No. _____

IN THE

Supreme Court of the United States

MISSOURI ETHICS COMMISSION, ET AL.,
Petitioners,

v.

FREE AND FAIR ELECTION FUND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the First Amendment, may a state prohibit political action committees from transferring money to other political action committees?

PARTIES TO THE PROCEEDING

Petitioners are

- the Missouri Ethics Commission;
- Commissioner Don Summers, in his official capacity;
- Commissioner Kimberly Benjamin, in her official capacity;
- Commissioner George Ratermann, in his official capacity;
- Commissioner Wayne Henke, in his official capacity;
- Commissioner Sherman W. Birkes, Jr., in his official capacity;
- Commissioner Cheryl D.S. Walker, in her official capacity; and
- Executive Director Elizabeth Ziegler, in her official capacity.

Petitioners were the appellants and defendants below. The State of Missouri was a defendant below but was dismissed from the case at the district court level and is not a party on appeal.

Respondents are

- the Free and Fair Election Fund;
- Missourians for Worker Freedom;
- American Democracy Alliance;
- Herzog Services, Inc.;
- Farmers State Bank;
- Missouri Electric Cooperatives, doing business as Association of Missouri Electric Cooperatives;
- Association of Missouri Electric Cooperatives, PAC;
- David Klindt;
- Legends Bank; and
- John Elliott.

Respondents were the appellees and plaintiffs below. In the district court, Todd Jones sought but was denied intervention, and he is not a party to this appeal.

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The Eastern District of Missouri's May 17, 2018 Amended Order and Opinion is reported at 252 F. Supp. 3d 723 (W.D. Mo. 2017), and is reprinted in the appendix at A12-A68.

JURISDICTION

The Eighth Circuit issued its opinion September 10, 2018. Petitioners sought and received an extension of time to file from December 9, 2018 to January 8, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment I, provides

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Constitution of the United States, Amendment XIV, provides

> . . . No state shall . . . deprive any person of life, liberty or property without due process of law . . . .

The Missouri Constitution, Article VIII, Section 23 provides, in relevant part

> 1. This section shall be known as the "Missouri Campaign Contribution Reform Initiative."
> 2. The people of the State of Missouri hereby find and declare that excessive campaign contributions to political candidates create the potential for corruption and the appearance of corruption; that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations and special interest groups to exercise a disproportionate level of influence over the political process; that the rising costs of campaigning for political office prevent qualified citizens from running for political officer; that political contributions from corporations and labor organizations are not necessarily an indication of popular support for the corporation's or labor

organization's political ideas and can unfairly influence the outcome of Missouri elections; and that the interests of the public are best served by limiting campaign contributions, providing for full and timely disclosure of campaign contributions, and strong enforcement of campaign finance requirements.

3. (1) Except as provided in subdivisions (2), (3) and (4) of this subsection, the amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed the following:

(a) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general, office of state senator, office of state representative or any other state or judicial office, two thousand six hundred dollars.

(2) (a) No political party shall accept aggregate contributions from any person that exceed twenty-five thousand dollars per election at the state, county, municipal, district, ward, and township level combined.

(b) No political party shall accept aggregate contributions from any committee that exceed twenty-five thousand dollars per election at the state, county, municipal, district, ward, and township level combined.

* * *

(12) Political action committees shall only receive contributions from individuals; unions; federal political action committees; and corporations, associations, and partnerships formed under chapters 347 to 360, RSMo, as amended from time to time, and shall be prohibited from receiving contributions from

other political action committees, candidate committees, political party committees, campaign committees, exploratory committees, or debt service committees. However, candidate committees, political party committees, campaign committees, exploratory committees, and debt service committees shall be allowed to return contributions to a donor political action committee that is the origin of the contribution.

(13) The prohibited committee transfers described in subdivision (12) of this subsection shall not apply to the following committees:

(a) The state house committee per political party designated by the respective majority or minority floor leader of the house of representatives or the chair of the state party if the party does not have majority or minority party status;

(b) The state senate committee per political party designated by the respective majority or minority floor leader of the senate or the chair of the state party if the party does not have majority or minority party status.

(14) No person shall transfer anything of value to any committee with the intent to conceal, from the Missouri ethics commission, the identity of the actual source.

* * *

7. As used in this section, the following terms have the following meanings:

* * *

(4) "Committee", a person or any combination of persons, who accepts contributions or makes expenditures for the primary or incidental purpose of influencing or attempting to

influence the action of voters for or against the nomination or election to public office of one or more candidates or the qualification, passage or defeat of any ballot measure or for the purpose of paying a previously incurred campaign debt or obligation of a candidate or the debts or obligations of a committee or for the purpose of contributing funds to another committee.

* * *

(6) The term "committee" includes, but is not limited to, each of the following committees: campaign committee, candidate committee, continuing committee and political party committee:

* * *

(c) "Continuing committee", a committee of continuing existence which is not formed, controlled or directed by a candidate, and is a committee other than a candidate committee or campaign committee, whose primary or incidental purpose is to receive contributions or make expenditures to influence or attempt to influence the action of voters whether or not a particular candidate or candidates or a particular ballot measure or measures to be supported or opposed has been determined at the time the committee is required to file any statement or report pursuant to the provisions of this chapter. "Continuing committee" includes, but is not limited to, any committee organized or sponsored by a business entity, a labor organization, a professional association, a trade or business association, a club or other organization and whose primary purpose is to solicit, accept and use contributions from the members, employees or stockholders of such

entity and any individual or group of individuals who accept and use contributions to influence or attempt to influence the action of voters.

* * *

(7) "Contribution", a payment, gift, loan, advance, deposit, or donation of money or anything of value for the purpose of supporting or opposing the nomination or election of any candidate for public office or the qualification, passage or defeat of any ballot measure, or for the support of any committee supporting or opposing candidates or ballot measures or for paying debts or obligations of any candidate or committee previously incurred for the above purposes. A contribution of anything of value shall be deemed to have a money value equivalent to the fair market value. "Contribution" includes, but is not limited to:

* * *

(12) "Expenditure", a payment, advance, conveyance, deposit, donation or contribution of money or anything of value for the purpose of supporting or opposing the nomination or election of any candidate for public office or the qualification or passage of any ballot measure or for the support of any committee which in turn supports or opposes any candidate or ballot measure or for the purpose of paying a previously incurred campaign debt or obligation of a candidate or the debts or obligations of a committee; a payment, or an agreement or promise to pay, money or anything of value, including a candidate's own money or property, for the purchase of goods, services, property, facilities or anything of value for the purpose of supporting or opposing

the nomination or election of any candidate for public office or the qualification or passage of any ballot measure or for the support of any committee which in turn supports or opposes any candidate or ballot measure or for the purpose of paying a previously incurred campaign debt or obligation of a candidate or the debts or obligations of a committee. …"Expenditure" includes, but is not limited to:
* * *

(c) The transfer of funds by one committee to another committee;
* * *

(20) "Political action committee", a committee of continuing existence which is not formed, controlled or directed by a candidate, and is a committee other than a candidate committee, political party committee, campaign committee, exploratory committee, or debt service committee, whose primary or incidental purpose is to receive contributions or make expenditures to influence or attempt to influence the action of voters whether or not a particular candidate or candidates or a particular ballot measure or measures to be supported or opposed has been determined at the time the committee is required to file any statement or report pursuant to the provisions of this chapter. Such a committee includes, but is not limited to, any committee organized or sponsored by a business entity, a labor organization, a professional association, a trade or business association, a club or other organization and whose primary purpose is to solicit, accept and use contributions from the members, employees or stockholders of such entity and any individual or group of

individuals who accept and use contributions to influence or attempt to influence the action of voters. Such committee shall be formed no later than sixty days prior to the election for which the committee receives contributions or makes expenditures.

* * *

8. The provisions of this section are self-executing. All of the provisions of this section are severable. If any provision of this section is found by a court of competent jurisdiction to be unconstitutional or unconstitutionally enacted, the remaining provisions of this section shall be and remain valid.

PETITION FOR WRIT OF CERTIORARI

The Missouri Ethics Commission, its commissioners, and its director petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit.

INTRODUCTION

This petition is about whether the Missouri Constitution's prohibition on transfers of funds between political action committees comports with the First Amendment. In November 2016, Missouri voters approved a new amendment to their state constitution, known as Amendment 2. This law aims to curtail the appearance of corruption caused by large campaign contributions and to give voters confidence that they can determine who is behind each campaign or message. Missouri voters passed this law following public outcry after years of nearly unfettered spending in Missouri political campaigns.

At issue in this petition is the constitutionality of one of Amendment 2's reforms. Amendment 2 restricts transfers among political action committees. This limited, but important, restriction is subject to intermediate, "exacting" scrutiny under the First Amendment. And, under this Court's precedent, the restriction survives this level of scrutiny because it is closely drawn to serve important state interests: reducing the fact and appearance of public corruption, promoting election transparency, and avoiding the circumvention of contribution limits.

The Eighth Circuit held this new part of the Missouri Constitution fails exacting scrutiny under the First Amendment to the U.S. Constitution. In doing so, the court undervalued several of these state

interests and disregarded precedent from the Eleventh Circuit holding that these interests justify prohibiting transfers among political action committees in Alabama.

STATEMENT OF THE CASE

This case is about the constitutionality of a citizens' ballot initiative that prohibits transfers among political action committees.

During the last presidential election, Missouri voters approved Amendment 2, an amendment to the Missouri Constitution to put in place a comprehensive regime of campaign finance reforms. Shortly thereafter, several committees and contributors sued challenging several of Amendment 2's provisions under the First Amendment to the United States Constitution.

The district court permanently enjoined the Missouri Ethics Commission from enforcing certain provisions of Amendment 2.

On appeal, the Eighth Circuit upheld the invalidity of one critical component of the amendment: the court's injunction barring the Commission from enforcing Amendment 2's prohibition on political action committees receiving contributions from other political action committees.

I. Missourians approved Amendment 2 to reduce actual and perceived corruption, promote transparency, and prevent circumvention of campaign finance laws.

Before Amendment 2, Missouri was "home to some of the weakest ethics and campaign finance laws in the nation." Dan Schnurbusch, *The Wild Mid-West*, 80 MO. L. REV. 1209 (2015). Nine years before voters

approved Amendment 2, the Missouri General Assembly repealed Missouri's then-existing limits on contributions to candidates in state elections, L.2008, S.B. No. 1038, § A. Missouri thus did not have individual contribution limits of any kind from 2008 to 2016.

As the cost of campaigns rose, many Missouri voters expressed concern about the size of political contributions, the lack of transparency among political figures, and the ensuing appearance of corruption. The leader of the committee proposing the initiative, Todd Jones, observed, "If you give a million dollars to a candidate, whose call are you going to take? Are you going to take mine? Or are you going to take the donor's?"[1]

An editorial in the St. Louis Post-Dispatch made the same point: "if voters really want to clean up Jefferson City," the editorial said, they should pass this measure to "tell Missouri politicians that voters are fed up with six- and seven-figure donations from those with business before the state; fed up with people collecting state lawmakers like baseball cards; fed up with anonymous dark-money contributions and the skullduggery of front groups and committee transfers; fed up with a system that benefits campaign consultants, influence peddlers and TV stations at the public's expense."[2]

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[1] Jason Rosenbaum, *Amendment 2 could bring campaign donation limits back to Missouri*, St. Louis Public Radio (Oct. 14, 2016), http://news.stlpublicradio.org/post/amendment-2-could-bring-campaign-donation-limits-back-missouri#stream/0.

[2] Editorial Board, *Editorial: Vote yes on Amendment 2. Stop the fundraising insanity*, St. Louis Post-Dispatch, http://www.stltoday.com/news/opinion/columns/the-platform/editorial-vote-yes-on-amendment-stop-the-fundraising insanity/article_acc5cd8c-c438-59b9-b4f3-8ea1245dd425.html.

The voters overwhelmingly agreed. In November 2016, Amendment 2 passed with 69.95% of the vote. App. A13. In formal findings memorialized in the law's preamble, the voters explained that they passed Amendment 2 to restore public accountability and personal integrity in government. They stated "that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations and special interest groups to exercise a disproportionate level of influence over the political process"; "that excessive campaign contributions to political candidates create the potential for corruption and the appearance of corruption"; and "that political contributions from corporations and labor organizations are not necessarily an indication of popular support for the corporation's or labor organization's political ideas and can unfairly influence the outcome of Missouri elections." Mo. Const. art. VIII § 23.2. They also observed "that the rising costs of campaigning for political office prevent qualified citizens from running for political office." *Id*.

II. Amendment 2's comprehensive reforms included contribution caps and a prohibition on transfers among political action committees.

To achieve its goals, Amendment 2 regulates the spending and receiving of money in state political and judicial elections in many ways, including, among other things, dollar-limit caps on contributions to candidate committees and restrictions on transfers among political action committees (PACs).

Amendment 2 imposes an inflation-indexed cap on how much anyone can contribute to elect a candidate for office in a state election, starting at $2,600. Mo. Const. art. VIII, § 23.3(1)(a). As this Court has recognized, base limits like these constitutionally

"restrict[] how much money a donor may contribute to a particular candidate or committee." *McCutcheon v. F.E.C*, 572 U.S. 185, 192 (2014) (citing 2 U.S.C. § 441a(a)(1)).

To promote transparency and to prevent evasion of Amendment 2's contribution limits, Amendment 2 also restricts contributions between and among political action committees. Mo. Const. art. VIII, § 23.3(12). A political action committee, also known as a PAC or a continuing committee, is a catchall term for any group of continuing existence that raises or spends money to influence elections but that is not formed for a particular ballot measure, judicial retention election, or candidacy. *Id*. §§ 23.7(4); 23.7(6)(c); 23.7(20). Amendment 2 provides that "[p]olitical action committees . . . shall be prohibited from receiving contributions from other political action committees . . . ." *Id*. § 23.3(12).

Under Amendment 2, political action committees remain free to accept contributions from many other sources, including individuals, unions, corporations, federal political action committees, and House and Senate political party committees. Mo. Const. art. VIII, § 23.3(12)–(13). The restriction on PAC-to-PAC contributions also does not apply when the recipient makes only independent expenditures. App. A57–59.

By prohibiting the shuttling of money among political action committees, Amendment 2 prevents political action committees from being used as actual or perceived vehicles to defeat regulations like contribution limits and disclosure requirements. As the Eleventh Circuit held, a restriction on PAC-to-PAC contributions serves "an important anti-corruption interest while only marginally impacting political dialogue." *Ala. Democratic Conference v. Attorney Gen. of Ala.*, 838 F.3d 1057, 1070 (11th Cir.

2016), cert. denied sub nom. *Ala. Democratic Conference v. Marshall*, 137 S. Ct. 1837 (2017).

III. Two groups of political participants alleged that Amendment 2 infringed their First Amendment rights.

Right after Amendment 2's enactment, two groups of campaign donors and committees filed suits challenging several parts of the new law, including the prohibition on PAC-to-PAC transfers. App. A3–4. Only that restriction is at issue in this petition. These groups sued the Missouri Ethics Commission, its members, and its director. App. A1. These public officials enforce Amendment 2. Mo. Const. art. VIII, §§ 23.3(14), 23.4.

After consolidation and a hearing on the merits, the U.S. District Court for the Western District of Missouri permanently enjoined the Commission from enforcing the PAC-to-PAC transfer restriction. App. A12–14. Applying exacting scrutiny, the district court held that the provision facially conflicts with the First Amendment. App. A13. It reasoned that, "[w]hile evasion of campaign finance limits is an important interest, Section 23.3(12)'s absolute prohibition on PAC to PAC transfers is not closely drawn" to this interest because PACs are independent actors subject to a dollar-limit cap on their contributions to candidates. App. A63–64. The people thus "do not have an interest in preventing corruption or the appearance thereof in PAC to PAC contributions among entities that are, by law, independent actors." App. A64.

IV. The Eighth Circuit held Amendment 2's prohibition on PAC-to-PAC transfers unconstitutional on its face.

The Commission appealed that ruling and the Eighth Circuit affirmed. The Eighth Circuit held that the PAC-to-PAC transfer prohibition implicates free speech and association by "prohibit[ing] a PAC from *making* contributions to other PACs." App. A5.

It correctly held that laws like Amendment 2 that regulate political contributions are subject to exacting scrutiny. *Id*. (citing *McCutcheon*, 572 U.S. at 197). To meet that standard, the challenged law must advance a sufficiently important state interest and employ means closely drawn to avoid unnecessary abridgment of First Amendment freedoms. *Id*. A restriction on First Amendment freedoms is unconstitutional on its face if "no set of circumstances exists under which [the restriction] would be valid." *Id*. (quoting *Phelps-Roper v. Ricketts*, 867 F.3d 883, 891–92 (8th Cir. 2017) and citing *United States v. Stevens*, 559 U.S. 460, 472 (2010)).

Purporting to apply exacting scrutiny, the court next held that Missouri's PAC-to-PAC transfer restriction did not advance the State's important state interest in preventing the fact or appearance of *quid pro quo* corruption of political candidates. App. A6–9. In its view, the provision "does little, if anything, to further" the State's anticorruption interests. App. A7. In its view, because Amendment 2 "defines a PAC as a committee that is 'not formed, controlled or directed by a candidate,' Mo. Const. art. VIII, § 23.7(20)," and "PACs operate independently from candidates," the risk of corruption is greater when an individual donates directly to a candidate, and is less when an individual donates money through one or more PACs that in turn funnel money to a candidate. App. A6–A7.

The Eighth Circuit also rejected the argument that a donor could use PAC-to-PAC transfers to evade the individual contribution limits. App. A7. It recognized that "a donor could contribute large, unearmarked sums of money to a candidate by laundering it through a series of PACs that he controls." *Id*. But it did not agree that this circumvention of the contribution limits creates a risk of quid pro quo corruption or its appearance. Instead, applying a standard that resembled strict scrutiny, the court required "evidence of any occasions before the amendment where PAC-to-PAC transfers led to the circumvention of contribution limits," and it faulted the record for lacking real-world examples by donor name or other identifying transaction of this circumvention. *Id*. The court also appeared to fault Amendment 2 for being underinclusive in its pursuit of anti-circumvention devices because it lets a donor make independent expenditures or "contribute directly to multiple PACs." *Id*.

The Eighth Circuit next rejected the argument that the PAC-to-PAC transfer restriction "promot[ed] transparency." App. A8–10. The Commission had argued that, because PACs may transfer funds back and forth between each other in complex maneuvers, "PAC-to-PAC transfers obscure the source of 'large' donations and make it 'nearly impossible for the Commission to enforce the State's individual contribution limits.'" App. A8. But the court held that transparency was better promoted by requiring disclosure of PAC donations, by prohibiting contributing to a PAC "with the purpose of concealing the source," or by capping the number of affiliated PACs. App. A8–10 (citing Mo. Const. art. VIII, §§ 23.3(7) & (14), 23.7(19) & Mo. Rev. Stat. §§ 130.041, 130.057).

The court also rejected the Commission's argument that "additional disclosure requirements would not help the public to track the source of donations that are co-mingled with the rest of a PAC's funds and shuttled through a series of other PACs before reaching a candidate." App. A10. The court held that, "If disclosure laws will not help the *public* discern who gave money to whom, then we are hard pressed to see how a *candidate* would identify an original donor to create a risk of *quid pro quo* corruption." *Id*. The court did not consider that a donor could conceal the money's original source from the public by routing it back and forth through various committee transfers while quietly telling the candidate who first put up the money.

The Eighth Circuit also held that Missouri's transfer restriction was not "closely drawn to avoid unnecessary abridgment" of First Amendment freedoms. App. A5. "Other regulations like contribution limits and disclosure requirements" already protected against corruption. App. A9. And other "available alternatives" served the same purpose but were less restrictive. App. A9.

The court thus refused to follow the Eleventh Circuit's decision upholding a restriction on PAC-to-PAC transfers. It said that the Eleventh Circuit had upheld Alabama's law because Alabama had no campaign contribution limits. App. A8–9. And it cited evidence in the Alabama case showing that Alabamans viewed PAC-to-PAC transfers as a tool for concealing donor identity. App. A8–9. Unlike in Alabama, Missouri has contribution caps whose circumvention the PAC-to-PAC transfer prohibition prevents and the Missouri people proposed and enacted Missouri's law to stop what they viewed as corruption. But, rather than finding Missouri's anti-

circumvention interest stronger, the Eighth Circuit held that Missouri's "anti-corruption interest" was "diminished" compared to Alabama's. App. A9.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision holding Missouri's constitutional amendment invalid conflicts with the Eleventh Circuit's decision upholding an Alabama prohibition on PAC-to-PAC transfers. As the Eleventh Circuit held, these laws serve "an important anti-corruption interest" while "only marginally impacting political dialogue." *Ala. Democratic Conference v. Attorney Gen. of Ala.,* 838 F.3d 1057, 1070 (11th Cir. 2016). But the Eighth Circuit held that Missouri's transfer restriction does "little, if anything" to serve anti-corruption interests while unnecessarily infringing on political dialogue. App. A7, A9–11.

This Court should grant certiorari to review this direct split on a recurring question of federalism and the First Amendment. Missouri's law directly advances important state interests in preventing the fact or appearance of corruption that may result from allowing circumvention of contribution limits and that can result in a non-transparent system.

I. The Eighth Circuit and Eleventh Circuit disagree about the constitutionality of state prohibitions on PAC-to-PAC transfers.

The lower courts are divided about the constitutionality of PAC-to-PAC transfer restrictions. In Alabama, the people may prohibit political action committees from transferring money to each other. In Missouri and the other states of the Eighth Circuit, the people may not. In addition to directly conflicting results, this circuit split raises at least four points of

conflict in the courts' reasoning: two points about the State's interests, and two about the law's burdens on speech.

A. The courts disagree about whether PAC transfer prohibitions advance state interests.

First, the courts disagree about whether PAC transfer prohibitions advance state interests in transparency, averting corruption, and avoiding circumvention of campaign finance limits.

Transparency. The circuit courts disagree about whether PAC-to-PAC transfer prohibitions advance transparency, and in turn, prevent actual and apparent quid pro quo corruption.

For the Eleventh Circuit, "'transparency plainly is related to and furthers the State's interest in preventing corruption and the appearance of corruption.'" *Ala. Democratic Conference*, 838 F.3d at 1065 (citation omitted). A PAC-to-PAC transfer prohibition advances transparency by making donor information more easily available to the average voter. *Id*. at 1064–65. And in turn disclosure of donors' identities "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976). "[A] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* at 67. "The State's proffered interest in transparency thus ties into its interest in preventing corruption to justify regulating transfers between PACs." *Ala. Democratic Conference*, 838 F.3d at 1065.

As the Eleventh Circuit explained, quid pro quo corruption is, in many ways, a problem of asymmetric

information: big money donors and political candidates know more about how to trace donations than the average voter does. *See id.* When contributions pass through multiple PACs, it creates an information gap. Those in the know can trace the donation's path and are motivated to do so; voters will have more difficulty tracing it and have little incentive to do so. PACs "can manipulate the system and attract their own elite power brokers, who operate in ways obscure to the ordinary citizen." *Randall v. Sorrell*, 548 U.S. 230, 265 (2006) (Kennedy, J., concurring). But voters "can only assess whether there has been a *quid pro quo* exchange if [they are] able to identify the party making the payment." *Ala. Democratic Conference*, 838 F.3d at 1065. PAC-to-PAC transfers prevent that from happening. PAC-to-PAC transfers thus undermine disclosure laws. Voters cannot "assess whether there has been a *quid pro quo* exchange" if they lack the information and incentives to follow the trail until they "identify the party making the payment." *Id.*

The Eighth Circuit, however, held that a PAC-to-PAC transfer prohibition does not "materially" advance transparency. App. A8. "[O]ther provisions," it said, did "more"—contribution caps, disclosure laws, and a prohibition on making PAC contributions with the "purpose" of concealment. *Id.* (citing Mo. Const. art. VIII, §§ 23.3(1)(a), (7) & (14), 23.7(19); Mo. Rev. Stat. §§ 130.041, 130.057)).

The question, then, is whether disclosure laws are effective enough to close the information gap between donors and candidates on one side, and voters on the other, despite PAC-to-PAC transfers. The two circuits disagree on that transparency question.

Circumvention. The circuit courts also disagree about whether PAC-to-PAC transfer prohibitions

prevent circumvention of valid campaign contribution limits, and in turn, prevent actual and apparent quid pro quo corruption.

The Eleventh Circuit held that Alabama's PAC-to-PAC transfer prohibition advanced sufficiently important state interests, and that anti-circumvention interests are valid state interests that might be served by this kind of law, even though Alabama did not have contribution limits. *Ala. Democratic Conference*, 838 F.3d at 1060. Yet the Eighth Circuit held that Missouri's PAC-to-PAC transfer prohibition did not serve anti-circumvention interests, even though Missouri *does* have contribution limits. App. A7–9.

B. The courts disagree about whether PAC transfer prohibitions are closely drawn.

The two courts also disagree about the application of exacting scrutiny to a transfer prohibition, questioning the fit between the state interest and the law's burdens and benefits.

Under exacting scrutiny, a law regulating political contributions must be "'closely drawn to avoid unnecessary abridgement of associational freedoms.'" *McCutcheon v. F.E.C.*, 572 U.S. 185, 197 (2014) (citation omitted). That is, a law may not "impose burdens upon First Amendment interests that (when viewed in light of the statute's legitimate objectives) are disproportionately severe." *Randall*, 548 U.S. at 237 (plurality op.). This "less rigorous standard" requires "proper deference to [legislatures'] ability to weigh competing constitutional interests in an area in which [they] enjoy[] particular expertise." *McConnell v. F.E.C.*, 540 U.S. 93, 137 (2003). It requires only a "reasonable" fit, not a "perfect" one. *McCutcheon*, 572 U.S. at 218 (citation omitted).

Burden. The circuit courts disagree about the burden a PAC transfer prohibition places on speech and association.

The Eleventh Circuit found that a PAC-to-PAC prohibition only "marginally impact[s] political dialogue." *Ala. Democratic Conference,* 838 F.3d at 1070. A PAC-to-PAC transfer prohibition "does not limit the amount of money [a PAC] can raise; it only limits [a PAC's] ability to raise money through a specific type of donation—PAC-to-PAC transfers." *Id.* Nor does the prohibition "directly affect [a PAC's] campaign contributions or independent expenditures." *Id*. For that court, this burden is not severe at all, let alone disproportionately severe. *Id*.

The Eighth Circuit, however, found that a PAC transfer prohibition unnecessarily infringes on first amendment rights. App. A9–11. In doing so, it did not engage the Eleventh Circuit's analysis. Instead, the Eighth Circuit hardly touched on the law's burden, noting only that "[r]estricting the recipients to who a PAC can donate" limits the PAC's rights. App. A5. Instead, the Eighth Circuit focused on what it considered "less restrictive alternatives." App. A9–10. And this emphasis on "the availability of less restrictive alternatives" led it to find that Missouri's PAC transfer prohibition was not closely drawn. App. A10. But an alternative is only "less restrictive" if it in fact burdens speech less. Choosing among alternative policies that only marginally burden speech and association is precisely the kind of "reasonable" judgment that should be left to state legislatures. *See McConnell*, 540 U.S. at 137.

The Eleventh Circuit in contrast found it "difficult to imagine a less restrictive means" than a PAC-to-PAC transfer prohibition. *Ala. Democratic Conference*, 838 F.3d at 1070. No less restrictive alternative

"would still address" the same corruption concerns as a PAC transfer law. *Id*. Again, if transparency is the goal, a PAC transfer prohibition makes disclosure laws more effective. PACs are often used to "obscure" information, *Randall*, 548 U.S. at 265 (Kennedy, J., concurring), and shuttling funds through multiple PACs does exactly that.

The Eleventh Circuit also emphasized that the "closely drawn" standard of review "does not even" require a State to use the least restrictive means. *Ala. Democratic Conference*, 838 F.3d at 1070. What matters is a *reasonable* fit. Among reasonable options, federal courts should defer to state legislatures. *McConnell*, 540 U.S. at 137.

Thus, the question dividing the courts is whether the burden a PAC-to-PAC transfer prohibition places on speech and association is justified under exacting scrutiny. The Eleventh Circuit held the burden justified. The Eight Circuit's opinion over-estimates the burden and the level of scrutiny. Missouri's law prevents candidate contributions made by shuttling donations through multiple PACs: individuals are still free to contribute to PACs, and PACs are still free to make independent expenditures or to contribute directly to candidates.

Benefit. The two courts also disagree about the transfer prohibition's fit to the state's interests because they also dispute the law's benefits.

Just as when it weighed the law's burdens, the Eleventh Circuit in contrast found it "difficult to imagine a less restrictive means" than a PAC-to-PAC transfer prohibition, with its accompanying benefits. *Ala. Democratic Conference*, 838 F.3d at 1070. No less restrictive alternative "would still address" the same corruption concerns as a PAC transfer law. *Id*.

The Eighth Circuit claimed that unspecified "enhanced disclosure requirements" would better yield transparency benefits. App. A9–10. The Eighth Circuit also suggested Missouri combine an anti-proliferation law with monetary caps on PAC-to-PAC transfers. App. A9–10. This, it argued, would make PAC-to-PAC transfers a less attractive means for circumventing individual contributions limits. *Id.*

In sum, the Eleventh Circuit found no less restrictive means and the Eighth Circuit found several. That outcome is troubling. If federal courts disagree about whether less restrictive means even exist, then they should let the people and state legislatures choose among reasonable alternative policies. *McConnell*, 540 U.S. at 137.

C. These disagreements cannot be papered over by factual distinctions.

The Eighth Circuit distinguished the Eleventh Circuit's holding rather than follow it, claiming that it avoided a circuit split because of factual differences between the cases. App. A8–9. But a closer look at the distinctions it cites only confirms the split.

The Eighth Circuit first purported to find an evidentiary distinction: Alabama citizens viewed PAC-to-PAC transfers as "a tool for concealing donor identity." App. A9. The Eighth Circuit said Missourians did not. *Id.*

But the Eighth Circuit ignored much more direct evidence about the views of Missouri citizens: Missourians approved Amendment 2 at a nearly seventy percent rate because of similar concerns about actual or apparent corruption. Mo. Const. art. VIII, § 23.2. Better evidence of how Missourians view PAC-to-PAC transfers would be hard to find.

The Eighth Circuit also noted that Missouri has contribution caps, while Alabama did not. App. A9. This, the appeals court held, "diminished" Missouri's anti-corruption interest compared to Alabama's. *Id.*

But the opposite is true. Missouri has a stronger anti-corruption interest. Unlike Alabama, it has contribution caps, and so it has an anti-circumvention interest apart from Alabama's transparency interest. *F.E.C. v. Beaumont*, 539 U.S. 146, 155 (2003).

As for transparency, Missouri's concerns remain the same as Alabama's with or without caps on PAC contributions. Either way, PAC-to-PAC transfers are one avenue to obscure the original source of campaign donations from public view, and Missouri advances its anticorruption interests by redirecting those donations down a more visible path. *See Buckley*, 424 U.S. at 67.

Finally, a significant legal difference dwarfs any factual distinctions between the two cases. The Eighth Circuit struck down Missouri's law on its face. It thus found "'no set of circumstances'" in which Missouri's PAC transfer prohibition would be valid. App. A5 (citation omitted). The Eleventh Circuit upheld Alabama's transfer prohibition even as applied to a PAC that kept separate bank accounts for independent expenditures and direct contributions. *Ala. Democratic Conference*, 838 F.3d at 1065–69. The broad scope of the Eight Circuit's facial ruling sweeps away any distinguishing factors and directly conflicts with the Eleventh Circuit's position.

In sum, the lower courts have given the Constitution a different meaning in Missouri than in Alabama. "Congress historically required this Court to review any decision of a federal court of appeals holding that a state statute violated the Federal

Constitution." *City. of Maricopa, Ariz. v. Lopez-Valenzuela*, 135 S. Ct. 2046, 2046 (2015) (Alito, J., dissenting from denial of certiorari) (citing 28 U.S.C. § 1254(2) (1982 ed.)). The Court should thus exercise its discretion to review these cases "with a strong dose of respect for state laws." *Id.* That means, at the very least, resolving circuit splits that prohibit some states from doing what other states may do.

State laws prohibiting PAC transfers are either constitutional or they are not. The Court should grant review so that the First Amendment will apply the same way in all states.

II. Missouri's prohibition on transfers among political action committees satisfies intermediate, exacting scrutiny.

On the merits, Amendment 2's prohibition of transfers among political action committees satisfies intermediate scrutiny. The intermediate, exacting scrutiny set forth in *Beaumont*, 539 U.S. at 155 governs. App. A35–37. Less rigorous than heightened scrutiny, this standard accords the people deference for their choice about how to weigh competing constitutional interests and allows them to "'anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.'" *Ala. Democratic Conference*, 838 F.3d at 1063 (quoting *McConnell*, 540 at 137).

Under exacting scrutiny, a campaign finance law is constitutional if it serves a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. *McCutcheon*, 572 U.S. at 196–97 (quoting *Buckley*, 424 U.S. at 21). There must be "a fit that is not necessarily perfect, but reasonable; that represents

not necessarily the single best disposition but one whose scope is in proportion of the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." *Id*. at 218 (quotation and ellipses omitted).

Missourians have an important—indeed, compelling—interest in preventing the fact or appearance of corruption that may result from political contributions, and this interest justifies imposing limitations on direct contributions to campaigns. *See McCutcheon*, 572 U.S. at 198–99. Missouri's PAC-to-PAC limitation directly advances—and is carefully tailored to advancing—this anticorruption interest in at least two important ways.

First, this Court has recognized that the State's prerogative to limit contributions to political campaigns necessarily entails a concomitant interest in preventing circumvention of those lawful contribution limits. In *Beaumont*, the Court held that a State has important anti-corruption interests in preventing the circumvention of contribution limits, 539 U.S. at 155, and in *California Medical Association v. F.E.C.*, 453 U.S. 182, 201 (1981), the Court held that a law limiting contributions to committees lawfully serves this interest. Missouri's PAC-to-PAC limitation directly advances these same interests by preventing savvy donors from using PACs to circumvent Missouri's lawful contribution limitations. This adds a reinforcing element to Missouri's interests not present in Alabama's case.

Second, courts have recognized that ensuring transparency about the source of political contributions prevents both the fact and the appearance of corruption. *See, e.g.*, *Buckley*, 424 U.S.

at 67. The Eleventh Circuit upheld Alabama's similar law on this basis. *Ala. Democratic Conference*, 838 F.3d at 1064–65.

The PAC-to-PAC limitation directly advances these important and compelling governmental interests, and is carefully tailored to achieve them without unnecessarily stifling political dialogue.

A. The limitation on PAC-to-PAC contributions directly advances the State's interest in preventing corruption and the appearance of corruption, because it prevents circumvention of valid contribution limitations.

The PAC-to-PAC transfer prohibition directly advances the State's interest in preventing the fact and appearance of corruption by preventing circumvention of contribution limitations.

The State's prerogative to avert corruption by capping contributions necessarily entails a concomitant authority to prevent the "circumvention of valid contribution limits." *Beaumont*, 539 U.S. at 155 (citations and brackets omitted). For example, *Beaumont* upheld the federal prohibition on contributions by corporations to campaign committees in part because contributions could be used to circumvent individual contribution limits. *Id*. Allowing sophisticated donors to "exceed the bounds imposed on their own contributions by diverting money through the corporation" would erode those individual limits. *Id*.

Beaumont's rationale applies with equal force to Amendment 2's limitation on PAC-to-PAC contributions. Political committees are "essentially conduits for contributions to candidates." *Cal. Med. Ass'n*, 453 U.S. at 203 (Blackmun, J., concurring).

Thus, these committees can enable sophisticated donors to funnel funds to political candidates "in ways obscure to the ordinary citizen." *Randall*, 548 U.S. at 265 (Kennedy, J., concurring). Donors can create a complex network of PACs that contribute money among one another, obscuring the original donors and making it impossible for those not in the know to discern whether individual donors have exceeded the $2,600 individual contribution limitations.

For decades, PACs were used for precisely this corrupt purpose in Missouri elections. *See, e.g.*, Jason Rosenbaum, *Senate Leaders Dislike Campaign Donor Limits*, COLUMBIA TRIB. Sept. 20, 2008 (explaining that Missouri's former campaign-finance regime had "a glaring loophole" that had "allowed for candidates to use a Byzantine clump of legislative district committees to channel huge donations" while obscuring the sources of those funds); Steve Bell, *Missouri Politics: Hiding Big Donations is Easy and Legal*, KCUR 89.3, May 3, 2012 (noting that without a prohibition on PAC-to-PAC contributions, "[i]t is literally legal for a politician to take $1 million from one special interest or another, launder those funds and then do things that have directly to do with that special interest, and then tell their constituents they never took money from that special interest").

The State need not accept that result. Instead, the State may "restrict[] contributions by various organization [as] hedges against their use as conduits for circumvention of valid contribution limits." *Beaumont*, 539 U.S. at 155. (quotation and brackets omitted). This includes restricting contributions to PACs. In *California Medical Association*, this Court upheld a limit on contributions to PACs because that limit "prevent[ed] circumvention of the very limitations on contributions that this Court upheld in

Buckley." 453 U.S. at 197–98. As the Court recognized, if the First Amendment were to prevent the state from restricting contributions to PACs, then donors could easily use contributions to PACs to circumvent valid contribution limits. *Id*. at 198–99.

Amendment 2 adopts the approach endorsed in both *Beaumont* and *California Medical Association* by preventing donors from evading Missouri's contribution limits by funneling funds through a series of PACs. With no law in place, PACs could commingle funds through transfers among each other and then contribute more collectively than a single PAC could individually. This raises the appearance of quid pro quo corruption in just the same way as a regime without contribution limits. This is why the First Amendment permits Missouri to implement reasonable measures like Amendment 2's limitation on PAC-to-PAC contributions to prevent donors "from using a political committee to do an end-run around" their campaign-finance laws. *Catholic Leadership Coal. v. Reisman*, 764 F.3d 409, 443 (5th Cir. 2014). And, because Missouri's interest extends to "'safeguarding against the appearance of impropriety'" it can legislate to remove even "'the *opportunity* for abuse.'" *See McCutcheon*, 572 U.S. at 198 (quoting *Buckley*, 424 U.S. at 30) (emphasis added).

But the court below did not heed, or even cite, the *Beaumont* and *California Medical Association* holdings that a State has a valid anti-circumvention interest in this area. But disregarding these cases by considering them overruled is a role reserved only for this Court. If "a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls,

leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

The Eleventh Circuit, in contrast, correctly applied these precedents. The Eleventh Circuit held that a prohibition on PAC-to-PAC transfers comports with the First Amendment because laws like these are closely drawn to the important state interests in preventing corruption. *Ala. Democratic Conference*, 838 F.3d at 1063. Just as in Alabama, "before [Amendment 2's] passage, PAC-to-PAC transfers were viewed by [Missouri] citizens as a tool for concealing donor identity, thus creating the appearance that PAC-to-PAC transfers hide corrupt behavior." *See id.* at 1070. And, without doubt, Missouri's anti-corruption interests are more compelling than Alabama's because Missouri has contribution limits to circumvent and Alabama does not.

The Eighth Circuit rejected the argument that a donor could use PAC-to-PAC transfers to evade the individual contribution limit because, in its view, Missouri could not "point to evidence of any occasions before the amendment where PAC-to-PAC transfers led to the circumvention of contribution limits." App. A7.

But, in doing so, the Eighth Circuit held Missouri to too heavy an evidentiary burden. Missouri did not even *have* contribution limits for several years before Amendment 2, *see* L.2008, S.B. No. 1038, § A, so it could not have demonstrated prior instances of circumvention. And the "closely drawn" standard requires courts to give the States "sufficient room to *anticipate*" circumvention concerns, not just room to react. *McConnell*, 540 U.S. at 137 (emphasis added). And, although not in the record, after the contribution

limits were put in place but the PAC-to-PAC transfer prohibition was enjoined, Missouri has seen large PAC to PAC transfers.

Plus, the State's anticorruption interest in preventing circumvention of campaign finance limits exists as a value judgment, as *Beaumont* and *California Medical Association* recognized, and so the amount of evidence justifying the interest is immaterial. The interest in avoiding corruption and promoting transparency rests on "a claim that good government requires greater transparency." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 16 (D.C. Cir. 2009). "That is a value judgment . . . of the people's representatives, and repeatedly endorsed by the Supreme Court as sufficient to justify disclosure statutes." *Id.* (citations omitted).

For this reason, evidence to support this value judgment is unnecessary under the deferential standard of exacting, intermediate scrutiny. But even if evidence were necessary, this case provides it. The fact of the ballot initiative's passage, as well as its findings, and the public debates surrounding its ratification, make clear that the public held this view. In *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), the Supreme Court relied on news articles—including an op-ed from the *St. Louis Post-Dispatch*—to justify Missouri's former campaign-finance regime. *Id.* at 393–94. *Shrink* held that these newspaper accounts, as well as the result of the statewide vote on the law, were evidence sufficient to confirm that Missouri's law reflected anti-corruption concerns. *Id.* at 393. The law, its preamble, and news articles in this record likewise go to show the public's evaluation of the risks in the system—the public perceived an opening for corruption in the flow of money through multiple committees. They rebut the claim that it is

implausible to think that any rational person would use PACs to funnel money to candidates rather than use independent expenditures.

The Eighth Circuit also held that the law does not protect against circumvention because there are easier ways to circumvent Missouri's contributions limits, such as unlimited independent expenditures. App. A7–8. But if independent expenditures were an adequate substitute for direct contributions, then *no* statutory safeguards could constitutionally prevent circumvention, and of course this Court has never held that. *McCutcheon*, 572 U.S. at 200–01.[3]

B. The limitation on PAC-to-PAC contributions directly advances the State's interest in preventing corruption and the appearance of corruption, because it ensures transparency.

The PAC-to-PAC limitation also directly advances the State's interest in preventing actual corruption or the appearance of corruption in a second critical way: by promoting transparency.

In cases like this, unlike in a run-of-the-mill contribution limit case, the state's anti-corruption interest includes an informational interest. Members of the public can only assess whether there has been a quid pro quo exchange if they can identify the party

[3] A ballot initiative called "Clean Missouri," passed after the Eighth Circuit's opinion, also makes circumvention harder. It establishes "a rebuttable presumption that a contribution . . . is made or accepted with the intent to circumvent" individual contribution limits when it is received from a PAC "that is primarily funded by a single person, individual, or other committee that has already reached its contribution limit." Mo. Const. art. III, § 2(d). This change makes the transfer prohibition even more effective, and serves as further evidence of Missourians' concerns about circumvention.

making the payment. *Ala. Democratic Conference*, 838 F.3d at 1065. When disclosure results only in obfuscation, the public is left with the impression that the tangled web of transfers is designed to obscure the original source for some nefarious purpose. *Id*. After all, "when individuals and corporations speak through committees, they often [do so] to conceal the true identity of the source." *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298 (1981).

For that reason, as the Eleventh Circuit held, "transparency plainly is related to and furthers the State's interest in preventing corruption and the appearance of corruption insofar as one can only assess whether there has been a *quid pro quo* exchange if one is able to identify the party making the payment." *Ala. Democratic Conference*, 838 F.3d at 1065.

Amendment 2's limitation on PAC-to-PAC contributions thus ensures the transparency necessary to identify and deter potentially improper transactions as well as to preserve public confidence in the integrity of Missouri's elections. *See id*. PAC-to-PAC contributions were used for years to obscure the source of large contributions in Missouri elections. *E.g.,* Jason Rosenbaum, *Senate Leaders Dislike Campaign Donor Limits*, COLUMBIA TRIB. Sept. 20, 2008; Steve Bell, *Hiding Big Donations Is Easy And Legal*, KCUR 89.3 May 3, 2012. Allowing funds to be shuffled among countless committees like a pack of cards would make it difficult for the Commission to gain the information necessary to enforce the State's individual-contribution limits.

The Eighth Circuit's decision suggests that the people's interest in transparency extends only to disclosure of individual transactions. App. A8. But if

that were true, the State cannot promote transparency in other ways, including through source-contribution limits.

The Eighth Circuit also misunderstood the transparency value of this law. It said, "If disclosure laws will not help the *public* discern who gave money to whom, then we are hard pressed to see how a *candidate* would identify an original donor to create a risk of *quid pro quo* corruption." App. A10.

The Eighth Circuit's analysis ignores common sense. The State's concern is that PACs may "operate in ways obscure to the ordinary *citizen*," *Randall*, 548 U.S. at 265 (Kennedy, J., concurring) (emphasis added), so that candidates can identify the original donor but the public cannot. But candidates have more ways to know the source of money: after all, insiders can drop a quiet hint to each other and they have every incentive to do so. And concerns about quid pro quo corruption are at their height when only political insiders can trace contributions.

C. The limitation on PAC-to-PAC contributions is closely drawn to the State's interests in preventing actual or perceived corruption, preventing circumvention of valid contribution limits, and ensuring transparency in campaign finance.

Amendment 2's limitation on PAC-to-PAC contributions is closely drawn to advance the State's interests in preventing corruption and the appearance of corruption.

As the Eleventh Circuit explained, this type of law "serve[s an] important anti-corruption interest without severely impacting political dialogue." *Alabama Democratic Conference*, 838 F.3d at 1070

(quotation, brackets, and ellipsis omitted). Amendment 2 does not limit the amount of money that PACs can raise, nor does it limit the amount of money that PACs can spend. "[I]t only limits [PACs'] ability to raise money through a specific type of donation—PAC-to-PAC transfers." *Id.* at 1070. This limitation does not impair PACs' ability to "amass the resources necessary for effective advocacy" and it is narrowly tailored to prohibit only a small class of contributions that raise anti-corruption concerns. *Id.* (quotation omitted).

Nor is it true, as the Eighth Circuit held, that State could use contribution caps, or other disclosure or anti-coordination laws to fight the circumvention and transparency problems posed by PAC-to-PAC transfers. App. A10; App. A62.

Contribution caps only encourage donors to send payments through PACs—as this Court has already noted. *See McCutcheon*, 572 U.S. at 200–01. Limiting the amount of contributions does not prevent donors from using a series of PACs to obscure the source of money; it just requires donors to use more PACs to accomplish that purpose. This is also why a limitation on the amount of money transferred among PACs or a limit on the number of PAC-to-PAC transfers—rather than an outright prohibition on any PAC-to-PAC transfers—would not accomplish the State's objectives.

More disclosure, by itself, will not solve the problem of coordinated, comingled, circuitous expenditures designed to avoid allowing the public to understand the source of donations. Missouri's other disclosure laws, like its "purpose" of concealment provision, like other fraud provisions, at best "reach[es] only the most clumsy attempts to pass contributions through to candidates." *F.E.C. v. Col.*

Republican Fed. Campaign Comm., 533 U.S. 431, 462 (2001). If donations can be commingled, split up, and routed through several committees, no amount of disclosure of individual transactions would prevent a determined donor from getting large sums into the coffers of favored candidates, let alone reveal the source of each contribution.

In contrast, a PAC-to-PAC transfer prohibition makes *all* disclosure laws more effective, whether "enhanced" or not, by removing one avenue political operatives can use to obscure the original donor. Disclosure laws are not nearly as effective as a transfer prohibition at safeguarding against circumvention.

Nor would more anti-proliferation laws, such as limiting the number of affiliated PACs, solve the problem. The Eighth Circuit had no evidence that these laws would effectively prevent circumvention, or just reduce it. Missouri lacks any anti-coordination laws that ensure that a committee cannot be controlled or coordinated with other committees, candidates, or donors: every Missouri PAC is by definition general-purpose. And even if the law changes and PACs were somehow never affiliated, they could still cooperate at arm's length, or just share their goals publicly. But, so long as the original donor committee knew that certain unaffiliated PACs would pass on funds to certain candidates, the donor could still route the funds on their way to their intended destination and exceed the contribution limits on the original source. What is more, anti-proliferation laws would not effectively address Missouri's transparency concerns. None of the Eighth Circuit's alternatives thus advances the *same* anticorruption interests.

The Eighth Circuit also questioned the importance of the state's anti-circumvention interest when it

noted that the State leaves other sources of corruption unregulated. But "'the First Amendment imposes no freestanding underinclusiveness limitation.'" *Wagner v. Fed Election Comm'n*, 793 F.3d 1, 27 (D.C. Cir. 2015) (quoting *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015)). The State need not "'curtail as much speech as may conceivably serve its goals.'" *Wagner*, 793 F.3d at 27 (citation omitted). Instead, the State may target a single problem without sweeping in all possible forms of speech because exacting scrutiny does not require a "perfect" fit between a campaign-finance law and the State's interests.

Nor must the State adopt "the least restrictive means" of advancing its stated interest. *McCutcheon*, 572 U.S. at 218–19. Instead, the fit simply must be "reasonable," and the burden imposed by the limitation need only be "in proportion to the interest served." *Id*. After all, a "statute that does not go as far as it might to cut off campaign contributions can hardly be said to constitute an 'unnecessary abridgment' of the freedom to make such contributions." *Wagner*, 793 F.3d at 27 (citing *McCutcheon*, 572 U.S. at 218).

In addition, a "State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee*, 135 S. Ct. at 1668. For this reason, this Court has "upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id*. A law need not "restrict more speech or the speech of more people" just to "be more effective." *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995).

D. The PAC-to-PAC transfer restriction leaves open ample alternate means of communication.

Missouri's law also avoids unnecessary abridgment of associational freedoms. *McCutcheon*, 572 U.S. at 218–19.

1. The law leaves a wide-berth for political speech while narrowly targeting a specific, well-recognized conduit for money to evade legitimate restrictions on campaign contributions. Under Amendment 2, political action committees remain free to accept contributions from many other sources, including individuals, unions, corporations, federal political action committees, and House and Senate political party committees. Mo. Const. art. VIII, § 23.3(12) & (13). The law also does not limit the total amount a group can raise, only the "ability to raise money through a specific type of donation—PAC-to-PAC transfers." *Ala. Democratic Conference*, 838 F.3d at 1070.

2. Nor does Amendment 2 limit the activities of committees that only engage in independent expenditures.

The initiative's term "contribution" is a longstanding term of art that does not include contributions to independent expenditure-only committees. Mo. Const. art. VIII, § 23.7(7). The Commission has long given guidance in other areas that expenditures made by a candidate do not constitute contributions if those expenditures were not requested to be made by, directed or controlled by, or made in cooperation with, or made with the express or implied consent of the candidate. These opinions are evidence of the pre-enactment meaning of the term contribution, and thus are relevant as a matter

of original meaning, just as a dictionary definition would be. Indeed, "[e]very field of serious endeavor develops its own nomenclature—sometimes referred to as terms of art. Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected." Scalia & Garner, Reading Law, § 6, p. 73 (2012). This meaning can often be found in the administrative or judicial interpretation of the word in prior statutes. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In Missouri, as a leading treatise notes, the Commission "uses normal methods of construction to interpret what is an independent expenditure and will make that determination on a case by case basis." David E. Poisson, Lobbying, PACs & Cam. Fin. § 27:91 (2017 ed.). Under this textual but fact-sensitive practice, "provided [a] candidate does not have any consent, coordination or control over any expenditure, the expenditure is not a contribution." *Id*. (citing Missouri Ethics Commission Adv. Op. 04.03.100).

Moreover, even if there were doubt on this point, so that it was unclear whether Amendment 2 applied to PACs that only make independent expenditures, the canon of constitutional avoidance would compel this Court to interpret Amendment 2 to comport with the First Amendment. Federal courts have long adhered to the principle that, if a law is subject to "'competing plausible interpretations,'" *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015) (citation omitted), the statute must be construed "'so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score,'" *Almendarez-Torres v. United States*, 523 U.S. 224, 237–28 (1998) (citation omitted). Likewise, under Missouri law, "if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have

been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. 1991). And, on this point, the district court held that Amendment 2 was ambiguous because "Section 23 does not define 'independent expenditure,' nor is it clear that a contribution to an independent expenditure only PAC from another PAC would not run afoul of Section 23.3(12)." App. A60.

That said, if the PAC-to-PAC transfer restriction did apply to a contribution to an independent expenditure-only committee, the challengers still could not bring a successful facial challenge to the PAC-to-PAC restriction. In that case, applying the restriction to non-expenditure-only committees would still be constitutional, and it takes only one constitutional application of a law to defeat a facial challenge. *United States v. Salerno*, 481 U.S. 739, 745 (1987). At most, the Free and Fair Election Fund respondent might succeed on its as applied challenge but only if the fund proves on remand that it is an independent expenditure-only committee.

III. This circuit split raises important and recurring questions.

The Eighth Circuit's judgment sits at the intersection of two sensitive interests: our federalist structure and the First Amendment. Its disagreement with the Eleventh Circuit about the interplay of these interests raises an important and recurring question worthy of this Court's review.

Federalism "'secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v. United States*, 564 U.S. 211, 221 (2011). It "allows States to respond" to the initiative of their own citizens by setting local priorities free from "the political processes that control a remote central power." *Id.*

How a State elects state officials lies at the very core of its sovereignty. It "is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). Campaign finance, like officer qualifications, shapes "the character of those who exercise government authority," and so is a "decision of the most fundamental sort for a sovereign entity." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Nebraska ex rel Thayer*, 143 U.S. 135, 161 (1892).

The Eighth Circuit interfered with these state policy choices when it faulted Missourians for not adopting a less restrictive alternative to the transfer prohibition, especially when exacting scrutiny does not require a perfect fit, and especially when the Eleventh Circuit doubted that any alternatives even exist. Federal courts are not "equipped" to make these policy judgments, which is why they should "ordinarily" defer to the state legislature when there is room for reasonable disagreement. *Randall*, 548 U.S. at 248. "In practice, the legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office." *Id*. (citation omitted). Both vertical and horizontal structural concerns thus favor review.

Of course, federal courts should protect First Amendment rights *if* campaign laws violate those rights. *McCutcheon*, 572 U.S. at 191. But this principle only confirms that this Court should examine the judgment.

First Amendment questions are at their "'most

urgent'" when raised about the "'conduct of campaigns for political office.'" *Id.* (citation omitted). The present circuit split leaves both States and political actors unsure about whether a state may pass this kind of law, chilling other states' policymakers from adopting this kind of law, and chilling regulated committees from speaking or incurring the expense of suit against the state if a state enacts this kind of law. Uncertainty about First Amendment questions "inevitably lead[s] citizens to steer far wider of the unlawful zone than if the boundaries . . . were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quotations omitted).

The need for certainty in the federalism and First Amendment arena—indeed, the need for certainty on this very question of committee transfers—is why several respondents, led by the Free and Fair Election Fund, urged this Court as *amici* to grant certiorari in the last case to raise this issue, *Alabama Democratic Conference v. Strange* (No. 16-832). If the questions raised were urgent and vital then, they are all the more urgent and vital now, two years later.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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January 8, 2019

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United States Court of Appeals
for the Eighth Circuit

No: 17-2239

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Plaintiffs - Appellees,

v.

Missouri Ethics Commission; Don Summers, in his official capacity; Kimberly Benjamin, in her official capacity; George Ratermann, in his official capacity; Wayne Henke, in his official capacity; Liz Ziegler, in her official capacity,

Defendants - Appellants.[1]

Appeal from United States District Court
for the Western District of Missouri - Jefferson City

Submitted: April 10, 2018
Filed: September 10, 2018

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[1] Appellants Henke and Ziegler are automatically substituted for their predecessors under Federal Rule of Appellate Procedure 43(c)(2).

[p. 2] Before COLLOTON, SHEPHERD and STRAS, Circuit Judges.

COLLOTON, Circuit Judge.

The Missouri Ethics Commission appeals the district court's[2] order permanently enjoining enforcement of a recently enacted provision of the Missouri Constitution. The provision, found in Mo. Const. art. VIII, § 23.3(12), prohibits a political action committee from receiving contributions from other political action committees. The district court concluded that the prohibition unconstitutionally infringed on a political action committee's First Amendment rights to freedom of speech and association. We agree and therefore affirm.

I.

On November 8, 2016, Missouri voters approved an amendment to the Missouri Constitution that added several provisions pertaining to campaign finance. The amendment took effect on December 8, 2016, *see* Mo. Const. art. XII, § 2(b), and was enacted as § 23 to Article VIII of the constitution.

At issue in this appeal is § 23.3(12), which provides in pertinent part: "Political action committees . . . shall be prohibited from receiving contributions from other political action committees . . . ." The amendment defines "political action committee" as

> a committee of continuing existence which is not formed, controlled or directed by a candidate, and is a committee other than a

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[2] The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

> candidate committee, political party committee, campaign committee, exploratory **[p. 3]** committee, or debt service committee, whose primary or incidental purpose is to receive contributions or make expenditures to influence or attempt to influence the action of voters whether or not a particular candidate or candidates or a particular ballot measure or measures to be supported or opposed has been determined at the time the committee is required to file any statement or report pursuant to the provisions of this chapter.

Mo. Const. art. VIII, § 23.7(20). A "contribution" includes, among other things, a payment made "for the purpose of supporting or opposing the nomination or election of any candidate for public office or the qualification, passage or defeat of any ballot measure." Mo. Const. art. VIII, § 23.7(7).

The Missouri Ethics Commission investigates alleged violations of laws pertaining to campaign finance and enforces those laws. Among other things, the Commission is authorized to receive complaints that allege violations of campaign finance disclosure requirements, violations of the provisions of the Missouri constitution that relate to the official conduct of state officials, and violations of § 23.3 by a candidate for elective office. *See* Mo. Rev. Stat. § 105.957; Mo. Const. art. VIII, § 23.4(1). If the Commission has reasonable grounds to believe that a complaint shows a violation of criminal law, the Commission may refer the complaint for prosecution. *See* Mo. Rev. Stat. § 105.961.2; Mo. Const. art. VIII, § 23.4(4). The Commission has asserted that it "intend[s] to enforce Article VIII, Section 23 as required by law." R. Doc. 27, at 4-5.

After the amendment was approved, two Missouri political action committees (PACs)—Free and Fair Election Fund (FFEF) and the Association of Missouri Electric Cooperatives Political Action Committee (AMEC-PAC)—sued the Commission and its members to enjoin enforcement of § 23.3(12)'s ban on PAC-to-PAC transfers. FFEF receives contributions and makes independent expenditures to influence voters. FFEF alleged that it desired to accept contributions from other **[p. 4]** PACs and to contribute to those PACs that make only independent expenditures. AMEC-PAC is a committee formed and maintained by AMEC, an association of nonprofit, member-owned rural electric cooperative membership corporations. AMEC-PAC alleged that it wished to accept contributions from and contribute to other PACs.

FFEF and AMEC-PAC sought declaratory and injunctive relief, alleging that the ban on PAC-to-PAC transfers was unconstitutional on its face under the First and Fourteenth Amendments, and unconstitutional as applied to each of them. After a hearing, the district court concluded that the transfer ban was unconstitutional on its face under the First Amendment and unconstitutional as applied to FFEF. It therefore permanently enjoined the Commission from enforcing that provision. The Commission appeals. Because the grant of injunctive relief turns on purely legal issues under the First Amendment, we review the district court's decision *de novo*. *See Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004).

II.

The First Amendment protects the "right to participate in the public debate through political expression and political association." *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (plurality opinion).

"When an individual contributes money to a candidate, he exercises both of those rights: The contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976) (per curiam)). Like individuals, PACs enjoy the right to freedom of speech and association. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480,492-96 (1985).

The ban on PAC-to-PAC transfers implicates these rights. By prohibiting a PAC from *receiving* contributions from other PACs, § 23.3(12) necessarily prohibits **[p. 5]** a PAC from *making* contributions to other PACs. Restricting the recipients to whom a PAC can donate therefore limits the donor-PAC's speech and associational rights under the First Amendment.

"When [a State] restricts speech, [it] bears the burden of proving the constitutionality of its actions." *Missourians for Fiscal Accountability v. Klahr*, 892 F.3d 944, 948 (8th Cir. 2018) (alterations in original) (quoting *McCutcheon*, 572 U.S. at 210). Laws that regulate political contributions are subject to "exacting scrutiny." *McCutcheon*, 572 U.S. at 197; *Nixon v. Shrink Mo. Gov. PAC*, 528 U.S. 377, 387-88 (2000). To meet that standard, the challenged law must advance a sufficiently important state interest and employ means closely drawn to avoid unnecessary abridgment of First Amendment freedoms. *Buckley*, 424 U.S. at 25. A restriction on First Amendment freedoms is unconstitutional on its face if "no set of circumstances exists under which [the restriction] would be valid." *Phelps-Roper v. Ricketts*, 867 F.3d 883, 891-92 (8th Cir. 2017); *see United States v. Stevens*, 559 U.S. 460, 472 (2010).

There is only one legitimate state interest in restricting campaign finances: "preventing corruption

or the appearance of corruption." *McCutcheon*, 572 U.S. at 206. This interest is limited to preventing "only a specific type of corruption—'*quid pro quo*' corruption" or its appearance. *Id.* at 207. A large donation that is not made "in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to . . . *quid pro quo* corruption." *Id.* at 208. Similarly, the general risk that a donor, through large donations, will "garner influence over or access to elected officials or political parties," either in fact or in appearance, is insufficient to create *quid pro quo* corruption. *Id.* (internal quotation marks omitted). Instead, "the risk of *quid pro quo* corruption is generally applicable only to the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder." *Id.* at 211 (internal quotation marks omitted).

[p. 6] In this case, Missouri has not demonstrated a substantial risk that unearmarked PAC-to-PAC contributions will give rise to *quid pro quo* corruption or its appearance. Because the amendment defines a PAC as a committee that is "not formed, controlled or directed by a candidate," Mo. Const. art. VIII, § 23.7(20), PACs operate independently from candidates. "[T]here is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *McCutcheon*, 572 U.S. at 210; *see also Citizens United v. F.E.C.*, 558 U.S. 310, 357 (2010). "When an individual contributes to . . . a PAC, the individual must by law cede control over the funds." *McCutcheon*, 572 U.S. at 210-11. If that PAC contributes the funds to a candidate, it is typically the PAC, not the individual, who receives credit for the contribution. If the PAC instead contributes the funds to another PAC, rather than to the candidate, "the chain of

attribution grows longer, and any credit must be shared among the various actors along the way." *Id.* at 211.

The Commission asserts that without the ban on PAC-to-PAC transfers, a donor could evade the individual contribution limits of $2600 per candidate set forth in Mo. Const. art. VIII, § 23.3(1)(a). The evasion would occur, the argument goes, because a donor could contribute large, unearmarked sums of money to a candidate by laundering it through a series of PACs that he controls. The Commission says that circumvention of the contribution limits creates a risk of *quid pro quo* corruption or its appearance. It therefore contends that the ban advances the State's interest in preventing corruption by preventing circumvention of contribution limits.

The transfer ban, however, does little, if anything, to further the objective of preventing corruption or the appearance of corruption. The Commission does not "provide any real-world examples of circumvention" along the lines of its hypothetical. *McCutcheon*, 572 U.S. at 217. It does not point to evidence of any occasions before the amendment where PAC-to-PAC transfers led to the circumvention of contribution limits. Nor does the Commission identify any donors **[p. 7]** who have exceeded contribution limits by using transfers among a network of coordinated PACs. The lack of examples is not surprising, for a donor determined to support a candidate with large sums of money need not employ PAC-to-PAC transfers. The donor may contribute *directly* to multiple PACs with the expectation that these PACs would support the donor's preferred candidate. Or, more practically, the donor may simply devote the full amount of contributions to independent expenditures in support of the preferred candidate without the suggested

machinations. Why establish 385 separate PACs to donate $2600 each to a preferred candidate when the donor can spend $1 million independently to support the candidate? *See id.* at 213-14.

The Commission also contends that the transfer ban furthers the State's anticorruption interest by promoting transparency. The Commission asserts that PAC-to-PAC transfers obscure the source of "large" donations and make it "nearly impossible for the Commission to enforce the State's individual contribution limits." In the Commission's view, exposing the source of these large donations discourages corrupt behavior and permits the Commission to detect violations of contribution limits. But the transfer ban does not materially further these objectives. Contribution limits already prevent "large" donations in excess of $2600 to a candidate by a single person, *see* Mo. Const. art. VIII, § 23.3(1)(a), and other provisions serve the State's interest in revealing efforts to contribute more. Donors are prohibited from contributing to PACs with the purpose of concealing the source, *see, e.g.*, Mo. Const. art. VIII, §§ 23.3(7) & (14), 23.7(19), and disclosure laws ensure that both the public and the Commission know the source of each donation. *See, e.g.*, Mo. Rev. Stat. §§ 130.041, 130.057.

The Commission urges us to follow the Eleventh Circuit in upholding a ban on PAC-to-PAC transfers. In *Alabama Democratic Conference v. Attorney General of Alabama*, 838 F.3d 1057 (11th Cir. 2016), the court reasoned that such a ban furthered the State's interest in preventing corruption or the appearance of corruption. **[p. 8]** *Id.* at 1070. The court pointed to evidence that before such a ban, "PAC-to-PAC transfers were viewed by Alabama citizens as a tool for concealing donor identity, thus creating the

appearance that PAC-to-PAC transfers hide corrupt behavior." *Id.* But the court also noted that Alabama law "does not limit the amount of money that a person, business, or PAC may contribute directly to a candidate's campaign." *Id.* at 1060. Unlike Alabama, Missouri limits the contributions that a PAC can make to a candidate, so the anti-corruption interest cited in support of the Alabama law is diminished here.

The transfer ban also is not closely drawn to serve an important state interest. Although the fit between the interest served and the means selected need not be perfect, it must be reasonable, with the means selected proportionate to the interest served. *McCutcheon*, 572 U.S. at 218. In this case, the risk of corruption from PAC-to-PAC transfers is modest at best, and other regulations like contribution limits and disclosure requirements act as prophylactic measures against *quid pro quo* corruption. The ban therefore amounts to the sort of "prophylaxis-upon-prophylaxis" that requires a court to be "particularly diligent in scrutinizing the law's fit." *Id.* at 221.

Assessing the fit of a proposed restriction requires consideration of available alternatives that would serve the State's interests while avoiding unnecessary abridgment of First Amendment rights. *See id.* As the Court explained in *McCutcheon*, anti-proliferation laws, including rules regarding affiliated PACs, are a less restrictive means of preventing the sort of abuse that concerns the Commission. If the State forbids a donor to create numerous PACs to support a candidate or to cause multiple PACs to coordinate their expenditures, then the Commission's hypothetical scenario would be unlawful. *See id.* at 211-13. Enhanced disclosure requirements, too, "often represent[] a less restrictive alternative to flat bans

on certain types or quantities of speech." *Id.* at 223. The Commission asserts that additional disclosure requirements would not help the public to track the source of donations that are co-mingled with the rest of a PAC's funds and shuttled through a **[p. 9]** series of other PACs before reaching a candidate. But even assuming the Commission is correct about the difficulty of tracking funds, the argument is selfdefeating: If disclosure laws will not help the *public* discern who gave money to whom, then we are hard pressed to see how a *candidate* would identify an original donor to create a risk of *quid pro quo* corruption. AMEC PAC suggests that a limit on the size of transfers between PACs is another less restrictive alternative. The Commission argues that such a limit would not work, because donors would simply use more PACs. But if a limit were combined with anti-proliferation provisions, then the feared loophole would be closed. We do not here decide the constitutionality of these other, hypothetical laws that might be enacted, but the availability of less restrictive alternatives contributes to our conclusion that the current provision is not closely drawn. *See Green Party of Conn. v. Garfield*, 616 F.3d 189, 210 (2d Cir. 2010); *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1216 (9th Cir. 1996).

Taken together, the low risk of *quid pro quo* corruption stemming from PAC-to-PAC transfers, the existence of other campaign finance laws that facilitate transparency, and the availability of less restrictive alternatives to the ban suffice to show that § 23.3(12) is not closely drawn to serve a sufficiently important state interest. We thus need not explore other concerns, such as whether the ban is overinclusive by prohibiting transfers between PACs that make only independent expenditures, or under-

inclusive by permitting transfers between state PACs and federal PACs.

The district court properly enjoined enforcement of the transfer ban in its entirety. The amendment violates the First Amendment as applied to PACs that donate only to candidates and to PACs that both donate to candidates and make independent expenditures. The Commission argues that § 23.3(12) does not apply to PACs like FFEF that make only independent expenditures, but it is unnecessary to address that point. A State does not have a sufficiently important interest in preventing contributions to a PAC that makes only independent expenditures, *see* **[p. 10]** *Citizens United*, 558 U.S. at 357-60, so the provision must be enjoined in its entirety whether or not it extends to this subgroup of PACs.

* * *

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

FREE AND FAIR ELECTION FUND, et al.,	)	
Plaintiffs,	)	
vs.	)	Case No. 16-04332 -CV-C-ODS
MISSOURI ETHICS COMMISSION, et al.,	)	
Defendants.	)	
MISSOURI ELECTRIC COOPERATIVES, d/b/a Association of Missouri Electric Cooperatives, et al.,	)	
Plaintiffs,	)	
vs.	)	
STATE OF MISSOURI, et al.,	)	
Defendants.	)	

AMENDED ORDER AND OPINION (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS, AND (2) PARTIALLY GRANTING PLAINTIFFS' MOTIONS FOR PERMANENT INJUNCTION[1]

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[1] The Court issued its original decision on May 5, 2017. Doc. #88. On May 16, 2017, Defendants filed a motion to clarify permanent injunction. Doc. #90. The Court grants Defendants' motion, and now issues this Amended Order and Opinion. The Court only amends point 4 of page 39 of the permanent injunction. This

On November 8, 2016, seventy percent of Missouri voters approved Initiative Petition 2016-007, thereby amending, effective December 8, 2016, Article VIII of the Missouri Constitution to add Section 23.[2] Plaintiffs seek permanent injunctive relief **[p. 2]** preventing enforcement of several provisions of Section 23. Defendants seek dismissal of Plaintiffs' claims. As detailed below, the Court grants in part and denies in part Defendants' motions to dismiss, partially grants Plaintiffs' motions, and enjoins

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amendment reflects the Court's original intent. The stay set forth in the Court's May 5, 2017 Order is not amended.

[2] The official ballot title provided:

> Shall the Missouri Constitution be amended to:
> • establish limits on campaign contributions by individuals or entities to political parties, political committees, or committees to elect candidates for state or judicial office;
> • prohibit individuals and entities from intentionally concealing the source of such contributions;
> • require corporations or labor organizations to meet certain requirements in order to make such contributions; and
> • provide a complaint process and penalties for any violations of this amendment?
> It is estimated this proposal will increase state government costs by at least $118,000 annually and have an unknown change in costs for local government entities. Any potential impact to revenues for state and local governments is unknown. Doc. #31, at 4 n.3.

Defendants' enforcement of Section 23 in a manner inconsistent with this Order.

I. BACKGROUND

Section 23 imposes campaign finance regulations and restrictions on individuals and entities in Missouri. Section 23's regulations and restrictions can be divided into three types: (1) monetary limits on contributions, (2) restrictions on the sources of some contributions, and (3) measures to prevent evasion of Section 23's regulations and restrictions.

Under Section 23's monetary limit on contributions, no individual may contribute more than $2,600 "[t]o elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general, office of state senator, office of state representative or any other state or judicial office...." Mo. Const., art. VIII, § 23.3(1)(a). A political party may not accept contributions, in aggregate, greater than $25,000 from an individual or political committee during any one election in which a political party participates. § 23.3(2)(a)-(b).

Section 23 imposes restrictions on contribution sources by dividing political candidates and committees into several overlapping categories, which are used to place **[p. 3]** restrictions on the sources from which these groups may receive contributions.[3] First, corporations and unions may not contribute to a campaign committee, candidate committee, exploratory committee, political party committee, or a

[3] The law uses the term "committee" to include both an individual person and a combination of persons, based on the purpose of the individual or group. § 23.7(4).

political party, but may establish a "continuing committee" to which its members, officers, directors, employees, and security holders may contribute. § 23.3(3)(a). Second, corporations may only contribute to a political action committee ("PAC") if the corporation is formed under chapters 347 through 360 of the Missouri Revised Statutes.[4] § 23.3(12). Third, a foreign corporation, one not organized under Missouri law, may not contribute to a PAC unless it is authorized to do business in Missouri pursuant to chapter 347. § 23.3(16)(c). Fourth, a PAC may not accept contributions from other PACs, candidate committees, political party committees, campaign committees, exploratory committees, or debt service committees. § 23.3(12). Fifth, candidate committees are prohibited from contributing to another candidate committee. § 23.3(4). Sixth, and finally, all candidates and committees are prohibited from receiving contributions from any out-of-state committee unless the out-of-state committee organizes within the State of Missouri or files Missouri-required disclosure reports. § 23.3(11).[5]

Section 23 also includes measures to prevent evasion of the new regulations and restrictions. Section 23 prohibits: (1) any person from contributing under a fictitious or borrowed name (§ 23.3(7)); (2) any person from contributing anonymously in amounts greater than $25 (§ 23.3(8)); (3) any committee from

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[4] All references to "chapter" are to chapters contained in the Missouri Revised Statutes unless stated otherwise.

[5] All non-Missouri committees remain free to make independent expenditures to influence Missouri elections in their own names. *See generally* § 23 (providing no prohibition on such conduct).

receiving more than $500 in anonymous contributions (§ 23.3(9)), with a narrow exception for certain well-documented group events (§ 23.3(10)); and (4) any committee or political party from accepting a cash contribution over $100 per election (§ 23.3(6)). Section 23 broadly forbids transferring "anything of value to any committee with the intent to conceal…the identity of the actual source." § 23.3(14). Further, Section 23 prohibits anyone from being reimbursed for contributions (§ 23.3(15)), and requires contributions from children **[p. 4]** under fourteen years old be deemed contributions from the child's parents or guardians (and thus, subject to their parents' or guardians' contribution limits). § 23.3(17).

Defendant Missouri Ethics Commission ("MEC") is charged with enforcing Section 23. Anyone who violates Section 23 may face civil and criminal penalties. §§ 23.3(14), 23.4(1)–(6); 23.5; 23.6; *see also* Mo. Rev. Stat. §§ 105.955–.977 (2017). Any person may file a complaint, and local county prosecutors may also bring charges for a violation of Section 23. Doc. #75. Finally, and relevant here, Section 23 includes a severability provision that provides, "[i]f any provision of this section is found by a court of competent jurisdiction to be unconstitutional or unconstitutionally enacted, the remaining provisions of this section shall be and remain valid." § 23.8.

Following Section 23's enactment, the MEC received questions from interested parties seeking to clarify what conduct Section 23 did or did not prohibit. On January 6, 2017, the MEC approved a resolution in which it acknowledged "interest of the regulated community in receiving interpretation" of many questions regarding Section 23, but the MEC declined "to issue the opinions on this date due to pending litigation but will consider the issuance on these

questions on a future date." Doc. #35-1, at 6. On February 10, 2017, the MEC issued several advisory opinions interpreting provisions of Section 23. The Court will discuss applicable advisory opinions in detail below.

On December 7, 2016, Plaintiffs Association of Missouri Electric Cooperatives ("AMEC"), Association of Missouri Electric Cooperatives PAC ("AMEC-PAC"), David Klindt ("Klindt"), and Legends Bank (collectively "AMEC Plaintiffs") brought suit in the United States District Court for the Eastern District of Missouri against the State of Missouri, the MEC, and the MEC's Commissioners in their official capacities. Case No. 17-4006, Doc. #1.[6] AMEC is an association of nonprofit, member-owned rural electric cooperative corporations. AMEC's members are organized under chapter 394, related to rural electric cooperatives, rather than chapters 347 through 360. AMEC alleges Section 23 prevents it and their member organizations from contributing to AMEC-PAC and various other entities. Klindt is AMEC's Vice President.[7]

[p. 5] AMEC-PAC is a PAC formed and maintained by AMEC. AMEC-PAC alleges Section 23 unconstitutionally prohibits it from accepting contributions from its member organizations, both foreign and domestic. Legends Bank is a Missouri chartered bank organized under chapter 362. Legends

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[6] AMEC Plaintiffs later filed an Amended Complaint. Case No. 17-4006, Doc. #28.

[7] Klindt recently retired from his position as AMEC Vice President, but is still associated with AMEC under a consulting agreement.

Bank made contributions to PACs in the past, but alleges Section 23 now prohibits future contributions.

The MEC is a state agency acting under Missouri's executive branch. The MEC investigates and enforces Missouri's campaign finance laws, and is composed of six members appointed by the Governor with the Missouri Senate's advice and consent. Each member is a Missouri citizen and resident, and serves a four-year term. Currently, the commission members are Chair Nancy Hagan, and Vice Chairs Bill Deeken, Eric L. Dirks, Don Summers, Kim Benjamin, and George Ratermann.

AMEC Plaintiffs allege Section 23's prohibitions on contributions violate their First Amendment rights to free speech and assembly, their Fourteenth Amendment equal protection rights, and their rights under Article 1, Section 8 of the Missouri Constitution. AMEC Plaintiffs ask the Court to enjoin Defendants, their agents, or anyone acting on their behalf or in concert with them from enforcing Sections 23.3(12) and (16)(c).

On December 23, 2017, Plaintiffs Free and Fair Election Fund ("FFEF"), Missourians for Worker Freedom ("Worker Freedom"), American Democracy Alliance ("ADA"), John Elliott ("Elliott"), Herzog Services, Inc. ("HSI"), and Farmers State Bank ("Farmers") (collectively "FFEF Plaintiffs") brought suit in this Court against the MEC, its commissioners in their official capacities, and James Klahr in his official capacity as Executive Director of the MEC.[8] Case No. 16-4332, Doc. #1. FFEF is a Missouri PAC

[8] Freedom PAC was initially a Plaintiff, but a stipulation of dismissal as to Freedom PAC (Doc. #42) was filed, after which the Court dismissed Freedom PAC from the lawsuit (Doc. #45).

and continuing committee. FFEF's purpose is to receive monetary contributions and make independent expenditures to influence voters. Worker Freedom is a Missouri campaign committee. ADA is a Missouri not-for-profit corporation organized under chapter 355, with its principal place of business in Jackson County, Missouri. Elliott is a Missouri citizen and taxpayer. HSI is a for-profit corporation organized under Kansas law, but its principal place of business is in Missouri and it has authority to transact **[p. 6]** business in Missouri. Farmers is a Missouri chartered bank organized under chapter 362, and is a Missouri citizen and taxpayer, with its principal place of business in Missouri. Collectively, FFEF Plaintiffs challenge Section 23's $2,600 cap on contributions to candidates, and challenge the same source prohibitions challenged by AMEC Plaintiffs.[9]

Although AMEC Plaintiffs brought suit in the United States District Court for the Eastern District of Missouri, Judge Catherine Perry ordered the case transferred to the Central Division of this Court. Case No. 17-4006, Doc. #45. The Court then consolidated the AMEC matter with FFEF's challenge, and set a hearing on Plaintiffs' motions for preliminary injunction.[10] Doc. #25. Defendants filed two motions to dismiss, and the Court expedited the briefing so

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[9] FFEF Plaintiffs alleged a violation of the United States Constitution's Privileges and Immunities clause, but have abandoned that claim. Doc. #60, at 35. Accordingly, the Court dismisses Count II of FFEF Plaintiffs' Complaint.

[10] On the same day the Court ordered these matters consolidated, the Court denied proposed Intervenor Todd Jones's Motion to Intervene. Case No. 17-4006, Doc. #54.

that all motions were fully briefed prior to the hearing. Docs. #28, 30, 32. Defendants' motions to dismiss were subsequently converted to motions for judgment on the pleadings.[11] Doc. #41. Finally, pursuant to Federal Rule of Civil Procedure 65(a)(2), the Court converted the hearing on Plaintiffs' motions for preliminary injunction to a hearing on Plaintiffs' requests for permanent injunction. Doc. #63.

On March 3, 2017, the Court held a hearing. All parties were expertly represented by counsel. During the hearing, the Court found several areas of agreement among the parties, and encouraged the parties to continue their dialogue regarding potential resolution of this matter. Although the parties were unable to resolve all claims, the parties reached agreement on two aspects. First, Defendants and the AMEC Plaintiffs stipulated to the dismissal of AMEC's Count V, which alleged Section 23's enactment violated the Missouri Constitution. Doc. #81. Accordingly, the **[p. 7]** Court dismissed Count V of AMEC's Amended Complaint. Doc. #87. Second, the parties agreed to a proposed consent judgment regarding the constitutionality and enforcement of Section 23's ban on corporate and union contributions to a ballot measure committee. Doc. #79. As detailed *infra*, section II.B.(3)(a), the Court incorporates this

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[11] Although the Court converted Defendants' motions to dismiss to motions for judgment on the pleadings, the Court refers to the motions as motions to dismiss for ease of reference. The Court reviews a motion for judgment on the pleadings under the same standard that governs motions to dismiss for failure to state a claim. *Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

proposed consent judgment, and will enjoin enforcement of Section 23's ban on corporate and union contributions to a ballot measure committee.

II. DISCUSSION

The issues before the Court are numerous. First, the Court considers Defendants' motions to dismiss. Second, the Court considers Plaintiffs' motions for permanent injunctive relief.

A. Motions to Dismiss

Defendants filed two motions to dismiss. First, Defendants move to dismiss the State of Missouri and all state-law claims presented in AMEC Plaintiffs' Amended Complaint. Doc. #28. Second, Defendants move to dismiss the operative complaints in both matters in their entirety. Doc. #30. The Court grants Defendants' first motion (Doc. #28), and denies Defendants' second motion (Doc. #30).

(1) First Motion to Dismiss

Defendants seek to dismiss the State of Missouri and all state-law claims brought by AMEC Plaintiffs. "The Eleventh Amendment immunizes an unconsenting State from damage actions brought in federal court, except when Congress has abrogated that immunity for a particular federal cause of action." *Becker v. Univ. of Neb. at Omaha*, 191 F.3d 904, 908 (8th Cir. 1999); *see generally Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) ("[F]or over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States."). Three exceptions to Eleventh Amendment immunity exist: (1) where the state waives immunity by consenting to suit in federal court, (2) where Congress abrogates the state's immunity through valid exercise of its powers,

and (3) under *Ex parte Young*, 209 U.S. 123 (1908), where the plaintiff files suit against state officials seeking **[p. 8]** prospective equitable relief for ongoing violations of federal law. *Sundquist v. Neb.*, 122 F. Supp. 3d 876, 876 (D. Neb. 2015).

AMEC Plaintiffs argue the State of Missouri is not immune from suit for declaratory judgment actions under state law, and maintain the state waived immunity by appearing in this matter. The Court rejects these arguments. AMEC Plaintiffs point to case law in which actions seeking a declaration that Missouri laws are unconstitutional proceeded against the State of Missouri. *See, e.g.*, *Rizzo v. State*, 189 S.W.3d 576 (Mo. banc 2006); *Legends Bank v. State*, 361 S.W.3d 383 (Mo. banc 2012). However, AMEC Plaintiffs' Count V, the only count presenting a challenge solely under Missouri law, was dismissed after the parties stipulated to Count V's dismissal. Doc. #87. As it relates to AMEC Plaintiffs' Amended Complaint, the Court is left with counts alleging violations of both federal and state law. The Court will address the merits of these claims in a manner that does not involve state law. Furthermore, the entry of an appearance and filing of an answer, in which the state asserted sovereign immunity, does not amount to a waiver of the state's immunity.

As AMEC Plaintiffs note, "[g]ranting the Motion to Dismiss the State of Missouri would have no practical effect on this litigation." Doc. #49, at 6 n.1. While state officials may be sued under *Ex Parte Young*, this doctrine does not extend to states. *See Monroe v. Ark. State Univ.*, 495 F.3d 591, 594 (8th Cir. 2007). Finding the State of Missouri is immune from suit under the Eleventh Amendment, and no exception to the general rule applies, the Court grants Defendants' motion to dismiss the State of Missouri.

Defendants also moved to dismiss all state-law claims presented in AMEC Plaintiffs' Amended Complaint. Defendants argue the Court lacks subject matter jurisdiction because Plaintiffs invoked jurisdiction only under 28 U.S.C. § 1331, which provides jurisdiction over claims invoking federal law. This Court has supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The Court addresses the merits of Plaintiffs claims under the United States Constitution, and does not consider Plaintiffs' claims under the Missouri Constitution. Accordingly, the Court dismisses the state-law **[p. 9]** claims without prejudice. The Court grants Defendants' first motion to dismiss (Doc. #28).

(2) Second Motion to Dismiss

In their second motion to dismiss, Defendants seek dismissal of all claims by both sets of plaintiffs. Defendants give four reasons why the Court should grant their second motion to dismiss. First, Defendants argue Plaintiffs mistake the actual requirements of Section 23, and accordingly, Plaintiffs' lack standing, and their claims are not ripe.[12] Second, Defendants admit Section 23's ban on

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[12] First, Defendants argue Plaintiffs mistake Section 23.3(1)(a)'s $2,600 contribution limit as applying in aggregate to all contributions per election to all candidates combined. Second, Defendants argue Plaintiffs mistakenly allege Section 23.3(1)(a)'s $2,600 contribution limit is unconstitutionally vague because it is not clear how the limit applies when Plaintiffs contribute to multicandidate PACs. Third, Defendants argue Plaintiffs mistakenly construe the

corporate and union contributions to ballot measure committees violates the United States Constitution, and state the MEC will not enforce that provision. Accepting Defendants' position on these two points would lead the Court to conclude Plaintiffs do not have standing and their claims are not ripe. Third, Defendants contend the remaining challenged portions of Section 23 are lawful restraints on political activity. Accepting Defendants' position on this point would lead the Court to conclude Plaintiffs fail to state a claim because Section 23's provisions are lawful. Fourth, Defendants point to their first motion to dismiss, noting claims against the State of Missouri and AMEC Plaintiffs' state-law claims should be dismissed. The Court has already addressed this final argument. *See* Section II.A.(1).

(a) Standing and Ripeness Legal Standards

The "irreducible constitutional minimum" of standing has three elements. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff must have "(1) suffered an injury in fact, **[p. 10]** (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan*, 504 U.S. at 560-61; *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 180-

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$2,600 contribution limit as applying to contributions to PACs that only make independent expenditures. Fourth, Defendants argue Plaintiffs mistakenly contend Section 23.3(16)(c) prevents contributions to PACs from corporations not organized under chapter 347 of the Missouri Revised Statutes. The Court will address these alleged mistakes when considering the merits of Plaintiffs' motions to permanent injunction.

81 (2000)). An "injury-in-fact" is "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 584 (8th Cir. 2013) (quoting *St. Paul Area Chamber of Commerce v. Gaetner*, 439 F.3d 481, 485 (8th Cir. 2006)).

Two types of injuries can confer standing in the First Amendment context when a plaintiff seeks prospective relief. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (citations omitted). First, a plaintiff can establish standing by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). A threat of future or present prosecution must be "credible" rather than "wholly speculative." *Iowa Right to Life Comm.*, 717 F.3d at 584 (citations omitted). Second, a plaintiff can establish standing by alleging it self-censored. *Missourians for Fiscal Accountability*, 830 F.3d at 794 (citing *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011)). "A party need not expose itself to arrest or prosecution under a criminal statute to challenge it in federal court." *Iowa Right to Life Comm.,* 717 F.3d at 584. A party suffering from a credible threat of future prosecution suffers from an ongoing injury resulting from the statute's chilling effect on his desire to exercise his First Amendment rights. *Missourians for Fiscal Accountability*, 830 F.3d at 794 (citations omitted).

Faced with a claim of self-censorship, the Court must consider whether a party's decision to chill its speech in light of the challenged statute was

objectively reasonable. *Id.* (citing *281 Care Comm.*, 638 F.3d at 627) (quotations omitted)). Although complaints against plaintiffs may not reach the criminal stage or prosecution may not be threatened, non-criminal consequences contemplated by a challenged statute may contribute to the objective reasonableness of an alleged chill. *Id.*

In addition to finding Plaintiffs have standing to bring their claims, the Court must determine whether Plaintiffs' claims are ripe for review. Rather than prematurely **[p. 11]** adjudicating a dispute, the ripeness doctrine prevents Courts "from entangling themselves in abstract disagreements over administrative policies, and also protects the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 796 (quoting *Nat'l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684 (8th Cir. 2003)). "To decide ripeness, courts consider: (1) the hardship to the plaintiff caused by delayed review; (2) the extent to which judicial intervention would interfere with administrative action; and (3) whether the court would benefit from further factual development." *Id.* at 796-97 (citation omitted). The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention. *Id.* at 797 (citation and quotations omitted).

(b) Advisory Opinions

The MEC issued advisory opinions after receiving inquiries from various entities. Defendants argue these advisory opinions accurately represent how Section 23 will be enforced, and are binding legal authorities establishing Plaintiffs will not suffer criminal or civil penalties if they engage in the challenged conduct. On that basis, Defendants argue

Plaintiffs lack standing because the advisory opinions establish Plaintiffs do not face a credible threat of enforcement if they engage in the challenged conduct. Plaintiffs argue these opinions are outside the scope of the MEC's authority, inaccurately interpret the law, are not final, binding opinions, and Section 23 does not expressly delegate authority to the MEC to issue interpretative advisory opinions.

The MEC has statutory authority to issue advisory opinions "regarding any issue that the commission can receive a complaint on pursuant to Section 105.957." Mo. Rev. Stat. § 105.955.16(1). Section 105.957 enumerates provisions on which the MEC may receive a complaint. Mo. Rev. Stat. § 105.957.1(1)-(6). Relevant to Plaintiffs' challenge, the MEC may receive complaints regarding alleged violations of "the constitution...relating to the official conduct of officials or employees of the state and political subdivisions." Mo. Rev. Stat. § 105.957.1(6). Plaintiffs note Defendants' advisory opinions on provisions of Section 23 do not relate to the conduct of officials or state employees. Nor does Section 23 expressly grant the MEC authority to receive a **[p. 12]** complaint on the provisions at issue in this matter. *See generally* Section 23.[13] Given the uncertainty of whether the MEC has authority to issue these advisory opinions, Plaintiffs urge the Court to confer standing to bring their claims.

If the MEC has authority to issue these advisory opinions, Plaintiffs argue an advisory opinion may be

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[13] Section 23.4(1) allows the MEC to receive complaints from any person alleging a violation of Section 23 "by any candidate for elective office." The provisions at issue in this matter do not challenge conduct by a candidate for elective office.

withdrawn at any time by the MEC, the state legislature's Joint Committee on Administrative Rules, or the General Assembly. *See* Mo. Rev. Stat. § 105.955.16(1). During the hearing in this matter, the Court requested supplemental briefing regarding whether previous MEC advisory opinions were rescinded, other than in response to legislation superseding prior opinions. All parties filed supplemental briefing on the matter. Docs. #76-78. Defendants state sixteen advisory opinions, of 407 total, were rescinded, and twelve of those rescissions occurred in response to new legislation. Plaintiffs recognize several advisory opinions were rescinded after legislative changes, but they cite to advisory opinions withdrawn after the MEC determined the opinion incorrectly interpreted the law, an allegation made regarding several advisory opinions at issue here. Plaintiffs also cite to an advisory opinion regarding the Missouri Constitution's nepotism clause that was allegedly withdrawn *sua sponte* by the MEC.

Defendants note passage of section 105.957, delineating issues on which the MEC may receive complaints, predates passage of Section 23, and argue the MEC has inherent authority to interpret the law given its regulatory and administrative function overseeing Missouri's campaign finance laws. This is a reasonable position. Plaintiffs argue the advisory opinions exceed the MEC's authority, incorrectly interpret the law, and do not provide reliable guidance on what conduct may be lawful because Plaintiffs fear the opinions may be withdrawn. On the record before the Court, this is also a reasonable position.

While the Court has doubts that the potential rescission of an advisory opinion would expose Plaintiffs to liability for an alleged violation occurring

before rescission, the Court need not decide whether the MEC exceeded its authority by issuing advisory **[p. 13]** opinions interpreting Section 23 to address the merits of this matter. Regardless of the validity of the advisory opinions, both parties advance arguments related to whether the text of Section 23 violates the First Amendment and other constitutional provisions. As explained below, the Court finds Plaintiffs have standing, and their claims are ripe for the Court's review.

(c) Plaintiffs' Standing and Ripeness of Claims

Plaintiffs allege Section 23 affects their ability to contribute to various entities and/or accept contributions from entities. AMEC-PAC desires to accept contributions from its domestic and foreign member organizations not organized under chapters 347 through 360, but alleges Section 23 prevents it from accepting these contributions.[14] AMEC-PAC further alleges it donated to other PACs in the past, and would do so again in the future, but Section 23 prohibits it from doing so. Legends Bank made contributions to PACs in the past, but alleges Section 23 now prohibits these contributions because Legends Bank is not organized under chapters 347 through 360. John Kleeba, Legends Bank's President, Chairman of the Board, and General Counsel, testified he made a contribution to the Missouri Bankers Association PAC days after Section 23 became effective, but the contribution was returned.

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[14] AMEC has at least one member that is not a Missouri domestic corporation, and is not authorized to do business in Missouri pursuant to chapter 347. Case No. 17-4006, Doc. #28, at 3.

Kleeba further testified Legends Bank stopped making contributions at this time.

FFEF wants to accept contributions from other Plaintiffs, but will not because it fears investigation, prosecution, and sanctions. FFEF intends to raise funds in unlimited amounts and use contributions to make independent expenditures in support of one or more candidates in the 2018 Republican primary for Missouri State Auditor.[15] Worker Freedom wants to accept contributions from ADA, HSI, and Farmers, but will not accept these contributions because it fears investigation, prosecution, and sanctions. Elliott **[p. 14]** wants to contribute in excess of $2,600 to FFEF for the purpose of making independent expenditures, and separately to candidate committees of more than one candidate in the 2018 Republican primary for Missouri State Auditor, but not more than $2,600 to any single candidate. Elliott will not make these contributions because he fears investigation, prosecution, and sanctions. ADA wants to make a contribution in excess of $2,600 per election to FFEF. Further, ADA would make a contribution to Worker Freedom, but will not because it fears investigation, prosecution, and sanctions. HSI wants to contribute in excess of $2,600 per election to FFEF and would contribute to Worker Freedom, but will not because it

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[15] FFEF will not use funds to make contributions, whether direct or in-kind to candidates or candidate committees, except FFEF may contribute to other committees that also intend to make only independent expenditures and do not make contributions to candidates or political parties. FFEF does not engage in coordination with candidates, candidate committees, political parties, or political party committees.

fears investigation, prosecution, and sanctions. Farmers wants to make a contribution in excess of $2,600 per election to FFEF and would make a contribution to Worker Freedom, but will not because it fears investigation, prosecution, and sanctions.

In this First Amendment case, Plaintiffs must demonstrate there is a credible threat of enforcement or they engaged in self-censorship to establish standing. Relying on Plaintiffs' alleged misinterpretations of Section 23 and recent advisory opinions, Defendants argue Plaintiffs do not face a credible threat of enforcement. A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. *See City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). As discussed above, the Court finds Plaintiffs' hesitancy to rely on the MEC's advisory opinions reasonable. Although the MEC has not brought an enforcement action against Plaintiffs, the Court cannot determine Plaintiffs face no credible threat of prosecution in light of Plaintiffs' challenges to Section 23's plain language.[16]

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[16] In response to the Court's questions regarding whether a county prosecutor may file charges for violations of Section 23, Defendants stated "[n]othing in Chapter 56 and nothing in the Missouri Constitution would prevent a prosecutor from filing charges arising out of violations of" Section 23.3(14) (prohibiting transfers to committees with the intent to conceal the true source of the contribution), and Section 23.6(1) (stating "[a]ny person who purposely violates the provisions of section 3 of this Article is guilty of a class A misdemeanor."). Doc. #75. Although

[p. 15] Plaintiffs' strongest argument in favor of standing is their self-censorship. Self-censorship must be objectively reasonable. *Missourians for Fiscal Accountability*, 830 F.3d at 794. As detailed above, Plaintiffs allege Section 23 prohibits them from receiving and making their desired contributions. Violations of Section 23 may result in criminal and monetary sanctions. Given confusion regarding the validity of the advisory opinions, and confusion regarding what conduct Section 23 proscribes, Plaintiffs' self-censorship is objectively reasonable. Thus, Plaintiffs have standing.

Next, the Court must determine whether Plaintiffs' claims are ripe for adjudication. The parties agree two claims are ripe: (1) Section 23.3(12)'s prohibition on contributions by entities not formed under chapters 347 through 360, and (2) Section 23.3(12)'s prohibition on PAC to PAC contributions. However, again relying on advisory opinions and Plaintiffs' alleged misinterpretations of Section 23, Defendants argue Plaintiffs' remaining claims are not ripe because Plaintiffs do not face criminal or civil penalties for the conduct in which they wish to engage.

"To decide ripeness, courts consider: (1) the hardship to the plaintiff caused by delayed review; (2) the extent to which judicial intervention would interfere with administrative action; and (3) whether

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a county prosecutor could bring charges for these violations, Defendants contend this Court cannot address this alleged chill because Plaintiffs did not name a county prosecutor as a defendant in this matter. The Court need not determine Plaintiffs' speech was chilled on account of fear of prosecution by a county prosecutor.

the court would benefit from further factual development." *Id.* at 796-97 (citation omitted). Plaintiffs have refrained from making or receiving desired contributions, and the Court heard testimony regarding Legends Bank's contribution to the Missouri Bankers Association being returned because Section 23 prohibited the contribution. Delayed review of the provisions at issue will further impose on Plaintiffs' ability to participate in political conduct in which they wish to engage. Further, the MEC issued advisory opinions interpreting Section 23, and in this regard, there is no judicial interference with any administrative action. Finally, the Court has received extensive briefing and heard testimony on these issues. Further factual development is not needed. Given these circumstances, the Court finds Plaintiffs' claims are ripe.

The Court denies Defendants' second motion to dismiss (Doc. #30) because the Court finds Plaintiffs have standing and their claims are ripe. In light of the parties' **[p. 16]** proposed consent judgment, the Court also finds claims related to Section 23's ballot measure ban should not be dismissed. Defendants' arguments that several aspects of Section 23 are lawful will be addressed below in the Court's discussion of the merits of Plaintiffs' motions for injunctive relief.

B. Permanent Injunction

As detailed above, Plaintiffs initially sought preliminary injunctions. Given the nature of this case and the need for a timely resolution, the Court converted the hearing on Plaintiffs' preliminary injunction motions to a hearing on Plaintiffs' requests for permanent injunction. Doc. #63. To obtain a preliminary injunction against an allegedly unconstitutional state law, a plaintiff must prove the injunction's necessity under the factors set forth in

Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981). *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). These factors are: (1) a "threat of irreparable harm to the movant"; (2) "the state of balance between this harm" and any injury that granting the injunction will cause to others; (3) the "probability that movant will succeed on the merits"; and (4) "the public interest." *Dataphase*, 640 F.2d at 114. "While no single factor is determinative, the probability of success factor is the most significant." *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (internal quotations and citations omitted). For a First Amendment challenge, if a plaintiff does not show a likelihood of success on the merits, it likely has not met the remaining requirements for preliminary injunction. *Powell v. Noble*, 798 F.3d 690, 702 (8th Cir. 2015). "When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (hereinafter "MCCL") (quoting *Phelps–Roper v. Troutman,* 662 F.3d 485, 488 (8th Cir. 2011)).

"The standard for issuing a preliminary or permanent injunction is essentially the same, excepting one key difference: a permanent injunction requires the moving party to show actual success on the merits, rather than the fair chance of prevailing on the merits required for a preliminary injunction. *See Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008); *Randolph v. Rodgers,* 170 F.3d 850, 857 (8th Cir.1999). If a court finds a movant is actually successful on the merits, it then considers the following factors in deciding whether to grant a permanent injunction: (1) the

threat of irreparable harm to the moving party; (2) the balance of harms with any injury an injunction might inflict on other parties; and (3) the public interest. *See Planned Parenthood*, 530 F.3d at 729 n.3; *Dataphase*, 640 F.2d at 113.

The Court first addresses the merits of Plaintiffs' claims. Finding partial success on the merits, the Court details appropriate injunctive relief.

(1) Level of Scrutiny

The Court must determine what level of scrutiny applies to Plaintiffs' claims. The Supreme Court has set forth different standards of review for different kinds of campaign finance regulations. *Wagner v. F.E.C.*, 793 F.3d 1, 5 (D.C. Cir. 2015) (citing *Buckley v. Valeo*, 424 U.S. 1, 19-25 (1976); *McCutcheon v. F.E.C.*, 134 S. Ct. 1434, 1444 (2014)). Laws limiting independent expenditures on electoral advocacy are subject to strict scrutiny. *Id.* (citing *McCutcheon*, 134 S. Ct. at 1444); *see, e.g.*, *Citizens United v. F.E.C.*, 558 U.S. 310, 339-41 (2010)). Laws regulating campaign contributions "are subject to a lesser, but still rigorous standard of review because contributions lie closer to the edges than to the core of political expression." *Id.* (citing *F.E.C. v. Beaumont*, 539 U.S. 146, 161 (2003)) (internal quotations omitted). The applicable standard of review for a law regulating campaign contributions requires the state to demonstrate a sufficiently important interest and to employ means closely drawn to avoid unnecessary abridgement of associational freedoms. *Id.* Demonstrating a law is "closely drawn" requires "'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served[;]...that employs not necessarily the least restrictive means but...a means narrowly tailored to achieve the desired

objective.'" *Wagner*, 793 F.3d at 21 (quoting *McCutcheon*, 134 S. Ct. at 1456-57). The Eighth Circuit, of course, follows the Supreme Court's different standards of review. *See MCCL*, 692 F.3d at 878 (stating "[p]ut simply, 'restrictions on contributions require less compelling justification than restrictions on independent spending.'") (quoting *Beaumont*, 539 U.S. at 158-59).

[p. 18] AMEC Plaintiffs urge the Court to apply strict scrutiny to invalidate portions of Section 23. They argue strict scrutiny applies because laws burdening political speech are subject to strict scrutiny. *See Citizens United*, 558 U.S. at 340; *MCCL*, 692 F.3d at 878 ("[c]ontributing to a political campaign is a form of political speech, as well as association.") (citing *Buckley*, 424 U.S. at 20-21)). However, the Supreme Court, in *Citizens United*, recognized the "variance in the rigor of scrutiny used to review independent expenditures and contributions...and neither endorsed nor condemned the distinction." *MCCL*, 692 F.3d at 878. The Supreme Court has repeatedly applied the "closely drawn" standard to challenges to campaign contribution restrictions. *See Wagner*, 793 F.3d at 5 n.3 (collecting cases). Furthermore, the Supreme Court has not revisited *Buckley*'s distinction between contributions and expenditures, nor the distinction between standards of review for these types of activities. *Wagner*, 793 F.3d at 5 n.4 (collecting cases).

In *Beaumont*, the Supreme Court applied the "closely drawn" test to uphold a federal law banning direct corporate campaign contributions. *Beaumont*, 539 U.S. at 149. The suggestion that *Citizens United* overruled *Beaumont* or "cast doubt" on its precedential value has floated throughout various courts in the years after *Citizens United* was decided.

See, e.g., *Wagner*, 793 F.3d at 6; *MCCL*, 692 F.3d at 879 n.12. However, the Eighth Circuit declined to disregard *Beaumont*, and applied the "closely drawn" standard to a Minnesota law prohibiting corporate contributions to political candidates and committees. *MCCL*, 692 F.3d at 879. The "closely drawn" standard remains applicable in reviewing a law banning or limiting campaign contributions. *Wagner*, 793 F.3d at 6 (collecting cases applying the "closely drawn" standard).

Plaintiffs do not allege Section 23 prevents them from making independent expenditures in support or opposition of a candidate. Plaintiffs allege Section 23 prevents them from making and receiving contributions among themselves and other entities. FFEF Plaintiffs also present a challenge to Section 23.3(1)(a)'s $2,600 contribution limit. Although a contribution limit burdens speech, it is not subject to strict scrutiny. *See Beaumont*, 539 U.S. at 162 ("It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny **[p. 19]** at the level selected, not in selecting the standard of review itself."). Accordingly, the Court will apply the "closely drawn" standard to Plaintiffs' claims.

(2) Interests Advanced by the State

Defendants must assert a sufficiently important interest in support of Section 23. Defendants assert Section 23 promotes the important interests in preventing corruption or the appearance thereof, promoting transparency, and preventing circumvention of campaign finance regulations.[17] The

[17] Section 23 states:

Supreme Court has repeatedly held the government's interest in preventing quid pro quo corruption or its appearance is sufficiently important to justify regulation of campaign contributions. *Wagner*, 793 F.3d at 8; *McCutcheon*, 134 S. Ct. at 1445; *Buckley*, 424 U.S. at 26-27. The Latin phrase, quid pro quo, captures the notion of a direct exchange of an official act for money, and such exchanges undermine the integrity of our system of representative democracy. *Wagner*, 793 F.3d at 8 (citations omitted). The interest in preventing quid pro quo corruption can even be a "compelling" interest that would satisfy strict

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> The people of the State of Missouri hereby find and declare that excessive campaign contributions to political candidates create the potential for corruption and the appearance of corruption; that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations and special interest groups to exercise a disproportionate level of influence over the political process; that the rising costs of campaigning for political office prevent qualified citizens from running for political officer; that political contributions from corporations and labor organizations are not necessarily an indication of popular support for the corporation's or labor organization's political ideas and can unfairly influence the outcome of Missouri elections; and that the interests of the public are best served by limiting campaign contributions, providing for full and timely disclosure of campaign contributions, and strong enforcement of campaign finance requirements.
>
> § 23.2.

scrutiny. *Wagner*, 793 F.3d at 8; *McCutcheon*, 134 S. Ct. at 1445.

The appearance of corruption is of equal concern because it can threaten the citizenry's confidence in the representative government system. *Wagner*, 793 F.3d at 8 **[p. 20]** (citing *Buckley*, 424 U.S. at 26-27). Failing to address corruption or the appearance thereof can give rise to the "cynical assumption that large donors call the tune [and] jeopardize the willingness of voters to take part in democratic governance." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000). The people of Missouri must have faith in elected officials and their appointees. *See Nixon*, 528 U.S. at 390 ("Democracy works only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.") (citation and quotations omitted).

Transparency in the electoral process serves the important government interest to "provide information to the electorate about who is speaking – information that is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *Yamada v. Snipes*, 786 F.3d 1182, 1197 (9th Cir. 2015) (citations and internal quotations omitted). "[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371; *see also Ala. Democratic Conference v. Att'y Gen. of Ala.*, 838 F.3d 1057, 1065 (11th Cir. 2016) ("transparency is plainly related to and furthers the State's interest in preventing corruption and the appearance of corruption...."). In addition, an interest in preventing circumvention of valid contribution

limits has been recognized as an important interest where there is concern about corruption or the appearance thereof. *See F.E.C. v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001).

(3) Merits of Plaintiffs' Claims

(a) Ballot Initiative Ban

Section 23.3(3)(a) states "[i]t shall be unlawful for a corporation or labor organization to make contributions to a campaign committee, candidate committee, exploratory committee, political party committee or a political party...." § 23.3(3)(a). Section 23.3(16)(c) makes it unlawful for a "campaign committee, candidate committee, continuing committee, exploratory committee, political party committee, and political party" to knowingly accept contributions from "any foreign corporation that does not **[p. 21]** have the authority to transact business in [Missouri] pursuant to chapter 347, RSMo, as amended from time to time." Section 23.7(6)(a) defines "campaign committee" as

> a committee, other than a candidate committee, which shall be formed by an individual or group of individuals, to receive contributions or make expenditures and whose sole purpose is to support or oppose the qualification and passage of one or more particular ballot measures in an election or the retention of judges under the nonpartisan court plan....

§ 23.7(6)(a).

Plaintiffs allege these provisions prevent them from contributing to a campaign committee formed for the purpose of supporting or opposing one or more ballot initiatives. A complete ban on corporate contributions to support or oppose ballot initiatives is

unconstitutional. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978) (holding a Massachusetts statute prohibiting corporate expenditures on a tax referendum violated the First Amendment). Citing *Bellotti*, Defendants indicated, in briefing and during the hearing, they will not enforce Section 23's restrictions on corporate or union contributions to campaign committees whose only purpose is supporting or opposing ballot initiatives. Doc. #31, at 23, 35-37. Plaintiffs are not satisfied with Defendants' assurances because such assurances have no legally binding effect. At the conclusion of the hearing, counsel for all parties indicated a willingness to discuss a possible consent judgment this Court could enter to resolve this issue. Subsequently, the parties submitted a proposed consent order of permanent injunction. Doc. #86. Accordingly, the Court incorporates the parties' proposed consent judgment and will enjoin enforcement of Section 23's restrictions on corporate or union contributions to campaign committees whose sole purpose is supporting or opposing ballot initiatives.

(b) Contribution Limits

FFEF Plaintiffs challenge Section 23.3(1)(a).[18] Section 23.3(1)(a) prohibits contributions in excess of $2,600 "made by or accepted from any person other than the candidate in any one election...[t]o elect an individual to the office of governor, **[p. 22]** lieutenant governor, secretary of state, state treasurer, state auditor, attorney general, office of state senator, office of state representative or any other state or judicial office."

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[18] AMEC Plaintiffs do not challenge Section 23.3(1)(a)'s contribution limit.

In Count V, Elliott alleges the $2,600 contribution limit applies to contributions made "per election" rather than "per election, per candidate." Put another way, Elliott alleges Section 23 prevents him from making a $2,600 contribution to multiple candidates running for the same office – i.e., he must spread his $2,600 between hypothetical candidates A and B who are running for the same office enumerated in Section 23.3(1)(a). For instance, if Elliott were to give $2,600 in a primary election to candidate A, but candidate A later drops out, Elliott alleges Section 23.3(1)(a) prevents him from then contributing to candidate B who remains in the race.

Defendants argue Section 23.3(1)(a) does not limit contributions to "one or more candidates," "multiple candidates" or "individuals." Rather, the limit applies on contributions to "elect an individual" to a singular office enumerated in the provision. The limit plainly applies to contributions in a single election to elect a single individual to an office.[19] This is not an aggregate limit that impermissibly "restricts how much money a donor may contribute in total to all candidates or committees." *McCutcheon*, 134 S. Ct. at 1442. Rather, this is a permissible base limit that "restricts how much money a donor may contribute to

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[19] An "election" is "any primary, general or special election held to nominate or elect an individual to public office, to retain or recall an elected officeholder or to submit a ballot measure to the voters, and any caucus or other meeting of a political party or a political party committee at which that party's candidate or candidates for public office are officially selected. A primary election and the succeeding general election shall be considered separate elections." § 23.7(11).

a particular candidate or committee." *McCutcheon*, 134 S. Ct. at 1442. Accordingly, Elliott's challenge is unfounded.

Count VI alleges Section 23.3(1)(a) prohibits ADA, Elliott, HSI, and Farmers from making contributions in excess of $2,600 to FFEF even though FFEF is an independent expenditure only committee. ADA, Elliott, HSI, and Farmers construe Section 23.3(1)(a) as applying to all contributions made in an election, including contributions to PACs. Plaintiffs argue they could not contribute a maximum amount of $2,600 to candidate A, and then contribute additional funds to a PAC that makes independent expenditures in support of or directly contributes to candidate A.

[p. 23] Defendants argue Section 23.3(1)(a) does not apply to contributions to PACs that only make independent expenditures because a "contribution" does not include contributions to independent expenditure only committees. Section 23.3(1)(a) does not specifically state the contribution limit applies to PAC contributions. However, the definition of "contribution" does not specifically exclude contributions to an independent expenditure only committee. § 23.7(7). Defendants find support for their position in an advisory opinion issued by the MEC. Advisory Opinion No. 2017.02.CF.003 states, "[i]t is the Commission's opinion that the contribution limits apply to candidate committees and only to continuing committees/political action committees if a contribution to that committee is restricted or designated for a candidate." The MEC advises:

> In order to satisfy the intent of the limitation, the contributing person must intend for the contribution to be used for the election of an individual to one of the enumerated offices. Therefore, the $2,600 contribution limit per

> election presumptively does not apply to contributions received by a continuing committee unless a contribution to a continuing committee has been restricted or designated for a candidate. While the committee may ultimately expend money advocating for a specific individual during a campaign, the limitation specifically applies to 'contributions made by or accepted from any person.' Thus, contributions made to enumerated candidates by a continuing committee/ political action committee are subject to the $2,600 limitation.

Advisory Opinion No. 2017.02.CF.003. The MEC further states "previous Commission opinions also found that the contribution limits did not apply to contributions received by continuing committees..., nor to campaign committees...." *Id.* The Court will enjoin enforcement of Section 23.3(1)(a) in a manner inconsistent with Advisory Opinion No. 2017.02.CF.003.

In Count VII, Elliott and FFEF allege Section 23.3(1)(a) is void for vagueness in that a person of ordinary intelligence cannot discern what conduct is prohibited under the amendment. Section 23.3(1)(a) is not a model of statutory clarity, but Elliott and FFEF strain to interpret it in a manner that would result in finding it unconstitutional. The plain language indicates contributions to elect an individual to an office shall not exceed $2,600 in a single election. For what it is worth, the MEC's advisory opinion clarifies Section 23.3(1)(a)'s applicability to contributions made to a PAC – the MEC will not enforce the $2,600 limit on contributions to a PAC unless the contribution is **[p. 24]** specifically designated for an individual candidate. Advisory Opinion No. 2017.02.CF.003. At the hearing, Defendants indicated

they do not oppose entry of an injunction formalizing the MEC's advisory opinions. The Court will enjoin the MEC from interpreting Section 23.3(1)(a) in a manner inconsistent with Advisory Opinion No. 2017.02.CF.003.

(c) Prohibitions on Entities Not Formed Under Chapters 347 through 360

The Court now turns to Plaintiffs' challenge to Section 23's prohibitions on the sources of certain types of contributions. First, Plaintiffs challenge Section 23.3(16)(c), which provides "[n]o campaign committee, candidate committee, continuing committee, exploratory committee, political party committee, and political party shall knowingly accept contributions from: Any foreign corporation that does not have the authority to transact business in [Missouri] pursuant to Chapter 347, RSMo, as amended from time to time." § 23.3(16)(c). Chapter 347 governs only limited liability companies ("LLC"). Second, Plaintiffs challenge Section 23.3(12), which provides "[p]olitical action committees shall only receive contributions from individuals; unions; federal political action committees; and corporations, associations, and partnerships formed under chapters 347 to 360, RSMo, as amended from time to time." § 23.3(12). Chapters 347 through 360 govern corporations, associations, and partnerships.

(i) Foreign Corporations

Plaintiffs' first challenge involves Section 23.3(16)(c)'s prohibition on receiving contributions from foreign LLCs, unless the LLC has a certificate of authority to do business in Missouri.[20] On its face,

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[20] AMEC Plaintiffs' Count I specifically attacks this provision, claiming the limitation is facially

Section 23.3(16)(c) bans contributions from foreign entities unless the contributing entity is an LLC authorized to do business in Missouri. Defendants cannot and do not attempt to argue otherwise. However, Defendants present an MEC advisory opinion interpreting this section, which states:

> **[p. 25]** § 23.3(12) provides specific authorization for political action committees to receive contributions from corporations, associations and partnerships formed under those chapters, and § 23.3(16) appears to include a prohibition for foreign corporations although referencing only one chapter of the Missouri Revised Code. It is the Commission's opinion that when both sections are read together, and because the legislature has expressly stated in those chapters listed in § 23.3(12) that foreign corporations and other business entities shall have the same rights and privileges as domestic corporations and business entities, political action committees can receive contributions from foreign corporations, associations or partnerships, holding valid certificates of authority to do business in this state under chapters 347 to 360, RSMo.
>
> Consistent with this analysis, the Commission interprets the prohibition on contributions to foreign corporations in § 23.3(16)(c) not to

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unconstitutional and unconstitutional as-applied to Plaintiffs. FFEF Plaintiffs' Count I broadly raises a challenge to the source contributions in Sections 23.3(12) and (16)(c), but overlaps with a challenge to the heavily regulated entities prohibitions discussed *infra*.

> extend to foreign corporations that have registered to do business in the state under Chapters 347 to 360, RSMo....

Advisory Opinion No. 2017.02.CF.006.

Chapters 347 through 360 provide a foreign corporation with a certificate of authority to do business in Missouri has the same rights and privileges as an in-state corporation. Mo. Rev. Stat. §§ 351.582.2, 356.031, 358.500, 358.510, 347.157. HSI, a for-profit corporation organized under Kansas laws, has a certificate of authority to transact business in Missouri pursuant to chapter 351. AMEC Plaintiffs' Amended Complaint lists KAMO Power, an Oklahoma corporation authorized to do business in Missouri pursuant to chapter 355, as a rural electric cooperative that has contributed to AMEC-PAC in the past, and wishes to do so in the future. AMEC-PAC believes Section 23.3(16)(c) prohibits it from receiving KAMO Power's contribution, but Advisory Opinion No. 2017.02.CF.006 indicates such a contribution is lawful in the MEC's view.

As with several challenges in this matter, Defendants argue their advisory opinions are legally binding, and therefore, the Court should find this claim is not ripe because these foreign corporations have authority to transact business in Missouri under chapters 347 through 360. Although the MEC's advisory opinion potentially provides clarity about Section 23.3(16)(c)'s application, the Court finds the entry of a permanent injunction enjoining enforcement of Section 23.3(16)(c) in a manner inconsistent with Advisory Opinion No. 2017.02.CF.006 appropriate. Accordingly, the **[p. 26]** Court will enjoin enforcement of Section 23.3(16)(c) in a manner inconsistent with Advisory Opinion No. 2017.02.CF.006.

(ii) Prohibition on Heavily Regulated Industries

Plaintiffs' second challenge involves the source prohibition on corporate entities found in Section 23.3(12), which restricts PACs to receiving contributions only from corporations, associations, and partnerships formed under chapters 347 through 360. Defendants term this limitation as one banning "heavily regulated industries" from contributing to PACs. While direct contributions to candidates, committees, and political parties by all corporations and unions are prohibited by Section 23.3(3)(a), Section 23.3(12) imposes a further restriction by banning contributions to PACs by these heavily regulated industries.

Defendants define a heavily regulated entity as one not formed under chapters 347 through 360. Although not an exhaustive list, businesses in a heavily regulated industry, applying Defendants' definition, include state-chartered banks and trust companies (chapters 362 and 363), loan and investment companies (chapter 368), savings and loan associations (chapter 369), credit unions (chapter 370), development finance corporations (chapter 371), fraternal benefit societies (chapter 378), insurance companies (chapter 375 through 385), railroad corporations (chapter 388), telegraph and telephone companies (chapter 392), and cooperative, nonprofit, membership corporations (chapter 394). Businesses in these heavily regulated industries may make independent expenditures, and may establish continuing committees for contributions from members or shareholders that can then donate to candidates or other groups. § 23.3(3)(a).

The ban on PAC contributions by businesses in heavily regulated industries affects multiple

Plaintiffs. AMEC's member rural electric cooperatives are organized under chapter 394, and these organizations have contributed and wish to continue contributing to AMEC-PAC. Legends Bank and Farmers are state-chartered banks organized under chapter 362 that wish to contribute to PACs. Defendants maintain the ban on heavily regulated industries is constitutional, while Plaintiffs argue the ban is not closely drawn to a sufficiently important interest.

[p. 27] All parties agree *Blount v. Securities Exchange Commission*, 61 F.3d 938 (D.C. Cir. 1995), should guide the Court's review of this issue. There, regulators of municipal securities markets investigated reports of "ethically questionable practices" by municipal bond traders and became concerned these practices "were becoming more prevalent and were undermining the integrity of the $250 billion municipal securities market." 61 F.3d at 939. In response to this concern, the Securities Exchange Commission ("the Commission") approved new rules restricting the "ability of municipal securities professionals to contribute to and to solicit contributions to the political campaigns of state officials from whom they obtain business." *Id.* Under the new rules, a municipal securities professional is prohibited from engaging with an official of an issuer for a period of two years if the professional contributed to the official. *Id.* at 940. A contribution to a PAC is treated as a contribution to the official if the PAC is controlled by the official or "any municipal finance dealer whatsoever." *Id.* Further, the two-year restriction is not triggered by a contribution of less than $250 per official, per election, and if the securities professional is entitled to vote for the official. *Id.*

Applying strict scrutiny, the District of Columbia Circuit Court upheld the rule under First and Tenth Amendment challenges.[21] *Id.* at 949. Despite the lack of specific evidence of a quid pro quo, the court noted:

> underwriters' campaign contributions self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity.

Id. at 944-45. In approving the rule, the Commission noted specific allegations of abuse in local and state governments, and cited newspaper clippings from thirteen states and the District of Columbia bolstering these allegations. *Id.* The court noted, "[a]lthough the record contains only allegations, no smoking gun is needed where...the conflict of **[p. 28]** interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic." *Id.* (citing *F.E.C. v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982)).

In light of the record, the court upheld the narrow rule. The rule applied only to the two potential parties to a quid pro quo, and did not apply to business

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[21] After a detailed analysis of whether the rule was content-based or content-neutral in light of the rule's suppression of speech, the court was "hesit[ant] to find the rule content-neutral." *Blount*, 61 F.3d at 943. The parties here engage in a brief discussion of whether this Court should apply strict scrutiny to Section 23 because the law seemingly favors content of certain corporations over others. As the Court explained above, application of the "closely drawn" standard here is appropriate given its application in the campaign finance context. *Wagner*, 793 F.3d at 6.

awarded on a competitive basis. *Id.* at 947 n.5. The rule restricted only a narrow range of activity for a relatively short period of time. *Id.* Lastly, the court noted several ways the rule did not restrict political activity, such as the ability to make direct expenditures, give speeches, volunteer for political candidates, generally solicit support as opposed to requesting money, and solicit funds for a political party. *Id.* at 948.

Section 23.3(12) is distinguishable from the rule at issue in *Blount*. The rule in *Blount* is a targeted prohibition on contributions directly to a candidate, and only for a limited period of time. Section 23.3(12) is a complete prohibition on contributions to PACs by entities not formed under chapters 347 through 360. The Supreme Court has held, "there is not the same risk of quid pro quo corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *McCutcheon*, 134 S. Ct. at 1452. The possibility of a quid pro quo between municipal bond traders and local and state governments is apparent in a direct contribution, but is not apparent in this case, where a PAC independently contributes to a candidate.

In addition to *Blount*, Defendants direct the Court to several cases purportedly supporting an outright ban on PAC contributions by businesses in heavily regulated industries. While a "particular threat to the integrity of State government posed by political contributions from participants in [a] tightly regulated industry" may be found in direct contributions to candidates, none of Defendants' cited cases stand for the proposition that an outright ban on PAC contributions passes constitutional muster. *See, e.g.*, *Green Party of Conn. v. Garfield*, 616 F.3d

189, 213 (2d Cir. 2010) (upholding a limited portion of a statute prohibiting state contractors from making campaign contributions directly to candidates for state office); *In re Earle Asphalt Co.*, 950 A.2d 918, 923 (N.J. Super. 2008) (upholding a statute preventing a state agency from awarding a contract with a value over $17,500 to a business entity that contributed more **[p. 29]** than $300 during the preceding eighteen months to the Governor, candidates for Governor, or any state or county political party); *Gwinn v. State Ethics Comm'n*, 426 S.E.2d 890, 892 (Ga. 1993) (upholding a statute that prohibited insurance companies from making campaign contributions to candidates for or occupants of the Office of Commissioner of Insurance).

While prohibitions on a limited class of businesses or individuals have been upheld, Section 23.3(12) draws no such distinction beyond a large grouping of businesses in what Defendants term heavily regulated industries. *See, e.g.*, *Wagner*, 793 F.3d at 22 (upholding a ban on indirect and direct contributions to any political party, committee, or candidate by federal contractors during the period of contract negotiation and performance); *Casino Ass'n of La. v. State ex rel. Foster*, 820 So.2d 494, 495 (La. 2002) (upholding a statute prohibiting campaign contributions by riverboat and land-based casino industries); *In re Petition of Soto*, 565 A.2d 1088, 1106 (N.J. Super. 1989) (upholding a statute prohibiting a casino officer or key employee from contributing to a candidate for public office or any party or group organized to support such a candidate).

Defendants have not demonstrated Section 23.3(12)'s ban on PAC contributions by either state-chartered banks or rural electric cooperatives is closely drawn to the government's interests.

Defendants indicated they developed a list of heavily regulated industries by researching the chapters under which the business is formed and examining the regulations imposed on the business or industry, but the Court can find little commonality among these businesses other than being organized outside title XXIII of the Missouri Revised Statutes. Certainly, not every business entity organized outside title XXIII is involved in a highly regulated industry. Defendants cite a particular danger of corruption or the appearance of corruption because these businesses are heavily regulated by the legislators to whom they wish to contribute. However, Section 23.3(12) is a ban on PAC contributions as opposed to contributions to candidates, and "there is not the same risk of quid pro quo corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *McCutcheon*, 134 S. Ct. at 1452.

[p. 30] Contributions to a PAC by a rural electric cooperative do not implicate the concerns raised by Defendants. Public utilities are regulated by the Public Service Commission, an independent executive agency, on myriad issues. Rural electric cooperatives are regulated only on one, the issue of safety.[22]

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[22] The Court also questions Defendant's identification of a rural electric cooperative as a heavily regulated industry. These entities generally do not seek business directly from the state; rather, they provide services to rural areas to which public utilities do not provide service. Moreover, Defendants have not shown rural electric cooperatives have been involved in corruption or even the appearance of corruption. The Court did not delve further into this particular

Defendants argue there is no buffer between rural electric cooperatives and their state representatives, and this lack of a buffer requires regulation of rural electric cooperatives' contributions because there is a heightened concern of quid pro quo and perceived corruption. That may be so, but Section 23.3(12) prohibits contributions to PACs, not direct contributions to candidates as in *Blount* and other cases cited by Defendants. The heightened risk of a quid pro quo exchange simply does not exist in a contribution to a PAC that independently decides how to spend a contributor's funds.

Likewise, Defendants do not establish a ban on contributions to a PAC by a state-chartered bank implicates the concerns they raised. The Court acknowledges a history of corruption or the appearance of corruption involving contributions by banking entities previously served as the basis for the implementation of campaign contribution limits in Missouri. *See Nixon*, 528 U.S. at 394-95. Defendants assert state-charted banks are properly characterized as a heavily regulated industry because chapter 362, and other regulations and statutes, impose numerous restrictions and requirements on state-chartered banks.[23] The financial industry faces complex laws

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issue because the Court finds this particular section is not narrowly drawn.

[23] The Court acknowledges the banking industry is more heavily regulated than rural electric cooperatives. However, Defendants fail to demonstrate state-chartered banks are a heavily regulated industry in which there is evidence of corruption or the appearance of corruption in PACs associated with state-chartered banks. To the extent Defendants argue otherwise, the Court finds

and regulations, but the Court again fails to see how contributions to a PAC by a state-chartered bank raise the same risk of quid pro quo corruption or its appearance as a direct contribution to a candidate might.

[p. 31] Plaintiffs also bring a facial challenge to this portion of Section 23. As explained above, the Court finds Defendants have not demonstrated Section 23.3(12)'s ban on contributions to PACs from rural electric cooperatives organized under chapter 394, or state-chartered banks organized under chapter 362, is closely drawn to avoid unnecessary abridgement of Plaintiffs' First Amendment freedoms. As the Supreme Court has held, "there is not the same risk of quid pro quo corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *McCutcheon*, 134 S. Ct. at 1452. Here, Section 23.3(12) prohibits contributions through independent actors, PACs, that do not raise the same risk of quid pro quo corruption or the appearance thereof. Consequently, the Court finds the outright ban on contributions to PACs by businesses not formed under chapters 347 through 360 is unconstitutional.

(d) PAC to PAC Contribution Ban

Plaintiffs also allege Section 23.3(12)'s prohibition on PAC to PAC contributions is unconstitutional. Section 23.3(12) provides "[p]olitical action committees...shall be prohibited from receiving contributions from other political action committees, candidate committees, political party committees,

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Defendants' allegations are broad and generalized. This Court will not uphold Section 23.3(12)'s ban on PAC contributions.

campaign committees, exploratory committees, or debt service committees." § 23.3(12). A "political action committee" is defined as follows:

> a committee of continuing existence which is not formed, controlled or directed by a candidate, and is a committee other than a candidate committee, political party committee, campaign committee, exploratory committee, or debt service committee, whose primary or incidental purpose is to receive contributions or make expenditures to influence or attempt to influence the action of voters whether or not a particular candidate or candidates or a particular ballot measure or measures to be supported or opposed has been determined at the time the committee is required to file any statement or report pursuant to the provisions of this chapter. Such a committee includes, but is not limited to, any committee organized or sponsored by a business entity, a labor organization, a professional association, a trade or business association, a club or other organization and whose primary purpose is to solicit, accept and use contributions from the members, employees or stockholders of such entity and any individual or group of individuals who accept and use contributions to influence or attempt to influence the action of voters....

[p. 32] § 23.7(20). AMEC-PAC and FFEF allege they are unconstitutionally prohibited from making contributions to and receiving contributions from other PACs organized under Missouri law. Defendants assert this prohibition is necessary to prevent corruption or the appearance of corruption,

promote transparency in the flow of money, and prevent circumvention of Section 23's restrictions.

There are differences between FFEF and AMEC-PAC, and those differences affect the Court's analysis. FFEF is a PAC whose purpose is to receive contributions and make independent expenditures to influence voters. FFEF does not contribute to candidates or their committees. FFEF does not intend to make contributions to political parties, and does not engage in coordination with candidates, candidate committees, political parties, or political party committees.

AMEC-PAC has contributed and wishes to contribute in the future to candidates and their committees. AMEC-PAC has never accepted contributions specifically designated to be contributed to a candidate. AMEC-PAC has received contributions from other PACs in the past and wishes to receive these contributions in the future. Finally, AMEC-PAC has made contributions to other PACs in the past and wishes to do so again in the future. The Court heard testimony from Klindt, AMEC's former Vice President and treasurer of AMEC-PAC, regarding AMEC-PAC's contributions to "Pork PAC" as an example of the types of contributions AMEC-PAC would make but for Section 23.3(12)'s ban on PAC to PAC contributions.

Although FFEF and AMEC-PAC challenge the constitutionality of Section 23.3(12)'s ban on PAC to PAC contributions, their challenges differ based upon the conduct in which each party wishes to engage. FFEF's challenge is, in a sense, narrower. FFEF seeks only for a judicial determination that Section 23.3(12) is unconstitutional when applied to PACs that only engage in independent expenditures. AMEC-PAC brings a broader challenge, arguing the PAC to PAC contribution ban is unconstitutional when applied to

PACs that contribute to candidates, as well as PACs that make independent expenditures. **[p. 33]**

(i) Independent Expenditure Only PACs

Defendants, in the context of this matter, state Section 23.3(12)'s ban does not apply to a PAC that seeks to receive funds from another PAC, but only uses its funds to make independent expenditures. Defendants cite Section 23's definition of "contribution" to support their position. Section 23.7(7) defines a "contribution" as follows:

> a payment, gift, loan, advance, deposit, or donation of money or anything of value for the purpose of supporting or opposing the nomination or election of any candidate for public office or the qualification, passage, or defeat of any ballot measure, or for the support of any committee supporting or opposing candidates or ballot measures or for paying debts or obligations of any candidate or committee previously incurred for the above purposes....

§ 23.3(7). Defendants argue this language does not apply to contributions to PACs making only independent expenditures. Furthermore, the MEC issued Advisory Opinion No. 2017.02.CF.004, which states, "[w]hile the Missouri Constitution and Chapter 130 do not specifically refer to 'independent expenditures,' the [MEC] has long given guidance that expenditures made by a candidate do not constitute contributions if those expenditures were 'not requested to be made by, directed or controlled by, or made in cooperation with, or made with the express or implied consent of the candidate.'" The advisory opinion further states, "§ 23.3(4) and § 23.3(12) place prohibitions on contributions and not expenditures by

a candidate committee to other candidate committees and political action committees/continuing committees."

Although Defendants indicate they will not enforce Section 23.3(12) in the manner feared by FFEF, case law is also instructive on this issue. The Supreme Court has recognized "independent expenditures do not lead to, or create the appearance of, quid pro quo corruption." *Citizens United*, 558 U.S. at 360. Because an independent expenditure is political speech that is not coordinated with a candidate, a state's interest in preventing corruption or the appearance of corruption may not justify regulation of independent expenditures when a contribution to or coordination with a candidate is not present. *See Ala. Democratic Conference*, 838 F.3d at 1066, *cert denied*, 2017 WL 1427593 (Apr. 24, 2017). Circuit Courts throughout the country have applied this reasoning to invalidate laws limiting contributions to independent expenditure only **[p. 34]** PACs. *See, e.g.*, *Republican Party of N.M. v. King*, 741 F.3d 1089, 1097 (10th Cir. 2013); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011); *SpeechNow.org v. F.E.C.*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).

Defendants urge this Court to find FFEF's challenge is not ripe because Defendants interpret Section 23 in a way that does not injure FFEF. However, based on the case law described above, Section 23.3(12)'s prohibition against a PAC's contribution to another PAC is impermissible when applied to an independent expenditure only PAC.

Although Defendants interpret "contribution" in a manner that does not encompass contributions to an independent expenditure only PAC, this interpretation is not apparent based on Section 23's language.[24] As Defendants admit, Section 23 does not define "independent expenditure," nor is it clear that a contribution to an independent expenditure only PAC from another PAC would not run afoul of Section 23.3(12). Given the case law on this issue, the Court will enjoin enforcement of Section 23.3(12) prohibiting FFEF from receiving a contribution from another PAC.

(ii) PACs that May Contribute to Candidates and Other PACs

AMEC-PAC argues Section 23.3(12)'s PAC to PAC contribution ban is unconstitutional when applied to PACs that contribute to candidates, as well as PACs that make independent expenditures. AMEC-PAC argues there is no risk of corruption or the appearance of corruption in a PAC to PAC contribution, as opposed to the state's interest in regulating contributions directly to candidates which do raise a risk of corruption or the appearance thereof. Defendants argue a PAC to PAC contribution raises the risk of corruption or the appearance thereof, and

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[24] Section 23 defines "contribution" as something given "for the support of any committee supporting or opposing candidates or ballot measures...." § 23.7(7). While an independent expenditure only PAC operates independent of a candidate and candidate committee, an independent expenditure is nonetheless made in support of a candidate or ballot measure. The Court fails to see how a contribution to an independent expenditure only PAC does not qualify as a "contribution" as defined by Section 23.7(7).

the prohibition serves the **[p. 35]** government's interest in preventing evasion or circumvention of Section 23's contribution limits to candidates.

Defendants direct the Court to case law in which a limit on contributions to a PAC was challenged. In *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981), the Supreme Court upheld a statute that prohibited individuals and unincorporated associations from contributing more than $5,000 per year to any "multicandidate political committee."[25] 453 U.S. at 185. The Supreme Court examined *Buckley*, a contribution limits decision, and found a contributor's rights were not impaired by the statute's limit on contributions to a multicandidate political committee. *Cal. Med.*, 453 U.S. at 197. The statute at issue in *California Medical Association* did not address PAC to PAC contributions.

The Eleventh Circuit's decision in *Alabama Democratic Conference v. Attorney General of Alabama*, 838 F.3d 1057 (2016), involves a prohibition on PAC to PAC contributions. There, Alabama law prohibited a PAC designed to contribute to several candidates, like AMEC-PAC, from contributing to another PAC that also contributed to candidates. 838 F.3d at 1060. The Eleventh Circuit found, as-applied to the plaintiff, the "ban serves an important anti-corruption interest while only marginally impacting

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[25] A "multicandidate political committee" is one that, relevant to this matter, "has received contributions from more than 50 persons, and... has made contributions to 5 or more candidates for Federal Office." *Cal. Med.*, 453 U.S. at 185 n.1. The Court considers a "multicandidate political committee" to be similar to AMEC-PAC in that AMEC-PAC wishes to contribute to candidates.

political dialogue." *Id.* at 1070. Critically, Alabama's campaign finance law "does not limit the amount of money that a person, business, or PAC may contribute directly to a candidate's campaign." *Id.* at 1060. Because Alabama did not limit candidate contributions, the state had an important interest in preventing quid pro quo corruption that could arise from contributions to the plaintiff PAC. *Id.* at 1070.

Here, Defendants assert an interest in preventing corruption or the appearance thereof, and preventing evasion of contribution limits, but the Court is not persuaded Section 23.3(12) is closely drawn to achieve these goals. Under Missouri law, a "political action committee" is an independent actor. *See* § 23.7(20) (defining a PAC as "a committee of continuing existence *which is not formed, controlled or directed by a* **[p. 36]** *candidate*, and is a committee other than a candidate committee, political party committee, campaign committee, exploratory committee, or debt service committee, whose primary or incidental purpose is to receive contributions or make expenditures to influence or attempt to influence the action of voters...." (emphasis added)). Given this status as an independent actor, the Supreme Court's guidance in *McCutcheon* once again applies, leading the Court to conclude Defendants do not have a valid interest in preventing corruption or the appearance thereof by regulating PAC to PAC transfers by imposing an absolute ban as Section 23.3(12) does. *See McCutcheon*, 134 S. Ct. at 1452 (stating "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly. When an individual contributes to a candidate, a party committee, or a PAC, the individual must by law cede control over the funds.").

Defendants also cite an important interest in preventing evasion or circumvention of Section 23's contribution limits as a reason to uphold the PAC to PAC contribution ban. The Supreme Court and many circuits have found this is a valid interest. *See, e.g.*, *Cal. Med.*, 453 U.S. at 197-98; *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 292 (4th Cir. 2008); *Catholic Leadership Coal. of Tx. v. Reisman*, 764 F.3d 409, 444 (5th Cir. 2014). However, AMEC-PAC and other Plaintiffs have not asserted a PAC is not subject to Section 23.3(1)(a)'s $2,600 contribution limit. In fact, AMEC Plaintiffs specifically state they are subject to these limits. *See* Doc. #34, at 3-4 (stating "Plaintiffs are not challenging the $2,600 limit on contributions from PACs to candidates found in Article VIII, Section 23" and "[i]n Missouri, PACs make both candidate contributions (subject to the $2,600 limit) and independent expenditures.").[26]

Finally, the Court notes the absolute prohibition, as opposed to a limit, imposed by Section 23.3(12). "In determining whether a contribution limit is 'closely drawn,' the Supreme Court has suggested that 'the amount, or level, of that limit could make a difference.'" *Ala. Democratic Conference*, 838 F.3d at 1069 (quoting *Randall v. Sorrell*, **[p. 37]** 548 U.S. 230, 247 (2006)). As the Court has repeatedly noted, Section 23.3(12) imposes an absolute prohibition on

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[26] The Court agrees with AMEC Plaintiffs' reading of Section 23. A "person" is subject to the $2,600 contribution limit. § 23.3(1)(a). A "committee" is included in the definition of a "person." § 23.7(19). The term "committee" includes a "continuing committee." § 23.7(6). A "continuing committee" is the same as a "political action committee." Advisory Opinion No. 2017.02.CF.003.

PAC to PAC contributions. The Court has found no similar statute or state constitutional amendment. While evasion of campaign finance limits is an important interest, Section 23.3(12)'s absolute prohibition on PAC to PAC transfers is not closely drawn to serve this interest when Section 23's contribution limits apply to PAC contributions to candidates and their committees. Moreover, Defendants do not have an interest in preventing corruption or the appearance thereof in PAC to PAC contributions among entities that are, by law, independent actors. Accordingly, the Court finds Section 23.3(12)'s ban on PAC to PAC contributions is unconstitutional. The Court will enjoin enforcement of Section 23.3(12)'s ban on PAC to PAC contributions.[27]

(4) Remaining *Dataphase* Factors

Although probability of success is the most significant factor, the Court must address the remaining *Dataphase* factors. These factors are: (1) a "threat of irreparable harm to the movant"; (2) "the state of balance between this harm" and any injury that granting the injunction will cause to others; and (3) "the public interest." *Dataphase*, 640 F.2d at 114. If a plaintiff shows a violation of a constitutional right, the other requirements for injunctive relief are generally satisfied. *See MCCL*, 692 F.3d at 870.

Because the Court determined Plaintiffs established a violation of their constitutional rights,

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[27] During this course of litigating this matter, Defendants questioned whether FFEF was a true independent expenditure only PAC. The Court finds Section 23.3(12) is facially unconstitutional, and unconstitutional as-applied to FFEF. Therefore, the Court does not address argument regarding FFEF's independence.

the other requirements for injunctive relief are generally satisfied. *See MCCL*, 692 F.3d at 870. The Court will briefly review these requirements. A loss of First Amendment rights poses a threat of irreparable harm to Plaintiffs. *See Elrod v. Burns*, 427 U.S. 347, 373 (1973) (holding "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."). Plaintiffs also seek a quick resolution of this matter so they may participate in ongoing legislative sessions and begin raising funds with which they will participate in upcoming elections. Furthermore, the Court finds granting a permanent injunction in this matter **[p. 38]** strikes a balance between the harms Plaintiffs face, and the harm granting this permanent injunction will cause to others. The Court recognizes Section 23 was passed by an overwhelming majority of Missouri voters. However, the Court but must balance the public's vote for campaign finance reforms with Plaintiffs' rights to engage in constitutionally protected conduct. The Court does not find Section 23 unconstitutional in full, but rather will enter a permanent injunction severing unconstitutional portions of Section 23, while upholding many provisions consistent with the MEC's advisory opinions. Finally, the public interest is in favor of protecting First Amendment freedoms. *See Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (stating "it is always in the public interest to protect constitutional rights."). For these reasons, the Court finds the remaining *Dataphase* factors weigh in favor of granting Plaintiffs' motions for permanent injunctive relief.

III. CONCLUSION

The Court grants Defendants' first motion to dismiss (Doc. #28). AMEC Plaintiffs' claims against

the State of Missouri are dismissed, and their state-law claims are dismissed without prejudice. The Court denies Defendants' second motion to dismiss (Doc. #30). The Court dismisses Count II of FFEF Plaintiffs' Complaint, pursuant to FFEF Plaintiffs' representation that they are abandoning this claim.

The Court partially grants Plaintiffs' motions for permanent injunction. Case No. 17-4006, Doc. #14; Case No. 14-4332, Doc. #18. In granting Plaintiffs' motions, the Court does not enjoin enforcement of Section 23 in its entirety. The Court finds unconstitutional portions of Section 23 are severable consistent with Section 23's severability provision. *See* § 23.8.

It is therefore Ordered:[28]

1. The Court permanently enjoins Defendants[29] from enforcing Article VIII, Sections 23.3(3) and 23.3(16)(c) of the Missouri Constitution against a **[p. 39]** corporation or labor organization for making a contribution to a campaign committee that only supports or opposes ballot measures.

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[28] In proscribing injunctive relief, the Court uses terms as defined in Article VIII, Section 23 of the Missouri Constitution.

[29] "Defendants" include the Missouri Ethics Commission, James Klahr in his official capacity as Executive Director of the Missouri Ethics Commission, Commissioners Nancy Hagan, and Vice Chairs Bill Deeken, Eric L. Dirks, Don Summers, Kim Benjamin, and George Ratermann, and including successors, current and future officers, agents, servants, employees, and all other persons in active concert of participation with them.

2. The Court permanently enjoins Defendants from enforcing Article VIII, Section 23.3(1)(a) of the Missouri Constitution against a person whose contribution to elect a single individual to office in a single election does not exceed $2,600 per election, allowing for an adjustment of the contribution limit as described in Section 23.3(18).
3. The Court permanently enjoins Defendants from enforcing Article VIII, Section 23.3(1)(a) of the Missouri Constitution against a person who contributes to a continuing committee or political action committee unless the contribution is restricted or designated for a specific candidate as Missouri Ethics Commission Advisory Opinion No. 2017.02.CF.003 provides.
4. The Court permanently enjoins Defendants from enforcing Article VIII, Section 23.3(16)(c) of the Missouri Constitution against a continuing committee or political action committee that accepts contributions from a foreign corporation that has authority to transact business in Missouri pursuant to chapters 347 through 360 of the Missouri Revised Statutes. This is consistent with Missouri Ethics Commission Advisory Opinion No. 2017.02.CF.006.
5. The Court permanently enjoins Defendants from enforcing Article VIII, Section 23.3(12) of the Missouri Constitution's prohibition against political action committees receiving contributions from entities formed outside of chapters 347 through 360 of the Missouri Revised Statutes.
6. The Court permanently enjoins Defendants from enforcing Article VIII, Section 23.3(12) of

> the Missouri Constitution's prohibition on political action committees receiving contributions from other political action committees.

[p. 40] At the hearing, Defendants requested this Court stay any injunctive relief ordered to allow Defendants the opportunity to appeal this Court's decision. The Court grants this request. The Court stays enforcement of the May 5, 2017 Order for a period of forty-five days after entry of the May 5, 2017 Order.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, SENIOR JUDGE
DATE: May 17, 2017 UNITED STATES DISTRICT COURT