

## NOTE

# THE PARTY EXPENDITURE PROVISION'S NEAR DEATH EXPERIENCE: *COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE v. FEDERAL ELECTION COMMISSION*

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## INTRODUCTION

Public concern over the role money plays in the American electoral process and political system is not a recent phenomenon.<sup>1</sup> For more than a century, prominent Americans have been calling for reforms aimed at containing the influence of money in politics.<sup>2</sup> Congress responded by gradually expanding, in piecemeal fashion, government regulation of methods used to finance campaigns for national office.<sup>3</sup> Finally, in 1971, Congress passed comprehensive campaign finance reform. By enacting the Federal Election Campaign Act ("FECA"),<sup>4</sup> Congress sought to prevent actual and perceived corruption and to reduce the costs of campaigns so that the size of a candidate's "war chest" did not necessarily determine the outcome of an election.<sup>5</sup>

1. See HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, & POLITICAL REFORM* 23 (4th ed. 1992) (tracing public concern over influence of money in politics back to 1873 University of Wisconsin speech by Chief Justice Edward G. Ryan of Wisconsin Supreme Court).

2. See *id.* at 24-28. Through the years, political leaders of both major political parties have expressed the need to reform the manner in which campaigns for national office are financed including former Presidents Chester A. Arthur, Harry S. Truman, Dwight D. Eisenhower, John F. Kennedy, and Lyndon B. Johnson, and former Members of Congress William E. Chandler, Russell Long, Charles Goodell, and Robert Ashmore. See *id.*

3. See *id.* at 24-29 (describing early efforts at campaign finance reform prior to enactment of Federal Election Campaign Act of 1971). Congress passed the Civil Service Reform Act in 1883, which prohibited candidates from soliciting campaign contributions from employees of the federal government. See *id.* at 24. In 1907, Congress banned corporate contributions with the Tillman Act, 34 Stat. 864 (1907). See *id.* In 1910, Congress passed the Publicity Act, the first campaign disclosure law. See Publicity Act of 1910, Pub. L. No. 61-274, 36 Stat. 822. Individuals were prohibited from contributing more than \$5000 per year to a federal candidate (or to that candidate's campaign committee) beginning in 1940 with the passage of the Corrupt Practices Act. See Federal Corrupt Practices Act of 1925. The Taft-Hartley Act later banned contributions from labor unions. See Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136.

4. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3.

5. See *Colorado Republican Fed. Campaign Comm. v. Federal Elections Comm'n*, 116 S. Ct. 2309, 2312 (1996) ("[FECA] sought both to remedy the appearance of a 'corrupt' political process (one in which large contributions seem to buy legislative votes) and to level the electoral playing field by reducing campaign costs." (citing *Buckley v. Valeo*, 424 U.S. 1, 25-27 (1976))); S. REP. NO. 93-689, at 2 (1974):

[FECA] was predicated upon the principle of public disclosure, that timely and complete disclosure of receipts and expenditures would result in the exercise of prudence

Three years later, following the campaign abuses uncovered during the Watergate scandal, Congress amended FECA (the "1974 Amendments").<sup>6</sup> The 1974 Amendments attempted to restore public confidence in the manner that campaigns for national office were financed by strengthening FECA's disclosure, contribution, and expenditure provisions.<sup>7</sup> In particular, the 1974 Amendments limited the amounts that federal candidates and their supporters could spend on behalf of federal candidates' campaigns ("expenditure limits").<sup>8</sup>

Shortly after passage of the 1974 Amendments, various federal candidates and potential supporters of federal candidates brought suit claiming, *inter alia*, that FECA's contribution and expenditure limits violated their First Amendment rights to express their views in the political arena. With regard to FECA's contribution limits, the Supreme Court, in *Buckley v. Valeo*,<sup>9</sup> found that the government's interest in preventing corruption or the appearance of corruption sufficiently outweighed the interests of potential contributors in making sizeable campaign contributions.<sup>10</sup> With respect to FECA's expenditure limits, however, the Court found that the interests of federal candidates and their supporters in promoting their views in the public arena outweighed the government's interest in preventing actual or perceived corruption,<sup>11</sup> particularly when those expenditures were

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by candidates and their committees and that excessive expenditures would incur the displeasure of the electorate who would or could demonstrate indignation at the polls.

; see also S. REP. NO. 92-96, at 20 (1972) ("[FECA] attempts to halt the spiraling cost of campaigning for public office.").

6. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

7. See ALEXANDER, *supra* note 1, at 29-30 (explaining impact of Watergate and describing provisions of 1974 Amendments).

8. The 1974 Amendments prohibited persons from making expenditures in excess of \$1000 "relative to a clearly identified candidate during a calendar year." See 18 U.S.C. § 608(e)(1) (1976) (repealed). Similar expenditure limitations applied to spending by candidates, see *id.* § 608(a), their campaigns, see *id.* § 608(c), and political parties in connection with election campaigns, see *id.* § 608(f).

9. 424 U.S. 1 (1976).

10. See *id.* at 20 ("[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."). The Court held that the interests of the government in preventing actual or perceived corruption are sufficient to outweigh "the limited effect upon First Amendment freedoms" caused by FECA's contribution limits. See *id.* at 29.

11. See *id.* at 19, 47-48 (finding that "[t]he expenditure limitations contained in [FECA] represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech" and that "the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process").

made independently ("independent expenditures"),<sup>12</sup> without the prior knowledge or consent of the candidates.<sup>13</sup> Recognizing the importance of costly media advertising to advancing one's political ideas,<sup>14</sup> the Court held that FECA's expenditure limits violated the First Amendment.<sup>15</sup>

As presently constituted, FECA prohibits persons,<sup>16</sup> political action committees ("PACs"),<sup>17</sup> multi-candidate political action committees ("multi-PACs"),<sup>18</sup> and political parties<sup>19</sup> from making contributions<sup>20</sup>

12. Under FECA, the term "independent expenditure" is defined as an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. § 431(17) (1994).

13. See *Buckley*, 424 U.S. at 47 (holding that limitations on "expenditures for express advocacy of candidates made totally independently of the candidate and his campaign" fail to serve the government's interest in preventing actual or perceived corruptions because "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate").

14. See *id.* at 40 (expressing concern that one particular expenditure limit "would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement 'relative to a clearly identified candidate' in a major metropolitan newspaper") (internal citation omitted).

15. See *id.* at 58-59 (holding that FECA's expenditure provisions "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate").

16. According to FECA, the term "person" includes "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. § 431(11).

17. As used in FECA, the term "political committee" includes:

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of § 441b(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of \$5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of \$5,000 during a calendar year, or makes contributions aggregating in excess of \$1,000 during a calendar year or makes expenditures aggregating in excess of \$1,000 during a calendar year.

*Id.* § 431(4).

18. According to FECA, the term "multicandidate political committee" is defined as:

[A] political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

*Id.* § 441a(4).

19. Under FECA, the term "political party" means "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." *Id.* § 431(16).

to candidates<sup>21</sup> for federal office<sup>22</sup> ("federal candidates") in excess of certain, specified limits<sup>23</sup> ("contribution limits"). As a result of *Buckley* and its progeny, supporters of federal candidates enjoy an unlimited right to spend money on behalf of federal candidates' campaigns, provided that they do so independently.<sup>24</sup> The sole expenditure<sup>25</sup> provision to survive the strict scrutiny of the Supreme Court was the "Party Expenditure Provision," which limits the amount that political parties can spend on behalf of federal candidates' campaigns when

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20. A "contribution," according to FECA, includes:

- (i) 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; or
- (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

*Id.* § 431(8)(A).

21. According to FECA, the term "candidate" is defined as:

an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election—

(A) if such individual has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of \$5,000 or has made such expenditures aggregating in excess of \$5,000.

*Id.* § 431(2).

22. Under FECA, the term "federal office" includes: "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." *Id.* § 431(3).

23. Persons and political committees are forbidden from contributing more than \$1000 per election to federal candidates. See FEDERAL ELECTION COMMISSION, CAMPAIGN GUIDE FOR POLITICAL PARTY COMMITTEES 15 (Aug. 1996). Multicandidate political committees and local, state, and national political parties may not contribute more than \$5000 per election to federal candidates. See *id.*

Contributions to a federal candidate's campaign committee are treated as contributions to the candidate himself. See 18 U.S.C. § 608(b)(4)(A) (1994) ("[C]ontributions to a named candidate made to any political committee authorized by such candidate, in writing, to accept contributions on his behalf shall be considered to be contributions made to such candidate.").

24. See, e.g., *Federal Elections Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (holding independent expenditure provision, 2 U.S.C. § 441b, unconstitutional as applied against a non-profit corporation that produced and distributed voter guides); *Federal Elections Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 498-500 (1985) (finding unconstitutional FECA provision making unlawful independent expenditures of more than \$1000 on behalf of presidential candidate opting to receive public campaign funds); *Federal Elections Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 24, 36 (1981) (holding that agency relationship between local and national Republican organization was neither endorsed nor precluded by FECA's independent expenditure provision, 2 U.S.C. § 441a(d)(3)); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 180, 195-200 (1981) (finding no First Amendment violation where FEC brought enforcement action against medical association for contributions to political action committee formed to further association's political interests).

25. The term "expenditure" under FECA includes "(i) 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; and (ii) a written contract, promise, or agreement to make an expenditure." 2 U.S.C. § 431(9)(A).

such expenditures are made "in connection with" a federal candidate's general election campaign.<sup>26</sup> In June of 1996, the Supreme Court had occasion to determine the constitutionality of the Party Expenditure Provision as applied against a state political party in Colorado. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,<sup>27</sup> the Court narrowly upheld the constitutionality of the Party Expenditure Provision, thus restricting campaign contributions that can be classified as "party expenditures" under FECA. At the same time, however, the Supreme Court indicated that political parties, like other supporters of federal candidates, are capable of making independent expenditures on behalf of federal candidates' campaigns.<sup>28</sup>

Part I of this Note provides the historical background necessary to a solid understanding of the Supreme Court's decision in *Colorado Republican*. Part II provides the factual and procedural background leading up to the Supreme Court's decision. Part III analyzes the Supreme Court's decision, and Part IV discusses the implications of the Court's holding.

## I. THE ROAD TO *COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE*

In order to gain a better understanding of how the Supreme Court decided *Colorado Republican*, it is necessary to review some important decisions that the Court has rendered since *Buckley*. In each case, the Court has been loyal to the framework it established in that landmark

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26. The "Party Expenditure Provision" provides:

The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section; or

(ii) \$20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, \$10,000.

*Id.* § 441a(d)(3).

27. 116 S. Ct. 2309 (1996).

28. Justice Breyer stated:

This case focuses upon the constitutionality of [the limits contained in the Party Expenditure Provision] as applied to this case. We conclude that the First Amendment prohibits the application of this provision to the kind of expenditure at issue here—an expenditure that the political party has made independently, without coordination with any candidate.

*Id.* at 2312.

decision for determining whether FECA's contribution and expenditure provisions violate the First Amendment.

A. *California Medical Association v. Federal Election Commission*

In *California Medical Association v. Federal Election Commission*,<sup>29</sup> appellants California Medical Association ("CMA") and California Medical Political Action Committee ("CALPAC") attempted to characterize the FECA contribution limits applied against them as unconstitutional expenditure limitations.<sup>30</sup> CMA, a non-profit, unincorporated association of doctors and CALPAC, which was formed by CMA to advance the political interests of its members, sought a declaration by the Supreme Court that the contribution limitations violated their First Amendment right of political speech.<sup>31</sup> One of the FECA provisions applied against CMA prohibited the CMA from giving more than \$5000 per year to "political committees," such as CALPAC.<sup>32</sup> Another FECA provision prohibited CALPAC from accepting more than \$5000 per year from any of its members, including CMA.<sup>33</sup>

Appellants argued that the \$5000 annual contribution limit was an unconstitutional independent expenditure restriction.<sup>34</sup> The thrust of their argument was that CMA should have the First Amendment right to contribute an unlimited amount of money to CALPAC because CALPAC has a constitutional right to spend an unlimited amount of money on federal candidates' campaigns.<sup>35</sup> Appellants attempted to persuade the Court that CMA and CALPAC were really the same legal entity, and that any restriction on CMA was tantamount to a limitation on CALPAC's constitutional right to make independent expenditures.

Finding that CMA and CALPAC were, in fact, separate legal entities and invoking *Buckley*, the Court rejected appellants' attempt to characterize a contribution limit as an independent expenditure restriction.<sup>36</sup> Instead, the Court determined that the Federal Election

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29. 453 U.S. 182 (1981).

30. See *id.* at 195 (describing CMA and CALPAC's contention that contribution limitation involved was "akin to an unconstitutional expenditure limitation").

31. See *id.* CMA and CALPAC attempted to persuade the Court to treat the FECA provisions at issue, 2 U.S.C. § 441a(a)(1)(C), (f), as independent expenditure limitations, thereby making them unconstitutional under the *Buckley* framework of analysis. See *id.* The Court declined appellants' invitation, however, and determined that the FECA provision was indeed a constitutional contribution limit. See *id.*

32. See *id.* at 185 n.1 (citing definitions of "political committee" and "multicandidate political committee").

33. See *id.*

34. See *id.* at 182.

35. See *id.*

36. See *id.* at 195 ("[Appellants] contend that § 441a(a)(1)(C) is akin to an unconstitu-

Commission ("Commission") did not violate the First Amendment by treating CMA's spending as a contribution and restricting it accordingly.<sup>37</sup> Central to the Court's reasoning was the fact that, even when subjected to the FECA contribution limit, CMA still retained the constitutional right to spend an unlimited sum of money on a federal candidate's campaign provided such spending was done independently.<sup>38</sup> The Court held, in essence, that contributors do not have a constitutional right to contribute an unlimited amount of money to a PAC to enable the PAC to promote federal candidates, particularly when contributors may do the promoting themselves, without using the PAC as a conduit.<sup>39</sup> Nevertheless, the Court reaffirmed its position that multi-PACs are capable of making independent expenditures.<sup>40</sup>

*B. Federal Election Commission v. National Conservative Political Action Committee*

In *Federal Election Commission v. National Conservative Political Action Committee*,<sup>41</sup> after the National Conservative Political Action Committee ("NCPAC") announced its intention to spend a large sum of money in support of President Reagan's reelection, the Democratic Party, the Democratic National Committee, and an individual who was eligible to vote in the upcoming presidential election sought a declaration by the Supreme Court that a particular provision<sup>42</sup> of the Presidential Election Campaign Fund Act was constitutional.<sup>43</sup> The provision in question criminalized the expenditure of more than \$1000 by an independent PAC that is made on behalf of a presidential candidate's general election campaign after that candidate has agreed to receive public funds.<sup>44</sup>

In determining whether such a restriction on independent spending violated NCPAC's First Amendment rights, the Court once again applied the *Buckley* framework of analysis.<sup>45</sup> The Supreme Court de-

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tional expenditure limitation because it restricts the ability of CMA to engage in political speech through a political committee, CALPAC.").

37. See *id.* at 197 (finding that the "speaker" entitled to First Amendment protection is CALPAC, not CMA, which was only one of a number of contributors to CALPAC).

38. See *id.* at 195 ("Nothing in § 441a(a)(1)(C) limits the amount CMA or any of its members may independently expend in order to advocate political views; rather, the statute restrains only the amount that CMA may contribute to CALPAC.").

39. See *id.*

40. See *id.*

41. 470 U.S. 480 (1985).

42. See 26 U.S.C. § 9012(f) (1994).

43. See *National Conservative Comm.*, 470 U.S. at 482.

44. See 26 U.S.C. § 9012(f)(1).

45. See *National Conservative Comm.*, 470 U.S. at 497. The Court reaffirmed its adherence to



terminated that as an independent expenditure, NCPAC's proposed spending enjoyed complete protection under the First Amendment, and examined the government's interest in regulating such an expenditure.<sup>46</sup> Stating that "the only legitimate and compelling government interests . . . for restricting campaign finances" are to prevent actual or apparent corruption, the Court considered whether NCPAC's expenditure represented the threat of quid pro quo corruption.<sup>47</sup> The Court concluded that without proof of prior coordination of the expenditure with the candidate, NCPAC's spending did not threaten the integrity of the political process,<sup>48</sup> and its interest in political expression clearly outweighed the government's interests.<sup>49</sup>

Consequently, the Supreme Court held unconstitutional the provision of the Presidential Election Campaign Fund Act that criminalized any independent expenditures made to further a presidential candidate's campaign.<sup>50</sup> In doing so, the Court not only reaffirmed its position that political committees are capable of making independent expenditures, but also indicated that Congress may not tread on the First Amendment rights of PACs by enacting a public funding scheme for federal elections.

C. Federal Election Commission v. Massachusetts Citizens for Life, Inc.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,<sup>51</sup> the Supreme Court extended First Amendment protection to an independent expenditure made by Massachusetts Citizens for Life, Inc. ("MCFL"), a non-profit corporation formed for the purpose of promoting its political agenda.<sup>52</sup> To encourage voters to vote for pro-life candidates in the upcoming federal and state elections, MCFL published and distributed a newsletter to potential voters in September 1978.<sup>53</sup> The newsletter listed all candidates for federal and state office and indicated which candidates supported MCFL's positions on

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*Buckley's* distinction between evaluating contribution limits and independent expenditure restrictions in light of a First Amendment challenge to a particular FECA provision. *See id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

46. *See id.*

47. *See id.* at 497-98.

48. *See id.*

49. *See id.* The Court went on to say that, even if it had concluded that the government's interest in prohibiting NCPAC's expenditure was compelling, § 9012(f) was "a fatally overbroad response." *Id.* at 498.

50. *See id.* at 501 (affirming District Court holding that § 9012(f) was unconstitutional).

51. 479 U.S. 238 (1986).

52. *See id.* at 263-65 (holding that non-profit organizations are not bound by FECA's expenditure restrictions).

53. *See id.* at 243-44.

the abortion issue.<sup>54</sup>

The Federal Election Commission brought an enforcement action against MCFL, charging the organization with violating a FECA provision that barred expenditures by corporations made in connection with political campaigns.<sup>55</sup> The Court used a three-step analysis to consider whether the FEC's enforcement of the provision infringed MCFL's First Amendment rights.<sup>56</sup> First, the Court determined that the money spent in preparing and distributing the pro-life pre-election newsletter was an "expenditure" as defined by FECA.<sup>57</sup> Second, the Court found the expenditure at issue was one made "in connection with" a federal campaign.<sup>58</sup> Third, noting that not all expenditures made "in connection with" a federal campaign are subject to FECA's disclosure provisions, the Court declared that FECA restricts "only funds used for communications which expressly advocate the election or defeat of a clearly identified candidate."<sup>59</sup> Considering the facts presented in *Massachusetts Citizens for Life*, the Court determined that the newsletter indeed advocated the election or defeat of clearly identified candidates.<sup>60</sup> Even though it acknowledged that MCFL's expenditure was covered by FECA, the Court nevertheless found the provision requiring MCFL to report such expenditures to be unconstitutional because finding to the contrary would place

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54. See *id.*

55. See *id.* at 244-45. The particular FECA provision MCFL was charged with violating was 2 U.S.C. § 441b, which states, in pertinent part: "It is unlawful for any . . . corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office . . ." 2 U.S.C. § 441b(a) (1994).

56. See *Massachusetts Citizens for Life*, 479 U.S. at 245-50 (using three-step process and concluding that MCFL's publication and distribution of the pre-election newsletter (1) was an expenditure, (2) made in connection with a campaign, and (3) expressly advocated the election or defeat of a clearly identified candidate).

57. See *id.* at 245-46. MCFL argued that its spending was not covered by FECA's prohibition against corporate expenditures made in connection with campaigns because it did not give anything to any candidate, campaign committee, or political party or organization. See *id.* In making this argument, MCFL relied upon the narrow definition of expenditure within § 441b, which defines an "expenditure" as "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section." 2 U.S.C. § 441b(b)(2) (emphasis added). The Supreme Court rejected MCFL's argument and relied instead on the more broadly worded definition of expenditure contained in the general definitions section of FECA. See *Massachusetts Citizens for Life*, 479 U.S. at 245-46. That section defines an "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). Using this definition of "expenditure" as its guidepost, the Court determined that the money spent preparing and distributing the pre-election newsletter was done for the purpose of influencing an election for Federal office and was, therefore, an "expenditure." See *Massachusetts Citizens for Life*, 479 U.S. at 249-50.

58. See *Massachusetts Citizens for Life*, 479 U.S. at 245.

59. *Id.* at 248-49 (quoting *Buckley v. Valeo*, 424 U.S. 1, 80 (1976)).

60. See *id.* at 249.

too onerous a burden on a non-profit corporation whose sole purpose was to advance the political views of its members.<sup>61</sup>

Having ascertained that persons, political committees, and non-profit corporations are capable of making independent expenditures and that such expenditures are entitled to full First Amendment protection, it was only a matter of time before a major political party would challenge the Party Expenditure Provision, and assert its right to spend money independently on its candidates' campaigns.

*D. The Party Expenditure Provision—Interpreting Statutory Silence*

FECA's Party Expenditure Provision states that "the national committee of a political party or a State committee of a political party, including any subordinate committee of a State committee, may not make expenditures in connection with the general election campaign of a candidate for federal office," subject to certain limitations contained in the statute.<sup>62</sup> The statute addresses the matter of expenditures made by political parties "in connection with" federal campaigns ("connected expenditures") by stating that parties may make connected expenditures up to the limits imposed by the formula contained in the Party Expenditure Provision.<sup>63</sup>

Although the statute plainly indicates that parties are limited in making connected expenditures, it is silent on the issue of whether political parties may make *independent* expenditures on behalf of federal candidates. One possible interpretation of the statute's silence is that the statute assumes that all expenditures made by political parties on behalf of their candidates will always be done in coordination with the respective candidates. On this view, all expenditures made by political parties on behalf of federal campaigns would be subject to the limitations outlined in the Party Expenditure Provision.

The FEC adopted this particular interpretation of the statute's silence. The regulations adopted by the FEC to enforce the Party Expenditure Provision clearly addressed the matter of independent expenditures by political parties. Those regulations stated that political parties "shall not make independent expenditures in connection with the general election campaign of candidates for federal office."<sup>64</sup> Political parties were not permitted to make independent expenditures because, in the FEC's view, political parties were "incapable" of mak-

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61. See *id.* at 263-65 (listing three characteristics of MCFL that made it unconstitutional to require the organization to comply with FECA's provisions).

62. See 2 U.S.C. § 441a(d)(3).

63. See *id.* § 441a(d)(1).

64. 11 C.F.R. § 110.7(b)(4) (1995), *repealed by* 61 Fed. Reg. 40,961 (1996).

ing independent expenditures.<sup>65</sup> The Commission was not alone in its determination that political parties lacked the capacity to spend money independently on behalf of federal candidates' campaigns. The Supreme Court seemed to share this view.<sup>66</sup>

Although the Commission clearly prohibited independent spending by parties, it indicated that only connected expenditures would count against the limits imposed by the Party Expenditure Provision.<sup>67</sup> All party spending not made "in connection with" a federal campaign was to be classified under one of the other reporting categories defined by FECA,<sup>68</sup> and was not subject to the Party Expenditure Provision's limitations.<sup>69</sup>

To assist parties in determining whether money spent on political advertising would be treated as an expenditure made "in connection with" a federal campaign, the Federal Election Commission issued two advisory opinions.<sup>70</sup> In one opinion, the Commission stated its view that those advertisements which "effectively advocate the defeat of a clearly identified candidate in connection with [a federal election] and thus have the purpose of influencing the outcome of the general election [of the federal candidate]" are covered by the Party Expenditure Provision.<sup>71</sup> In the other advisory opinion, the Commission stated that the limits contained in the Party Expenditure Provision applied to advertisements which "(1) depicted a clearly identified candidate and (2) conveyed an electioneering message."<sup>72</sup>

## II. *FEDERAL ELECTION COMMISSION V. COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE*<sup>73</sup>

### A. *Facts and Procedural History*

In April 1986, prior to the selection of the Republican and Demo-

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65. See FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide (CCH) § 5819, at 11,186 n.4 (July 18, 1985) ("Party political committees are incapable of making independent expenditures."); see also FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) § 5766, at 11,070 n.2 (July 18, 1984) ("[A] national party committee is incapable of making independent expenditures.").

66. See *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28 n.1 (1981).

67. See *FEC Advisory Opinion 1984-15*, 1 Fed. Election Campaign Election Fin. Guide, at 11,070.

68. See 2 U.S.C. § 434(b)(4).

69. See *FEC Advisory Opinion 1984-15*, 1 Fed. Election Campaign Fin. Guide, at 11,070.

70. See *id.*; see also *FEC Advisory Opinion 1985-14*, 1 Fed. Election Campaign Fin. Guide, at 16-17.

71. See *FEC Advisory Opinion 1985-14*, 1 Fed. Election Campaign Fin. Guide, at 11,070.

72. *Id.* at 11,185.

73. 839 F. Supp. 1448 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *rev'd*, 116 S. Ct. 2309 (1996).

cratic nominees for an open seat in the U.S. Senate from Colorado, the Colorado Republican Federal Campaign Committee (the "Colorado Party") spent \$15,000 to broadcast a radio advertisement against then-Congressman Timothy Wirth (D-Colo.), the presumptive Democratic nominee.<sup>74</sup> According to the formula in the Party Expenditure Provision,<sup>75</sup> each political party could spend approximately \$103,000 in connection with its candidate's campaign for the U.S. Senate seat from Colorado.<sup>76</sup>

Following the airing of the negative radio advertisements against Congressman Wirth, the State Democratic Party lodged a complaint with the Federal Election Commission alleging that the Colorado Party failed to report<sup>77</sup> as a connected expenditure the \$15,000 used to purchase air time for the advertisements.<sup>78</sup> Agreeing with the State Democratic Party and after administrative settlement negotiations failed, the Commission filed a complaint against the Colorado Party in the United States District Court for the District of Colorado alleging that the party failed to comply with FECA's reporting requirements.<sup>79</sup>

As an unincorporated political association, the Colorado Party was

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74. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2314 (1996). The content of radio advertisement, entitled "Wirth Facts #1," was as follows:

Paid for by the Colorado Republican State Central Committee

Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment. [Congressman] Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

*Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1451.

75. Section 441a(d)(3) of FECA provides, in pertinent part:

The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

in the case of a candidate for election to the office of Senator . . . , the greater of—  
2 cents multiplied by the voting age population of the State . . . ; or  
\$20,000 . . . .

2 U.S.C. § 441a(d)(3) (1994).

76. See *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2314 (quoting 2 U.S.C. § 441a(c), (d)(3)(A)(I)).

77. See *Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1450 (explaining that the Campaign Committee instead listed \$15,000 as an "operating expense").

78. See *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2314. The State Democratic Party claimed that CRFCC's purchase of air time for the radio advertisements was an "expenditure in connection with the general election campaign of a candidate for Federal office." *Id.* (quoting 2 U.S.C. § 441a(d)(3)).

79. See *id.*

required, under FECA, to submit periodic reports to the Commission detailing its Party Expenditure Provision spending.<sup>80</sup> In its quarterly report covering the period of time during which the expenditure occurred, the Colorado Party had listed the amount spent on the air time for the anti-Wirth advertisements as an "operating expense" rather than as a Party Expenditure Provision expenditure.<sup>81</sup> The Colorado Party claimed that its expenditure of \$15,000 on the anti-Wirth advertisement was not an expenditure made in connection with a federal campaign.<sup>82</sup>

The gist of the Colorado Party's argument was that at the time the advertisements were developed and aired, the Republican party had not yet selected its candidate for the open U.S. Senate seat. Party officials maintained that they developed the anti-Wirth advertisements independently, without consulting any of the candidates seeking the Republican nomination for the open Senate seat. According to party officials, they were not obligated to report such spending under the Party Expenditure Provision because the facts clearly demonstrated that the development of the advertisements and the purchase of air time were not accomplished in connection with any particular candidate's campaign. Under this view, the \$15,000 spent by the party was properly reported as an operating expense and did not count against the \$103,000 limitation of the Party Expenditure Provision.<sup>83</sup> In addition to denying that it violated FECA's disclosure requirements, the Colorado Party also claimed that the Party Expenditure Provision violated the First Amendment by prohibiting political parties from making independent expenditures.<sup>84</sup>

### B. *The District Court's Opinion*

The District Court adopted a two-step approach to determine whether the Commission correctly classified the \$15,000 spent by the Colorado Party as a connected expenditure that should have been reported as a Party Expenditure Provision expenditure. First, the court analyzed whether the expenditure was a coordinated expenditure or an independent expenditure. The court explained that in-

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80. See *Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1451. The relevant FECA provision, § 434(b) (4) (H) (iv), mandates disclosure of all § 441a(d) (3) expenditures that are made "in connection with the general election campaign of a candidate for Federal office." 2 U.S.C. §§ 434(b) (4) (H) (iv), 441a(d) (3).

81. See *Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1451. The Colorado Party described this disbursement of funds as "voter information to Colorado voters—advertising." *Id.*

82. See *id.*

83. See *id.*

84. See *id.*

dependent expenditures warranted greater First Amendment protection than coordinated expenditures, which are treated as contributions<sup>85</sup> and may be "more freely limited."<sup>86</sup> The court defined a coordinated expenditure as "one made in cooperation with, or with the consent of, a candidate, his agents, or an authorized committee of a candidate."<sup>87</sup> In contrast, an independent expenditure was defined as "one made without the knowledge or permission of a candidate, his agent, or his campaign committee."<sup>88</sup>

Although the facts seemed to indicate that the expenditure in question was an independent expenditure, the court found that the Colorado Party properly classified its spending as "coordinated" because the Supreme Court<sup>89</sup> and the Federal Election Commission<sup>90</sup> heretofore had held that political parties were incapable of making independent expenditures. Suggesting that it needed to justify its conclusion further, the court continued to address the Colorado Party's argument by asserting that it was immaterial whether or not the Republican candidate with whom the Colorado Party "coordinated" had been selected at the time the anti-Wirth adver-

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85. Section 441a(a)(7)(B)(i) of FECA provides as follows:

For purposes of this subsection—

....

(B) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate . . .

2 U.S.C. § 441a(a)(7)(B)(i).

86. See *Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1452 (noting proposition that contribution limits are subject to less exacting scrutiny than restriction on expenditures (citing *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491 (1985); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 194, 196-97 (1981); *Buckley v. Valeo*, 424 U.S. 1, 47 n.53 (1976))).

87. *Id.* (citing *Buckley*, 424 U.S. at 47 n.53).

88. *Id.* (citing 2 U.S.C. § 431(17); *Buckley*, 424 U.S. at 47 n.53).

89. See *id.* at 1452-53. In reaching its conclusion that party expenditures are, by definition, "coordinated," the District Court relied upon a footnote in the Supreme Court's opinion in *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981). In footnote one of that opinion, the Supreme Court stated, *inter alia*, that "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates." *Id.* at 27 n.1.

90. See *Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1453. Citing *Buckley*, 424 U.S. at 109-10, and *Democratic Senatorial Campaign Comm.*, 454 U.S. at 38, for the proposition that the FEC's advisory opinions are entitled to deference by a reviewing court because the FEC has "the 'primary and substantial responsibility for administering and enforcing [FECA]'" coupled with "extensive rulemaking and adjudicative powers." The District Court gave great weight to two FEC advisory opinions in particular: FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5819 (July 18, 1985), and FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984). Both advisory opinions state unequivocally that "[p]arty political committees are incapable of making independent expenditures." *FEC Advisory Opinion 1985-14*, 1 Fed. Election Campaign Fin. Guide, at 11,186 n.4; *FEC Advisory Opinion 1984-15*, 1 Fed. Election Campaign Fin. Guide, at 11,070 n.2.

tisements were created or aired.<sup>91</sup> Relying on a Commission advisory opinion, the District Court reasoned that the eventual Republican candidate for the open U.S. Senate seat from Colorado would ultimately benefit from the advertisements run by the Colorado Party against then-Congressman Wirth.<sup>92</sup>

In the second step of its analysis, the court analyzed whether the "coordinated" expenditure was one made "in connection with" the Republican candidate's campaign and therefore was subject to being reported as a Party Expenditure Provision expenditure.<sup>93</sup> Finding no controlling precedent, the District Court relied instead upon a Supreme Court decision interpreting the "in connection with" language found in a different FECA provision.<sup>94</sup> The District Court proceeded to apply the "express advocacy" test used by the Supreme Court in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*<sup>95</sup> to determine whether the coordinated expenditure was also a connected expenditure.<sup>96</sup> The test holds that the term "expenditure" encompasses "only funds used for communications that *expressly advocate* the election or defeat of a clearly identified candidate."<sup>97</sup>

In applying the "express advocacy" test to determine whether the Colorado Party's coordinated expenditure was made "in connection

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91. See *Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1453.

92. See *id.* (citing *FEC Advisory Opinion 1984-15* and *Buckley* for the proposition that "it is irrelevant whether a candidate has been nominated at the time the expenditure is made. . . . [because] [i]t was made on behalf of the Republican candidate, whomever that might be").

93. See *id.* at 1451, 1453.

94. See *id.* at 1453 (relying on *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), in which Supreme Court interpreted "in connection with" language found in FECA § 441b).

Unlike § 441a(d)(3), which concerns contributions or expenditures made by party committees, § 441b applies to contributions and expenditures made by national banks, corporations, and labor organizations. Compare 2 U.S.C. § 441a(d)(3) (1994), with *id.* § 441b. Despite this difference, however, the District Court found a basis for applying the "express advocacy" test, discussed *infra*, in a rule of statutory construction that holds that "identical words used in different parts of the same act are intended to have the same meaning." *Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1453 (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). The court noted, as well, that this rule of statutory construction should normally be applied where the two different sections of the same act have the same purpose. See *id.* Finding that §§ 441a(d)(3) and 441b were both aimed at regulating contributions and expenditures from multi-person organizations, the District Court determined that the "express advocacy" test was appropriately applied in analyzing whether an expenditure was made "in connection with" a general election campaign for federal office under § 441a(d)(3). See *id.*

95. 479 U.S. 242 (1986). In *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, the FEC charged the non-profit corporation with making an expenditure in connection with campaigns for Federal office when the pro-life organization published and distributed a newsletter encouraging potential voters to vote for "pro-life" candidates in a forthcoming election. See *id.* at 242-45. In determining whether the pro-life organization's expenditure was one made "in connection with" the upcoming elections within the meaning of FECA § 441b, the Supreme Court applied a test it first announced in *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

96. See *Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1453.

97. *Id.*



with" the eventual Republican senatorial nominee's campaign, the District Court focused on the actual language used in the anti-Wirth advertisement.<sup>98</sup> Using *Buckley* as its guidepost, the court found that the anti-Wirth advertisement did not contain words expressly advocating action on behalf of or against a particular candidate.<sup>99</sup> Consequently, the court held that the Colorado Party's expenditure of \$15,000 on "Wirth Facts #1," though coordinated, did not constitute an expenditure made "in connection with" a general election campaign for federal office.<sup>100</sup> As a result, the Colorado Party did not violate FECA's reporting requirements by failing to report the expenditure as a Party Expenditure Provision expenditure.<sup>101</sup> By ruling that the Colorado Party did not violate FECA, the District Court side-stepped the issue of whether the Party Expenditure Provision was constitutional.<sup>102</sup>

### C. *The Tenth Circuit's Opinion*

Following the District Court's decision granting the Colorado Party's motion for summary judgment and dismissing its counterclaim that the Party Expenditure Provision is unconstitutional, the Commission and the Colorado Party appealed to the United States Court of Appeals for the Tenth Circuit.<sup>103</sup> In reviewing the District Court's opinion, the Tenth Circuit agreed with the lower court's determination that any expenditure by a political party is, by definition "coordinated."<sup>104</sup>

In analyzing whether the expenditure was one made "in connection with" the eventual Republican Senate nominee's campaign and thus subject to reporting requirements of the Party Expenditure Pro-

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98. See *id.* at 1455 (citing *Buckley*, 424 U.S. at 42, for the proposition that reviewing courts should examine the actual wording used in determining whether speech is "express advocacy").

99. See *id.* The District Court, quoting *Buckley*, 424 U.S. at 46 n.52, listed specific words identified by the Supreme Court as "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' or 'reject.'" *Id.* The District Court found that the "Wirth Facts #1" advertisement contained, at most, "an indirect plea for action" that was not enough to constitute "express advocacy." See *id.* at 1455-56.

100. See *id.* at 1456-57.

101. See *id.*

102. See *id.* (explaining that District Court not required to address constitutional challenge to § 441a(d)(3) because court determined that expenditure in question was not one made "in connection with" campaign for federal office).

103. See *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1017 (10th Cir. 1995), *rev'd*, 116 S. Ct. 2309 (1996).

104. See *id.* at 1019. Like the District Court below, the Tenth Circuit cited *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 29 n.1 (1981), for the proposition that political parties are incapable of making "independent" expenditures.

vision, however, the Tenth Circuit rejected the lower court's reliance on "express advocacy."<sup>105</sup> The Tenth Circuit found unclear Congress' intent regarding the appropriate standard for judging whether a coordinated expenditure was a connected expenditure, and determined that the proper approach was to defer to the Commission's interpretation of the statutory language.<sup>106</sup>

In its review of two Commission advisory opinions defining the appropriate standard for determining whether the Colorado Party's coordinated expenditure was made "in connection with" a federal campaign, the Tenth Circuit found that "[the Party Expenditure Provision] applies to coordinated spending that involves a clearly identified candidate and an electioneering message, without regard to whether that message constitutes express advocacy."<sup>107</sup> The Tenth Circuit found that the anti-Wirth advertisement met both criteria, and concluded that the Colorado Party's expenditure was subject to disclosure under the Party Expenditure Provision.<sup>108</sup> Moreover, it concluded that the party violated the Act by listing the \$15,000 spent on the anti-Wirth advertisement as an operating expense on its quarterly report to the Commission.<sup>109</sup>

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105. See *Colorado Republican Fed. Campaign Comm.*, 59 F.3d at 1020-21. The Tenth Circuit stated that the District Court's reliance on *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), was inapposite because amendments to FECA subsequent to the *Buckley* decision called into question the notion that both independent and coordinated expenditures are necessarily ones that "expressly advocate" the election or defeat of a clearly identified candidate for federal office. See *Colorado Republican Fed. Campaign Comm.*, 59 F.3d at 1020-21. The Court of Appeals noted the different language defining "independent" and "coordinated" expenditures in 2 U.S.C. § 431(9)(B)(ix) and § 431(17), respectively. See 2 U.S.C. § 431(9)(B)(ix), (17) (1994). Although the definition of "independent" expenditures explicitly contains the "expressly advocating" language, the definition of "coordinated" expenditures does not. See *Colorado Republican Fed. Campaign Comm.*, 59 F.3d at 1020-21.

106. See *Colorado Republican Fed. Campaign Comm.*, 59 F.3d at 1021. The Court of Appeals, finding no guidance in the statute for a particular standard for determining whether a coordinated expenditure was made "in connection with" a campaign, determined that the appropriate course was to defer to the FEC's interpretive guidance on the issue. See *id.* In so doing, the Tenth Circuit stated that it was following the Supreme Court's command in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), that "[when] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

107. *Colorado Republican Fed. Campaign Comm.*, 59 F.3d at 1022. The Court of Appeals first reviewed *FEC Advisory Opinion 1984-15*, in which the FEC determined that certain sums that the Republican Party planned to expend for the purpose of running negative television advertisements disparaging potential Democratic candidates for the presidency were covered by § 441a(d)(3) because the advertisements in question "effectively advocate[d] the defeat of a clearly identified candidate" and because they "[had] the purpose of influencing the outcome of the general election for President of the United States." *Id.* at 1021. The Tenth Circuit also referenced *FEC Advisory Opinion 1985-14*, in which the FEC explicitly stated that § 441a(d)(3) regulates expenditures that "both (1) depict[] a clearly identified candidate and (2) convey[] an electioneering message." *Id.* at 1022.

108. See *id.* at 1021.

109. See *id.* at 1022-23. The court found that "Wirth Facts #1" was directed at a clearly iden-

In finding a violation of the Party Expenditure Provision, the Tenth Circuit could not avoid passing on the constitutionality of the Party Expenditure Provision.<sup>110</sup> Considering whether the expenditure limitations contained in the Party Expenditure Provision violated the Colorado Party's First Amendment rights, the Tenth Circuit characterized those restrictions as contribution limits, stating that "*Buckley* accepted the FECA's treatment of expenditures by national and state committees of political parties as contributions, as have subsequent opinions of the Supreme Court."<sup>111</sup>

Treating the expenditure in question as a contribution, the Tenth Circuit proceeded to analyze whether the government's interest in regulating the contribution was outweighed by the party's interest in making it.<sup>112</sup> In reviewing the history of the Supreme Court's treatment of contribution and expenditure limits, the Court of Appeals determined that contribution limits require a less compelling government interest to survive First Amendment scrutiny than do expenditure limits.<sup>113</sup> Identifying the government's interest in limiting contributions from political parties as "preventing corruption or the appearance of corruption,"<sup>114</sup> the Tenth Circuit determined that it could not rule out the possibility that contributions from political parties might represent a threat to the integrity of the political process.<sup>115</sup> Finding that the government's interest in limiting political party contributions outweighed the party's interest in making them, the Tenth Circuit held that the Party Expenditure Provision was constitutional.<sup>116</sup>

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ified candidate because it "referenced Wirth's senatorial aspirations and challenged his personal integrity and campaign statements in the context of a current election." *Id.* at 1022. The court also found that the advertisement "unquestionably contained an electioneering message." *Id.* at 1023. In reaching this conclusion, the Tenth Circuit relied on *FEC Advisory Opinion 1984-15* and *FEC Advisory Opinion 1985-14*, which stated that electioneering messages include advertisements that "question or challenge the candidate's statements, position, or record," *id.*, or are "designed to urge the public to elect a certain candidate or party." *Id.* (quoting *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957)).

110. *See id.* at 1023.

111. *Id.* at 1021 (citing *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. at 259-60; *Democratic Senatorial Campaign Comm. v. Federal Election Comm'n*, 454 U.S. 27, 28 n.1 (1981); *see also Buckley v. Valeo*, 424 U.S. 1 (1976)).

112. *See Colorado Republican Fed. Campaign Comm.*, 59 F.3d at 1024.

113. *See id.* at 1023 (agreeing with FEC's position "that *Buckley* and later cases endorse distinctions between independent expenditures and contributions, and that other FECA contribution ceilings have consistently been upheld as constitutional by the Supreme Court").

114. *Id.* at 1024 (listing twin aims of FECA as determined by the Supreme Court in *Buckley*, 424 U.S. at 25-26).

115. *See id.* ("We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures.").

116. *See id.*

### D. *The Supreme Court's Decision*

#### 1. *Justice Breyer's opinion*

In reviewing the record upon which the Tenth Circuit based its opinion, Justice Stephen Breyer, writing the plurality opinion for a sharply divided Supreme Court,<sup>117</sup> first recognized the goals of FECA's enactment, which are to prevent the appearance of corruption of the electoral process and to reduce the costs of campaigns.<sup>118</sup> Second, the Court examined the means chosen by Congress to effectuate the Act, namely the imposition of limits on contributions to candidates for federal office, and the restriction of the amount that candidates and others may spend on behalf of the candidate's campaign.<sup>119</sup> Third, Justice Breyer recited the history of the Court's examination of FECA's provisions in light of various First Amendment challenges.<sup>120</sup> In examining whether a particular FECA provision violated the First Amendment, Justice Breyer found that the Court has historically applied a strict scrutiny test.<sup>121</sup> In so doing, Justice Breyer noted that the Supreme Court has held that FECA provisions imposing expenditure limits violate the First Amendment,<sup>122</sup> while those

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117. The Court divided into four camps. The lead opinion was written by Justice Stephen Breyer, who was joined by Justices Sandra Day O'Connor and David H. Souter. See *Colorado Republican Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2312 (1996). Justice Anthony M. Kennedy, joined by Chief Justice William H. Rehnquist and Justice Antonin Scalia, concurred in the judgment and dissented in part. See *id.* at 2321 (Kennedy, J., concurring in part and dissenting in part). Justice Clarence Thomas wrote a separate opinion concurring in the judgment and dissenting in part, in which Chief Justice Rehnquist and Justice Scalia joined in Parts I and III. See *id.* at 2323 (Thomas, J., concurring in part and dissenting in part). Finally, Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg, wrote a dissenting opinion. See *id.* at 2332 (Stevens, J., dissenting).

118. See *id.* (listing goals of FECA).

119. See *id.* (citing 18 U.S.C. §§ 608, 610 (1970 & Supp. IV 1974)).

120. See *id.* at 2313 (citing *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976)).

121. See *id.* ("[T]he Court essentially weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views, against a 'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." (citing *Massachusetts Citizens for Life*, 479 U.S. at 256-63; *National Conservative Political Action Comm.*, 470 U.S. at 493-501; *California Med. Ass'n*, 453 U.S. at 193-99; *Buckley*, 424 U.S. at 14-23)).

122. See *id.* Justice Breyer listed the FECA expenditure provisions that the Supreme Court found unconstitutional. According to Justice Breyer, in *Buckley*, the Court found unconstitutional expenditure provisions that limited the amount of money that a candidate could spend on behalf of his own campaign and those that restricted the right of others to spend money independently to further the candidate's campaign. See *id.* (citing *Buckley*, 424 U.S. at 39-51, 54-58). Furthermore, Breyer noted that, in *National Conservative Political Action Committee*, the Supreme Court struck down limitations on the right of political committees to spend money independently on behalf of a candidate for national office. See *id.* (citing *National Conservative Political Action Comm.*, 470 U.S. at 497).

merely restricting contributions do not.<sup>123</sup>

After explaining the manner in which political parties' "contributions" to candidates are regulated by FECA,<sup>124</sup> the Court went on to analyze whether the Party Expenditure Provision was unconstitutional, either on its face or as applied to the defendants in the underlying case.<sup>125</sup> It focused on the lack of evidence indicating coordination between the Colorado Party and the ultimate Republican nominee for the open U.S. Senate seat in developing the anti-Wirth advertisement, and determined that, absent such evidence, the Colorado Party's expenditure must be treated as an "independent expenditure" rather than as a "contribution."<sup>126</sup>

In reaching its conclusion, the Supreme Court, unlike the lower courts, was not compelled to defer to the Commission's interpretation of FECA's silence regarding whether political parties were capable of making independent expenditures.<sup>127</sup> The Court also disavowed its own statement of support for the view that political parties were incapable of making independent expenditures in *Federal Election Commission v. Democratic Senatorial Campaign Committee*.<sup>128</sup> The Court explained its departure from the route taken by the lower

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123. See *id.* ("The provisions that the Court found constitutional mostly imposed *contribution* limits—limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate." (citing *California Med. Ass'n*, 453 U.S. at 193-99; *Buckley*, 424 U.S. at 23-36, 46-48)).

124. See *id.* at 2313-14. The Court explained that FECA specifically exempts political parties from the contribution limits contained in § 441a(a)(1), (2), and (3), which apply to "persons" and "multicandidate political committees." See *id.* at 2313. Instead, § 441a(d)(1), the "Party Expenditure Provision," explicitly provides that political parties "may make expenditures in connection with the general election campaign of candidates for Federal office" according to the formula established in § 441a(d)(3)(A)(i) and (ii). See *id.* at 2314 (citing 2 U.S.C. § 441a(d)(3)(A)(i)-(ii) (1994)).

125. See *id.* at 2314-15.

126. See *id.* at 2315. The Supreme Court held that the government must present particularized evidence of actual coordination between a political party and a candidate in order for the Party Expenditure Provision to apply. See *id.* Because the chairman of the Colorado Party stated in a deposition that it was the practice of the party to assist potential Republican candidates prior to their nomination, the government argued that such an admission amounted to evidence of coordination. See *id.* The Court dismissed the government's argument by saying that the chairman's remarks amounted to nothing more than "general descriptions of party practice." *Id.*

127. See *id.* at 2318-19.

128. *Id.* at 2318. In *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 28-29 n.1 (1981), the Court stated that "[e]xpenditures by party committees are known as 'coordinated' expenditures and are subject to the monetary limits of § 441a(d)." *Id.* (citing 6 *FEC Record*, No. 11, at 6 (Nov. 1980)). The Court in *Democratic Senatorial Campaign Committee* also stated unequivocally that both national and state party committees are considered "incapable" of making independent expenditures and are "forbidden" from doing so by the FEC. See *id.* (citing 11 C.F.R. § 110.7(b)(4) (1981)). The Supreme Court distanced itself from this pronouncement in *Democratic Senatorial Campaign Committee*, calling its previous statement of unqualified support for the FEC's interpretation "dicta." See *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2318.

courts by stating that, before enforcing the Party Expenditure Provision against a political party, the Commission must first make an "empirical judgment" that party officials have actually coordinated with a candidate.<sup>129</sup> Justice Breyer noted that while one Commission advisory opinion presumes coordination, the presupposition does not foreclose the possibility that a party could make an independent expenditure.<sup>130</sup>

After its conclusion that the expenditure in question was made independently, the Court proceeded to analyze whether the government may constitutionally limit independent spending by political parties.<sup>131</sup> The Court did so by weighing the interest of political parties in making independent expenditures against the government's interest in prohibiting such expenditures.<sup>132</sup> Considering the political parties' interests first, the Court found that expression by a political party is a "'core' First Amendment activity" because it reflects the shared views of its members and is done for the purpose of convincing potential voters to become actively involved in democratic government.<sup>133</sup> The Court then examined the purpose of the Party Expenditure Provision and determined that the only rational government interest in restricting independent expenditures by political parties was to limit the overall cost of elections for federal office.<sup>134</sup> Weighing this interest against a political party's interest in exercising its "core" First Amendment rights, the Court found the party's interest more compelling. Therefore, the Court held that prohibiting the Colorado Party from making an independent expenditure on behalf of a federal candidate, absent any evidence of prior coordination between the party and the candidate, amounted to a violation of the Colorado Party's First Amendment rights.<sup>135</sup>

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129. See *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2318.

130. See *id.* To buttress its view that the FEC does not strictly forbid parties from making independent expenditures, the Court cited a different FEC advisory opinion that suggested that the FEC recognizes that sometimes parties do, in fact, make independent expenditures. See *id.*

131. See *id.* at 2315. The Court reaffirmed its commitment to the framework for analyzing First Amendment challenges to FECA laid down in *Buckley*. See *id.*

132. See *id.* at 2316.

133. See *id.* (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989)). In *Eu*, the Supreme Court stated that political parties have the same right to freely associate that individuals have long enjoyed under the First Amendment. See *Eu*, 489 U.S. at 224.

134. See *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2316-17. Upon his review of the legislative history of the Party Expenditure Provision, Justice Breyer came to the view that Congress actually intended to "enhance what was seen as an important and legitimate role for political parties in American elections." *Id.* (citing *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41 (1981)).

135. See *id.* at 2315.

In so holding, Justice Breyer narrowly avoided addressing the Colorado Party's facial challenge to the Party Expenditure Provision.<sup>136</sup> Although four of the nine Supreme Court justices would have invalidated the provision on its face,<sup>137</sup> Justice Breyer argued that, because the Court had already determined that the provision was unconstitutionally applied, it did not need to address the Colorado Party's challenge because it was not a crucial element for adjudicating the dispute.<sup>138</sup> In addition, he was hesitant to "overrule sua sponte [the] Court's entire campaign finance jurisprudence, developed in many cases over the last 20 years," especially given the fact that the parties had not properly briefed the issue.<sup>139</sup>

## 2. Justice Kennedy's concurrence

Concurring only in the judgment of the plurality opinion, Justice Anthony M. Kennedy wrote separately to express his view that the Court should have addressed the Colorado Party's facial challenge to the Party Expenditure Provision.<sup>140</sup> He criticized the plurality for engaging in a protracted discussion on whether the Commission's presumption that political parties are incapable of making independent expenditures was a valid implementation of the Party Expenditure Provision.<sup>141</sup> Kennedy focused instead on the statute, finding that, when applied to political parties, FECA imposes impermissible burdens on parties to determine when certain expenditures are protected by the First Amendment.<sup>142</sup>

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136. See *id.* at 2319-21.

137. See *id.* at 2321 (Kennedy, J., concurring in part and dissenting in part); see also *id.* at 2331 (Thomas, J., dissenting). Justice Kennedy, joined by Justice Scalia and the Chief Justice, advocated the creation of an exemption for political parties from limitations on contributions, which he argues is consistent with *Buckley* because "political party spending 'in cooperation, consultation, or concert with' a candidate does not fit within [the Court's] description of 'contributions' in *Buckley*." *Id.* at 2321-22 (Kennedy, J., concurring in part and dissenting in part). In addition to agreeing that the Party Expenditure Provision is facially unconstitutional, Justice Thomas argued that the distinction drawn between independent expenditures and contributions by the *Buckley* court was one "that lacks constitutional significance" and went on to state that he "would not adhere to it." *Id.* at 2325-29.

138. See *id.* at 2320 (arguing that Colorado Party's counterclaim is mooted because Court found Party Expenditure Provision unconstitutional as applied).

139. *Id.* at 2321.

140. See *id.* (Kennedy, J., concurring in part and dissenting in part).

141. See *id.* (characterizing plurality's discussion of FEC presumption as irrelevant).

142. See *id.* Section 441a(a)(7)(B)(i) of FECA states that: "expenditures made by any person in cooperation, consultation, or concert, with or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B) (1994). Justice Kennedy argued that the effect of defining the term "person" in § 441a(a)(7)(B)(i) to include political parties, and thus treating party expenditures as contributions, is "to restrict any party's spending in a specific campaign for or against a candidate and so to burden a party in expending its own money for its own speech." *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2321.

Although Justice Kennedy did not question the notion that contributions may be regulated consistent with *Buckley*,<sup>143</sup> he argued that the Court was not bound by the Government's characterization of the Colorado Party's expenditure for the anti-Wirth advertisements as a contribution rather than as an expenditure.<sup>144</sup> Noting that the *Buckley* Court never addressed potential First Amendment challenges to expenditure limits as applied to parties,<sup>145</sup> Kennedy drew a distinction between political parties and all other potential contributors, arguing that political parties are unique institutions.<sup>146</sup> According to Justice Kennedy, the parties should not necessarily be treated the same as other contributors under FECA because of their special characteristics.<sup>147</sup> In his view, the application of the Court's prior decisions, which upheld contribution limits in certain situations, was inappropriate in determining whether political party contributions could be regulated consistent with the First Amendment.<sup>148</sup>

### 3. Justice Thomas' approach

In the first part of his separate opinion, which was joined by Justice Antonin Scalia and Chief Justice William H. Rehnquist, Justice Clarence Thomas strenuously disagreed with Justice Breyer's assertion that it was unnecessary for the Court to consider the Colorado Party's facial challenge to the Party Expenditure Provision.<sup>149</sup> Despite the fact that the parties had not briefed the issue extensively, he reasoned that the Court was not incapable of weighing the government's interest in regulating political party expenditures against the party's interest in First Amendment expression, or of testing the means adopted by the government to effectuate its interest.<sup>150</sup> Justice Tho-

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143. See *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2321 (citing *Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976)).

144. See *id.* at 2321-22.

145. See *id.* at 2322 (citing *Buckley*, 424 U.S. at 58 n.66).

146. See *id.* at 2322-23. Justice Kennedy explained that, unlike other would be contributors, the interests of political parties are inextricably linked with those of their chosen candidates. See *id.* Kennedy also noted that parties must advance their interest through candidates and that candidates, in turn, count on their party's crucial support in an election. See *id.*

147. See *id.* at 2322 ("In my view, we should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving FECA's restrictions on political party spending.")

148. See *id.* (stating that contribution limits applied to individuals, upheld in *Buckley*, 424 U.S. at 23-38, and to associations, upheld in *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 193-99 (1981), should not control outcome when judging constitutionality of limitations on political party spending).

149. See *id.* at 2323 (Kennedy, J., concurring in part and dissenting in part) (finding "unpersuasive" Justice Breyer's arguments for not addressing Colorado Party's counterclaim).

150. See *id.* at 2324. Although Justice Thomas acknowledged that the Colorado Party's challenge to a limitation on coordinated expenditures was one of first impression, he argued that, because the Court granted certiorari, it should address the issue. See *id.* In addition, Justice



mas further argued that failing to address the constitutionality of the Party Expenditure Provision would leave political parties uncertain about what future conduct would constitute "coordination" and thus subject them to the Party Expenditure Provision's limits.<sup>151</sup> He predicted that this uncertainty would have a chilling effect on parties' exercise of their First Amendment rights.<sup>152</sup>

Unlike the Chief Justice and Justice Scalia, Justice Thomas argued that the court should have gone beyond simply declaring the Party Expenditure Provision unconstitutional. Viewing the distinction established in *Buckley* for separately analyzing First Amendment challenges to expenditure limits and contribution limits as one that "lacks constitutional significance," he would find all contribution limits unconstitutional.<sup>153</sup> In effect, Justice Thomas would overrule twenty years of Supreme Court jurisprudence allowing the Commission to limit the size of campaign contributions.<sup>154</sup>

#### 4. *Justice Stevens' dissent*

Writing in dissent, and joined by Justice Ruth Bader Ginsburg, Justice John Paul Stevens argued that the Supreme Court should have affirmed the Tenth Circuit's decision finding the Party Expenditure Provision constitutional, both on its face and as applied.<sup>155</sup> Stevens found that three important government interests were served by the enforcement of the Party Expenditure Provision's limitations on spending.<sup>156</sup> First, Stevens saw the potential for the party to corrupt its candidate, forcing the candidate to adopt the party's view on any given public issue due to the party's power to spend (or withhold) money on the candidate's behalf.<sup>157</sup> The government's second inter-

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Thomas chided Justice Breyer for suggesting that the issue should be avoided because it is complex, reminding Breyer that "[w]e do not sit to decide only easy cases." *Id.*

151. *See id.* at 2325 (stating that Court's failure to determine whether Party Expenditure Provision is facially unconstitutional will leave parties wondering which expenditures on behalf of candidates will be protected by First Amendment).

152. *See id.* ("The validity of [the Party Expenditure Provision]'s controls on coordinated expenditures is an open question that, if left unanswered, will inhibit the exercise of legitimate First Amendment activity nationwide.").

153. *See id.* ("In my view, the distinction [between contribution and expenditure limits] lacks constitutional significance, and I would not adhere to it."); *see also id.* at 2327 ("In sum, unlike the *Buckley* Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits.").

154. *See id.* at 2328 ("I think that the *Buckley* framework for analyzing the constitutionality of campaign finance laws is deeply flawed. Accordingly, I would not employ it.").

155. *See id.* at 2332 (Stevens, J., dissenting).

156. *See id.*

157. *See id.* Like Justice Kennedy, Justice Stevens acknowledged the interdependent relationship between candidates and their parties. *See id.* Whereas Justice Kennedy sought to preserve or enhance this close relationship, Justice Stevens argued that the government has an interest in minimizing the threat that candidates will feel beholden to the party because of its

est in regulating political party expenditures, according to Justice Stevens, was to prevent the circumvention of existing contribution limits which restrict individuals from giving more than \$1000 in a calendar year to a particular candidate<sup>158</sup> or more than \$5000 per year to a party committee<sup>159</sup> by allowing individuals to funnel contributions to candidates through the party apparatus.<sup>160</sup> Third, Justice Stevens found that limiting political party spending served an important government interest in holding down the overall costs of campaigns to "level[] the electoral playing field" among candidates for federal office.<sup>161</sup>

### III. ANALYSIS OF THE COURT'S RULING

*Colorado Republican* stands for several important propositions. First, the Court found that political parties are capable of making independent expenditures.<sup>162</sup> Second, the Court held that when political parties spend money independently on behalf of federal candidates, such expenditures may not be restricted by the government.<sup>163</sup> Finally, the Court's decision serves to reaffirm its commitment to the idea that independent expenditures warrant greater First Amendment protection than do contributions.<sup>164</sup>

Although the Court's decision resolved a number of important questions, it also raised several others which, if left unanswered, will create great uncertainty in the minds of judges, regulators and political officials regarding the enforceability of the Party Expenditure Provision. Undoubtedly, the most important unanswered question is whether the prohibition on government restriction of political party spending applies to coordinated as well as independent expenditures. The Court, arguing that a fuller record must be developed in order to properly consider this question, remanded the case to the lower courts.<sup>165</sup> Should the Court ultimately determine, as at least

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power to spend. *See id.*

158. *See id.* (citing 2 U.S.C. § 441a(a)(1)(A) (1994)).

159. *See id.* (citing 2 U.S.C. § 441a(a)(1)(C)).

160. *See id.*

161. *See id.*

162. *See* FEC Final Rule, 61 Fed. Reg. 40,961 (1996) ("The Court ruled that party committees are capable of making independent expenditures on behalf of their candidates for Federal office and that these expenditures are not subject to the coordinated party expenditure limits [contained in the Party Expenditure Provision].").

163. *See id.*

164. *See Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2315 (explaining that contribution limits and expenditure limits have historically been given different First Amendment treatment by Court).

165. *See id.* at 2320-21.

four justices have already concluded,<sup>166</sup> that the First Amendment protects coordinated expenditures no less than independent expenditures, the Party Expenditure Provision will be stricken.

Assuming, however, that the Court ultimately finds that the government may regulate coordinated spending by political parties, the Court must explain with greater precision the difference between an independent expenditure and a coordinated expenditure so that judges, regulators and the parties may know the boundaries within which they may operate. In its opinion, the Court indicated that the Commission must be able to identify evidence of coordination between the party and the candidate relating to the specific expenditure in question in order to treat the party's spending as a coordinated expenditure.<sup>167</sup> The court failed, however, to specify exactly what constitutes a coordinated expenditure. As Justice Thomas predicted in his dissenting opinion,<sup>168</sup> the Court's lack of clear guidance on this matter has left political parties wondering whether and when they may exercise their newly discovered First Amendment right to spend money independently on behalf of their federal candidates.<sup>169</sup>

In deciding whether to treat a connected expenditure as one covered by the Party Expenditure Provision, courts also will find that the Supreme Court's decision in *CRFCC* provides little guidance on how to make this determination. The District Court, in its opinion, determined that only coordinated expenditures for communications that "expressly advocate the election or defeat of a clearly identified candidate" are subject to the Party Expenditure Provision.<sup>170</sup> Using a somewhat broader standard, the Tenth Circuit indicated that all expenditures for communications that "involve a clearly identified candidate and an electioneering message" are subject to the Party Ex-

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166. See *id.* at 2323 (Kennedy, J., concurring in part and dissenting in part) (expressing view, shared by Chief Justice Rehnquist and Justice Scalia, that coordinated party expenditures should be given same First Amendment protection afforded to expenditures by candidates and their campaign committees); see also *id.* (Thomas, J., concurring in part and dissenting in part) (stating that he would find that Party Expenditure Provision's limitations on coordinated as well as independent expenditures fails strict scrutiny).

167. See *id.* at 2315.

168. See *id.* at 2325 ("Parties are left to wonder whether their speech is protected by the First Amendment when the Government can show—presumably with circumstantial evidence—a link between the Party and the candidate with respect to the speech in question.").

169. See *Democrats Seek to Foil Republican Spending with FEC Ruling*, POL. FIN. & LOBBY REP., July 24, 1996, at 1, 3 (explaining that Democratic Party has asked Federal Election Commission to clarify right given to political parties by Court to spend money independently on behalf of their federal candidates).

170. See *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1453-54 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *rev'd*, 116 S. Ct. 2309 (1996).

penditure Provision.<sup>171</sup> Until the Court either declares the Party Expenditure Provision unconstitutional on its face or chooses the appropriate legal standard for determining when a coordinated expenditure becomes a Party Expenditure Provision expenditure, judges, regulators and political parties will be left to wonder which types of expenditures for communications on behalf of candidates are immune from government restriction.

#### IV. REACTION TO THE COURT'S RULING

While awaiting the Court's determination concerning the constitutionality of government regulation of political parties' coordinated spending, both the Commission and the political parties have begun to interpret for themselves the implications of the Court's ruling. In response to the Court's decision that political parties are capable of making independent expenditures, the Commission withdrew its regulation forbidding parties from spending money independently on behalf of federal candidates' campaigns.<sup>172</sup> The Commission is now in the process of writing new regulations concerning the conduct it views as constituting coordination for purposes of applying the Party Expenditure Provision's limitations.<sup>173</sup>

Initial reaction to the Court's ruling by the two major political parties was split along party lines. The Republican Party, with a decisive lead over the Democrats in the battle to raise money for the 1996 Senate races, reacted favorably to the Court's conclusion that it could spend money independently and was looking forward to finding a way to use the money to help its Senate candidates in the upcoming elections.<sup>174</sup> The Democratic Party's reaction, on the other hand, was less enthusiastic.<sup>175</sup>

Considering the lack of guidance from the Court concerning what exactly constitutes coordination, the parties find themselves struggling to determine for themselves how they might exercise their newly clarified spending rights without running afoul of the prohibi-

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171. See *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1022 (10th Cir. 1995), *rev'd*, 116 S. Ct. 2309 (1996).

172. See FEC Final Rule, 61 Fed. Reg. 40,961 (1996) (deleting 11 C.F.R. § 110.7(b)(4)) (forbidding political parties from making independent expenditures).

173. See FEC Proposed Rule on Independent Expenditures and Party Committee Expenditure Limitations, 62 Fed. Reg. 24,367 (1997) (explaining FEC's proposal to create a new definition of the term "coordination").

174. See Frank Wolfe, *Ruling Could Change How Parties Spend*, ARK. DEMOCRAT-GAZETTE, June 30, 1996, at B1 (citing election commission report showing that as of June, 1996, National Republican Senatorial Committee had amassed \$12 million compared to Democratic Senatorial Campaign Committee's \$4 million).

175. See *id.* ("Reaction from the Democratic National Committee was more subdued.").

tion on coordination with candidates.<sup>176</sup> One possible approach may be for the political parties to establish a formal policy of isolating party employees involved in making independent expenditures from other party workers who may interact with candidates.<sup>177</sup> The parties await the Commission's opinion regarding whether such a "Chinese wall" approach would be sufficient to prevent the Commission from attempting to enforce the Party Expenditure Provision in connection with this type of arrangement.<sup>178</sup>

Although there seems to be no question that the Court's decision enhanced the stature of political parties compared to other supporters of federal candidates, the question still remains whether stronger parties are beneficial or detrimental to the political system. Those who argue that stronger parties are necessary to counter-balance the ever-increasing power of special interest groups<sup>179</sup> view the Court's ruling as a major step in the right direction.<sup>180</sup> Others, who share Justice Stevens's concerns regarding the amount of control that parties may seek to exercise over candidates' positions on certain issues as a condition of the party's financial support,<sup>181</sup> are troubled by the Court's ruling.<sup>182</sup>

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176. See *Democrats Seek to Foil Republican Spending Plans with FEC Advisory Opinion*, *supra* note 169, at 3 (explaining that "the high court's 7-2 plurality decision in [Colorado Republican Federal Campaign Committee] failed to explain how political parties, which ordinarily maintain close relationships with their candidates, might make independent expenditures without offending FEC regulations which forbid any consultation or coordination between spenders and candidates").

177. See *id.* at 3.

178. See *id.*

179. See Geoffrey M. Wardle, Note, *Time to Develop a Post-Buckley Approach to Regulating the Contributions and Expenditures of Political Parties*: Federal Election Commission v. Colorado Republican Federal Campaign Committee, 46 CASE W. RES. L. REV. 603, 626-27 (1996) (arguing that strengthening political parties may be beneficial); see also Wolfe, *supra* note 174, at B1.

180. See Wolfe, *supra* note 174, at B1 (quoting Haley Barbour, former chairman of Republican National Committee, as saying that "decision guarantees political parties the same free speech rights other individuals and organizations have enjoyed" meaning that "[n]o longer will political committees run by big labor bosses have greater freedom of independent expression in the political debate than the political parties enjoy").

181. See *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2332 (Stevens, J., dissenting) (warning that political parties may "abuse the influence it has over the candidate by virtue of its power to spend"); see also *GOP Facing New Abortion Debate; Proposal Bars Aid to Those Opposed to Ban on 'Partial Birth' Procedure*, WASH. POST, Dec. 30, 1997, at A3 (explaining proposal presently under consideration by Republican National Committee to "prohibit the party from providing financial support" to any Republican candidates who oppose restrictions on late-term abortions).

182. See Note, *Parties, PACs, and Campaign Finance: Preserving First Amendment Parity*, 110 HARV. L. REV. 1573, 1573-74 (1997) (warning that corruption of political process is possible and may result if Supreme Court ultimately adopts Justice Kennedy's view of political parties as unique institutions warranting special First Amendment protection not presently afforded to political action committees).

## CONCLUSION

Perhaps the most that can be said of the Supreme Court's decision in *Colorado Republican* is that it is incomplete. If the Court ultimately decides that the Party Expenditure Provision is unconstitutional on its face, then parties will enjoy even greater freedom to spend money on behalf of federal candidates' campaigns than any other potential supporters. If, on the other hand, the Court eventually determines that the government may continue to restrict political parties' coordinated expenditures, further clarification of the constitutionally relevant differences between independent expenditures, coordinated expenditures, and connected expenditures is needed in order to provide guidance to judges, regulators and political parties. Absent more precise standards by which to evaluate whether particular expenditures are worthy of full First Amendment protection, it may take years for political parties, the Commission and the courts to arrive at a meaningful consensus concerning the extent to which the government may restrict party spending made "in connection with" congressional campaigns.