."); Fed. R. Civ. P. 52(a)(6); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) ("This [clearly erroneous] standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.").

far better suited than appellate courts (this one especially) to evaluate facts on the ground."[61]

The errors the Court made fifteen years ago were errors of fact-finding. Since the errors were made during the Court's private deliberations, they enjoyed few of the safeguards of lower-court fact-finding. Indeed, the Court found these facts without the benefit of a record.

The Court might have suggested that its proposed facts were possible, perhaps even plausible, and sent them back for a robust factual determination as to whether they were accurate; instead, the Court made final factual determinations itself, *sua sponte*. Justice Stevens recognized at the time that the record supporting that determination was "not simply incomplete or unsatisfactory; it is nonexistent. Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress' efforts without a shred of evidence."[62] Errors in fact-finding by the Court are not entitled to separation-of-powers deference from other branches in our constitutional scheme. Rather, the Supreme Court is here to say what the *law* is.

The factual determination in *Citizens United* that no risk of corruption would result from the

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[61] *Trump v. Am. Fed'n of Gov't Emps.*, 145 S. Ct. 2635, 2636, 2640 (2025) (Jackson, J., dissenting from the grant of stay) ("[F]rom its lofty perch far from the facts or the evidence, this Court lacks the capacity to fully evaluate, much less responsibly override, reasoned lower court factfinding about what this challenged executive action actually entails.").

[62] *Citizens United*, 558 U.S. at 400 (Stevens, J., concurring in part and dissenting in part).

release of unlimited political money into American elections[63] was at best a debatable proposition at the time. This determination relied on two factual predicates, both of which have been proven false.

One factual predicate was that the newly released funding would remain independent of candidates' campaigns. As this Court explained, "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."[64] The Court then incorrectly predicted there would be "separation between candidates and independent expenditure groups."[65]

The second factual predicate was that the newly unleashed political funding would be transparent (or as the decision said, subject to "effective disclosure"[66]). Essentially, this Court concluded that voters would know who was behind the newly unleashed funding. Neither of these predictions has proven true.

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[63] *Id.* at 357 (majority opinion) ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

[64] *Id.* at 360.

[65] *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 751 (2011) (citing *Citizens United*, 558 U.S. at 357-61).

[66] *Citizens United*, 558 U.S. at 370 ("A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.").

Full fact-finding in a trial court at the time would surely have revealed the extent to which the supposed "independence" of outside spending would prove to be a sham. There is simply too little evidence of "independence," and too much evidence of coordination, for this factual proposition to remain credible.[67]

Absolutely erroneous is the Court's fact-finding about transparency. Since the *Citizens United* decision, at least $4.3 billion dollars in dark money has been spent.[68] Multiple billions of dark-money dollars, indisputably disproving that predicate fact, should count for something.

The Court must reckon now with the fact that these two factual predicates, "independence" and "transparency," have both proven incorrect; one

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[67] *See, e.g.*, Brief of U.S. Senators Sheldon Whitehouse and John McCain as *Amici Curiae* in Support of Respondents at 9-12, *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012) (No. 11-1179) ("In sum, super PACs *are* coordinating with campaigns, and they are using methods the Court did not contemplate in its *Citizens United* decision."); Saurav Ghosh et al., Campaign Legal Ctr., *The Illusion of Independence: How Unregulated Coordination Is Undermining Our Democracy, and What Can Be Done to Stop It* 54 (2023), https://campaignlegal.org/sites/default/files/2023-11/Coordination%20Report%20%28Final%20POST%20Proofing%29.pdf ("There is a severe disconnect between the aspirational vision of independent electoral advocacy outlined in *Citizens United* and the everyday reality of how super PACs, nonprofits, and other outside spending groups are operating. The lofty notion that corporate electoral spending would be 'independent,' and would therefore not raise the risk of corruption, has fallen short."); Trevor Potter, *The Failed Promise of Unlimited "Independent" Spending in Elections*, ABA Human Rights Mag., June 25, 2020, at 22.

[68] Massoglia, *supra* note 22.

almost certainly, and the other absolutely certainly. Indisputably, both conclusions now amount to "clear error."

The analytical structure of *Citizens United* collapses without these findings. This brief is not here to kibitz about passing or incidental errors of fact exhumed from the past; these fact-finding errors were mission-critical to this Court's result.

Congress has the power and duty to defend the integrity, and even the appearance of integrity in voters' minds, of the elections that are at the heart of our American experiment. The only way for the Court to erase Congress's role in election integrity was for the decision to erase the prospect of corruption (or even the appearance thereof); and the only way to erase the prospect of corruption and the role of Congress was to find as a fact that there would not be corruption. That counter-intuitive (and now demonstrably counter-factual) proposition needed legs to stand on, and the legs it stood on were the two predicate factual findings described above. Without them, the legs of the argument collapse, the argument about corruption falls, the prospect of corruption (or the appearance thereof) re-emerges, and Congress should regain its role protecting the integrity of elections from corruption (or the appearance thereof). The bottom line is that these now-clearly-erroneous "facts" were outcome-determinative, as well as false.

C. This Court Should Now Also Correct the Error It Refused to Address in *Bullock*

Shortly after *Citizens United* let unlimited money into federal elections, a case from Montana came to this Court challenging that decision's application to state-run elections.[69] The challenge came from a state with a proven history of big-money election corruption and a 100-year-old campaign finance law that the Montana Supreme Court had held was justified by a compelling anti-corruption interest in limiting corporate independent expenditures in the state.[70] In that case, Senators McCain and Whitehouse filed an amicus brief explaining that, even only two years post-decision, both of *Citizens United*'s factual predicates had already collapsed and been conclusively proven false.[71]

Senator McCain was perhaps uniquely knowledgeable about election law and election integrity: as an elected official subject to regular election, as the author of the McCain-Feingold election finance reform, and as a candidate who at the highest level of political contest carried his party's banner into a presidential election. De-corrupting American elections was a battle that

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[69] *See Am. Tradition P'ship, Inc.*, 567 U.S. at 516 (per curiam).
[70] *W. Tradition P'ship, Inc. v. Att'y Gen.*, 271 P.3d 1, 7-11, *cert. granted, rev'd sub nom.*, *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012) (per curiam).
[71] Brief of U.S. Senators Sheldon Whitehouse and John McCain as *Amici Curiae* in Support of Respondents, *supra* note 67, at 8-17.

defined Senator McCain's long and distinguished career in the Senate.

The Court failed to consider the import of that brief, refusing to allow argument and summarily reversing the Montana Supreme Court's judgment on the basis that the case was controlled by *Citizens United*—without attending to or addressing the plain errors of fact-finding within *Citizens United*.[72] Justice Breyer pointed out in dissent that "Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United*, casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so."[73] Yet the factual errors lived on, and billions in corrupting dark money kept flowing.

Proper fact-finding, in its proper place in the judicial structure, would likely show that *Citizens United* has in fact already corrupted American elections. The proposition that secretly sourced, unlimited election funding induces corruption is almost too obvious to require argument. *Citizens United* implicitly accepted that obvious truth by embarking on the fact-finding excursion to declare that unlimited election funding would be transparent. In effect, the Court has already accepted that unlimited dark money in elections produces, or at least risks, political corruption.

As Senators Whitehouse and McCain's brief argued, money actually need not even to be spent to be corrupting; mere threats and promises backed by the power to spend unlimitedly (and anonymously)

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[72] *See Am. Tradition P'ship, Inc.*, 567 U.S. at 516-17.
[73] *Id.* at 517 (Breyer, J., dissenting).

could be corrupting, while leaving no financial trace.[74] The natural secrecy of such threats and promises actually makes the threat of undetected corruption far worse than if massive funds are actually visibly (though anonymously) spent.

Humankind faces a lot of danger right now; and it is in significant part the result of political failure, a failure enabled by two demonstrably false facts arrived at in closed, private deliberations, and the legal conclusions that followed. Now is no time to compound the error of *Citizens United* and use its unfortunate results to overrule *Colorado II*. Instead, this Court should take the first opportunity to reconsider and correct *Citizens United*, while at the same time repairing American democracy's grave vulnerability to secret special-interest political influence.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals and reconsider the clearly erroneous fact-finding, and the resulting outcome, of *Citizens United* at the first possible opportunity.

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[74] Brief of U.S. Senators Sheldon Whitehouse and John McCain as *Amici Curiae* in Support of Respondents, *supra* note 67, at 7, 19 ("The ability to make and to credibly threaten large expenditures gives outside groups the opportunity to exert improper leverage over politicians running for office. . . . A promise or threat to a candidate that goes unseen or unheard by the public is a means of corruption that was not considered in *Citizens United*.").

Respectfully submitted,

GERSON H. SMOGER
Counsel of Record
SMOGER & ASSOCIATES
4228 Hallmark Drive
Dallas, TX 75229
(510) 531-4529
gerson@texasinjurylaw.com

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