No. 18-896

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

RESPONDENTS' MISSOURI ELECTRIC COOPERATIVES, ASSOCIATION OF MISSOURI ELECTRIC COOPERATIVES-PAC, LEGENDS BANK, AND DAVID KLINDT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES W. HATFIELD
Counsel of Record
STINSON LEONARD STREET LLP
230 W. McCarty Street
Jefferson City, MO 65101
Tel: 573.636.6263
Fax: 573.636.6231
chuck.hatfield@stinson.com

ERIN M. NAEGER
STINSON LEONARD STREET LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
Tel: 816.691.2364
Fax: 816.412.8128
erin.naeger@stinson.com

Attorneys for Respondents Missouri Electric Cooperatives; David Klindt; Association of Missouri Electric Cooperatives-PAC; and Legends Bank

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Under the First Amendment, is a complete ban on political action committees giving contributions to, or receiving contributions from, other political action committees for any purpose (including to make independent expenditures) an adequately tailored constitutional means to achieve a state's interest in preventing *quid pro quo* corruption or the appearance thereof?

CORPORATE DISCLOSURE STATEMENT

Respondent Missouri Electric Cooperatives, doing business as Association of Missouri Electric Cooperatives does not have a parent corporation, and no publicly held company or corporation owns ten percent or more of Missouri Electric Cooperatives' stock.

Respondent Legends Bank's parent corporation is Linn Holding Company, Inc. No publicly held company or corporation owns ten percent or more of Legends Bank's stock.

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INTRODUCTION

Missouri's Ethics Commission, et al. seek review of what they pose as a simple question: whether a state may prohibit political action committees from transferring money to other political action committees. This simplified summary conceals the nuanced factual issues that arise in this case due to the unique nature of Missouri's campaign finance scheme. Large portions of Missouri's campaign finance law were struck down as unconstitutional, leaving piecemeal legislation. Under the remaining law, all political action committees are independent actors, which by law may not be formed, directed or controlled by a candidate. MO. CONST. Art. VIII, Section 23.7(20).[1] Missouri PACs can make both independent expenditures and candidate contributions, as well as support ballot measures, but none of these activities can be undertaken in coordination with a candidate. *Id*. Missouri's law is so unique that it is unlikely to recur in other states, making this case a poor vehicle to address the issue of a prohibition on transfers between political action committees.

These unique factual nuances also demonstrate there is no genuine conflict among the circuits. Indeed, these factual distinctions are the very reason Missouri's prohibition on transfers between political action committees was struck down as unconstitutional

[1] Petitioners mistakenly claim Missouri lacks any anti-coordination laws, in direct contradiction to the plain language of the Constitution. Pet. 37. Under Missouri law, PACs cannot be controlled or directed by candidates. MO. CONST. Art. VIII, Section 23.7(20).

by both the District Court and the Eighth Circuit. As demonstrated below, what is left of Missouri's campaign finance system following this litigation provides sufficient protection to any asserted state interest in regulating transfers between political action committees. Even if the Court wanted to take up the issue of transfers between political action committees, the factual record below was not well developed, making this case a poor vehicle for review. Finally, in 2018 Missouri enacted a new campaign finance measure, putting into place further preventative measures that would seemingly resolve one of Petitioners' asserted interests. The Court should deny review and allow Missouri political action committees to exercise their First Amendment rights through political contributions.

STATEMENT OF THE CASE

In late 2016, Missouri made significant changes to its campaign finance laws. MO. CONST. Art. VIII, Section 23. Before then, Missouri imposed no restrictions or limits on campaign contributions; rather Missouri citizens and entities could make unlimited contributions to candidates and committees. The passage of MO. CONST. Art. III, Section 23 dramatically changed all that, including but not limited to monetary limits on contributions to candidates for statewide office, a ban on corporate contributions to candidates, a prohibition on Missouri political action committees receiving money from certain corporations, and a ban on transfers between political action committees.

On December 7, 2016, AMEC filed a complaint in the United States District Court for the Eastern District of Missouri challenging four discreet portions of Amendment 2: (1) a prohibition on campaign committees and political action committees ("PACs") accepting contributions from foreign business entities unless they are authorized to do business in Missouri as an LLC; (2) a prohibition on PACs accepting contributions from Missouri corporations formed outside of certain Missouri statutes; (3) a ban on transfers between PACs, also known as PAC-to-PAC transfers; and (4) a ban on corporate contributions to campaign committees whose sole purpose is to support or oppose ballot measures. *Missouri Electric Cooperatives v. State of Missouri*, Case No. 4:16-cv-01901 (E.D. Mo. Dec. 7, 2016). After extensive briefing on a request for injunction as well as a hearing on a request for a restraining order, the Eastern District transferred venue to the United States District Court for the Western District of Missouri and consolidated AMEC's case with that of the *Free and Fair Election Fund* Plaintiffs (Case No. 16-04332-CV-C-ODS).[2]

Missouri then filed two motions to dismiss, which were briefed by the parties on an expedited basis. On March 3, 2017, the District Court held a consolidated hearing on AMEC's motions for preliminary and permanent injunction and the motions to dismiss. At the hearing, the parties entered a consent order in favor of

[2] The Eastern District agreed that it was a proper venue for the challenge, but transferred on grounds of *forum non conveniens.*

AMEC and against Petitioner on one of AMEC's claims – the prohibition on corporate contributions to campaign committees whose sole purpose is to support or oppose ballot measures. The trial court took evidence on the remaining claims including both documents and live testimony presented by AMEC (the State presented only documents). On May 5, 2017, the District Court rendered its judgment, finding in favor of the AMEC Respondents on Counts I through IV of their Amended Complaint and entering a permanent injunction. *Free and Fair Election Fund, et al. v. Missouri Ethics Commission, et al.*, 252 F.Supp.3d 723 (W.D. Mo. 2017).

The State appealed. Their appeal abandoned most of the issues, leaving just one: the finding that the prohibition on contributions between political action committees violates the First Amendment. After briefing and oral argument, the Eighth Circuit affirmed. *Free and Fair Election Fund, et al. v. Missouri Ethics Commission, et al.*, 903 F.3d 759 (8th Cir. 2018). Missouri filed this petition for a writ of certiorari on January 8, 2019.

The State asks this Court to review the complicated issue of whether Article VIII, Section 23.3(12) – which prohibits **all** contributions between all political action committees – is an unconstitutional restriction in violation of the First Amendment. Pet. i. The District Court and the Eighth Circuit properly found the ban on PAC-to-PAC transfers violates Respondents' First Amendment rights to free speech and assembly. Pet. App. A11, A64.

Missouri's unique definition of PACs is important to the analysis. Missouri PACs can make both independent expenditures (expenditures advocating the election of, but not in coordination with, a candidate) and contributions directly to candidates. This Court teaches there is no governmental interest in regulating independent expenditures. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010). This principle should end the analysis, but even as to contributions between PACs that engage in candidate contributions, Missouri has not established a compelling interest nor is the total ban on PAC contributions to other PACs sufficiently focused on those interests. This Court's most recent case law makes clear that the state has no (or very little) interest in regulating contributions between PACs because they present no (or very little) risk of *quid pro quo* corruption. And Missouri has sufficient other limitations in place to protect the other interests asserted by the State.

REASONS FOR DENYING THE PETITION

The Court should not grant review in this case. The Eighth Circuit's decision made clear that this case is factually different from the Eleventh Circuit's decision in *Alabama Democratic Conference v. Attorney General of Alabama*, 838 F.3d 1057 (11th Cir. 2016) relied upon by Petitioners to demonstrate a Circuit split. Given the broad differences in Missouri and Alabama's campaign finance regulations, this case is inappropriate for review. Moreover, this case suffers

from defects in the record and a unique campaign finance regime that make the issues here unlikely to recur.

I. The Alleged Circuit Split Identified in the Petition Is Exaggerated or Nonexistent

Contrary to Petitioners' assertions, the Eighth Circuit's decision did not create a split from the Eleventh Circuit. Petitioners go so far as to mischaracterize the Eleventh Circuit's decision in *Alabama Democratic Conference v. Attorney General of Alabama* as "precedent" that the Eighth Circuit failed to follow. Pet. 10. But any alleged split is overstated considering the significant differences between the law in Missouri and the law in Alabama.

Similar to Respondent Association of Missouri Electric Cooperatives-PAC ("AMEC-PAC"), the Alabama Democratic Conference ("ADC"), was a political action committee ("PAC") that made both independent expenditures and campaign contributions. However, that is where the similarities end. Although the ADC had segregated bank accounts for independent expenditures and candidate contributions, it "openly admit[ted] to coordinating its political spending with the candidates it supports" including "coordinating its putative independent political activities with the candidates who provide almost half of its funding." *See* Brief in Opposition, *Alabama Democratic Conference v. Marshall*, 2017 WL 876226, at *1, 17 (U.S. Mar. 1, 2017). Further, the ADC had a connection to the Alabama Democratic Party. *Id*. As a result, the Alabama scheme

gives the state a greater interest in regulating PACs as a way to regulate candidates and address *quid pro quo* corruption of candidates and officeholders.

In contrast, all Missouri political action committees are independent actors who, by law, are "not formed, controlled, or directed by a candidate." Article VIII, Section 23.7(20).[3] And Missouri PACs are not limited to supporting candidates. They can make both independent expenditures and direct candidate contributions, but they can also support and oppose ballot measures,[4] and none of these activities can be undertaken in coordination with a candidate. *Id*. Unlike Alabama, Missouri law requires PACs to be independent of political party committees. *Id*. These facts were crucial to the District Court's and Eighth Circuit's analysis of both the State's interest and the fit between the State's asserted interest and the measure.

Moreover, the District Court and the Eighth Circuit both recognized that there is a critical distinction between Alabama and Missouri law – Alabama allows PACs, individuals, and businesses to make unlimited contributions to candidates. Missouri, on the other

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[3] Petitioners mistakenly claim Missouri lacks any anti-coordination laws, in direct contradiction to the plain language of the Constitution. Pet. 37. Under Missouri law, PACs cannot be controlled or directed by candidates. Article VIII, Section 23.7(20).

[4] Missouri has an extensive initiative petition process that allows the people to propose amendments to both the Missouri Constitution and State statutes independent of the legislature. MO. CONST. Art. III, Section 49 *et seq*. Alabama does not allow such direct advocacy by its citizens.

hand, already advances its interest in preventing corruption or the appearance thereof through limits (currently $2,600 per election cycle) on contributions from PACs to candidates that are almost half of the $5,000 that the Supreme Court deemed so minimal "that it hardly raises the specter of abuse that concerned the court in *Buckley*." *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 201 (2014); MO. CONST. Art. VIII, Section 23.3(1)(a). Additionally, the Alabama PAC transfer law was more closely tailored to the perceived problem as it only prohibited financial transfers between PACs; it did not extend to in-kind contributions, as Missouri's law does, nor did it extend to PACs that are not designated as a "principal campaign committee." *Alabama Democratic Conference*, 2017 WL 876226, at *11; *Alabama Democratic Conference v. Attorney General of Alabama*, 838 F.3d 1057, 1060 (11th Cir. 2016).

These significant factual distinctions should doom the State's petition for certiorari.[5] Missouri's constitutional amendment differs greatly in scope from Alabama's statute, which alone should be sufficient to deny review. Further, this Court declined to review the

[5] Petitioners argue that because Missouri's PAC-to-PAC transfer ban was found facially unconstitutional, any distinguishing factors from the Alabama decision are irrelevant. Pet. 25. This misinterprets the law – in order to assess the fit between the measure and the State's interest, it is necessary to look at the entire campaign finance regime. Regardless, Petitioners also misstate the District Court's and Eighth Circuit's holdings. Both courts found that the PAC-to-PAC transfer ban was unconstitutional both facially and as-applied. Pet. App. A11, A64.

Eleventh Circuit's decision in the *Alabama Democratic Conference* case, even though Petitioners there asserted an even wider alleged split involving at least six Circuits. *Alabama Democratic Conference v. Marshall*, 137 S.Ct. 1837 (2017) (denying petition for writ of certiorari).

II. This Case is a Faulty Vehicle for Addressing PAC-to-PAC Transfers

Even if the Court wanted to take up the issue of PAC-to-PAC transfers, this case is not a good vehicle to do so. The Court should wait for a case where the regulatory scheme is more representative of most jurisdictions and where the record below is more fully developed regarding the State's asserted interests in regulating PAC-to-PAC transfers. Also, after this matter was decided, Missouri enacted a new campaign finance measure, imposing further preventative measures that would seemingly resolve at least one of Petitioners' asserted interests.

A. Missouri's Campaign Finance System is One-of-a-Kind

In determining the question presented, this Court analyzes the fit between the challenged regulation and the State's alleged interest. The Court takes into account the state's entire campaign finance system, including what other options are available to the State to address its interests. *McCutcheon*, 572 U.S. at 221-23. When the Court considers the entire scheme, it will

find Missouri's approach unique and unlikely to recur in other states.[6]

For example, Missouri takes a bizarre approach to the term "contribution." The State tries to avoid a clear violation of the First Amendment by re-defining the term "contribution" as a longstanding "term of art" in Missouri that does not include contributions to independent-expenditure-only committees. Pet. 39. However, as the District Court correctly pointed out, "this interpretation is not apparent based on Section 23's language." Pet. App. A60. In fact, the District Court was clear that it "fail[ed] to see how a contribution to an independent expenditure only PAC does not qualify as a 'contribution' as defined by Section 23.7(7)." Pet. App. A60.

Other provisions are equally non-obvious. The measure at issue here was so poorly written and ambiguous that, rather than relying on the plain language, the Missouri Ethics Commission attempted to save its provisions by issuing advisory opinions

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[6] In fact, it is difficult to find any uniformity between the states in the treatment of PACs. For example, Arizona differentiates between so-called "mega PACs" and regular PACs, with different contribution limits for each. Ariz. Rev. Stat. Ann. § 16-908; § 16-914. California and Colorado establish different contribution limits for "small contributor" or "small donor" PACs that also vary based on the level of office, compared with regular PACs. Cal. Govt. Code § 85203; § 85300 *et seq.*; COLO. CONST. Art. XXVIII, Section 2; Section 3. Washington prohibits a PAC that has not received contributions of $10 or more from 10 or more Washington registered voters during the past 180 days from making any contributions to candidates. Wash. Rev. Code § 42.17A.442.

directing how they would interpret the law. Pet. App. A26-A29. The District Court opined that although these advisory opinions may provide clarity[7] about the measure's application, injunctive relief was still appropriate to ensure the measure is not applied in an unconstitutional manner. Pet. App. A47. Finally, large swaths of Missouri's law were so facially unconstitutional that the State consented to enjoining some of them (Pet. App. A40-A41) and declined to appeal other District Court rulings. *Compare Free and Fair Election Fund v. Missouri Ethics Commission*, 252 F.Supp.3d 723 (W.D. Mo. 2017) *with Free and Fair Election Fund v. Missouri Ethics Commission*, 903 F.3d 759 (8th Cir. 2018). Given the less than well-developed state of Missouri's campaign finance law and the fact that many of its provisions have been found unconstitutional and enjoined from enforcement, the likelihood of a similar law being enacted in other states is remote.

B. Changes to Missouri's Constitution Resolve the Anti-Circumvention Concerns Raised in the Petition

As Petitioners recognized, since the adoption of the Constitutional Amendment at issue here, Missouri voters have adopted another ballot initiative that

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[7] Whether the opinions provide clarity is somewhat illusory. Missouri law makes clear that opinions of the Ethics Commission may be over-ruled or otherwise withdrawn for various reasons and it is not clear that those opinions provide protection from prosecution for anyone other than the person who requested the opinion. Mo. Rev. Stat. § 105.955.16.

makes circumvention of contribution limits (one of Petitioners' asserted interests) harder. Pet. 33. A new Article III, Section 2(d) now establishes a "rebuttable presumption that a contribution to a candidate for public office is made or accepted with the intent to circumvent the limitations on contributions imposed in this section when a contribution is received from a committee or organization that is primarily funded by a single person, individual, or other committee that has already reached its contribution limit under any law relating to contribution limitations." Stated plainly, if a committee receives a contribution from another committee that is funded by one large donor and that committee has already reached its contribution limit, there is a rebuttable presumption that said contribution was intended to circumvent the contribution limits. This addresses exactly the situation Petitioners fear – a PAC-to-PAC transfer being used to evade the contribution limits.

C. The Factual Record Below Was Not Well Developed Because Petitioners Failed to Present Evidence Necessary to Assess the State's Asserted Interests

The next hole in the cert application is the lack of a good record below. At the District Court, Petitioners failed to introduce evidence concerning the State's asserted interests, required to support the fit between the measure and the State's interests. Despite Petitioners' assertion that the State's anti-corruption interest is a "value judgment" making evidence

unnecessary, this Court has "never accepted mere conjecture as adequate to carry a First Amendment burden . . . ." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 (2000). Although this Court declined to define the type of evidence necessary, it held that "the evidence introduced into the record by petitioners or cited by the lower courts in this action and the action regarding Proposition A is enough . . . ." *Id*. Petitioners erroneously state that *Shrink* accepted newspaper accounts and the result of the statewide vote on the law as sufficient evidence to confirm anti-corruption concerns. In fact, the evidence in *Shrink* included an affidavit from a state senator who co-chaired the Interim Joint Committee on Campaign Finance Reform, newspaper accounts of large contributions supporting inferences of impropriety, an Eighth Circuit decision citing scandals involving kickbacks and misuse of state property, and published studies regarding campaign finance, none of which the State presented here. *Id*. at 393-94. More important, there was no doubt that the evidence in *Shrink* directly addressed the government's regulation of large contributions to candidates. But here there was no evidence at all – not even news reports – about whether PAC contributions to other PACs were a legitimate corruption or perception problem in Missouri.

While Petitioners urge the Court to compare this case to *Alabama Democratic Conference*, they ignore that Alabama squarely dealt with the threshold issue and presented real, hard evidence of "two incidents in which there was at least an appearance that

PAC-to-PAC transfers were operating to disguise the true source of contributions in just the way the law was intended to prevent." 838 F.3d at 1064. In fact, Alabama actually submitted an indictment alleging that bribery was being committed by laundering money through PACs. *Alabama Democratic Conference v. Strange*, 2015 WL 4626906, at *2, n.5 (N.D. Ala. Aug. 3, 2015). Here, Petitioners presented no such evidence. Pet. App. A7. Instead, Petitioners relied entirely on hearsay – newspaper articles and editorials regarding the broad subject of campaign contributions (not specific to PAC-to-PAC transfers) – rather than affidavits, live testimony, or published studies regarding campaign finance issues. More importantly the articles and editorials Petitioners rely on and cite to in their Petition are from a time prior to the enactment of Missouri's new campaign finance law and thus present situations and hypotheticals that are no longer a reality in light of the unchallenged portions of the law.[8] Should this Court wish to address PAC-to-PAC transfers, this Court would be better served to wait for a case with a more developed record that better presents these issues.

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[8] The Petition cites to several newspaper articles that are not part of the record below, but are being relied on for factual assertions necessary to establish the State's interest. *See* Pet. 29, 34 citing *Senate Leaders Dislike Campaign Donor Limits*, COLUMBIA TRIB. Sept. 20, 2008; Steve Bell, *Missouri Politics: Hiding Big Donations is Easy and Legal*, KCUR 89.3, May 3, 2012. Because these articles were not entered into the record, Respondents had no opportunity to object and the District Court was not able to evaluate their credibility.

III. The Decision Below is Correct

There's another reason not to review the Eighth Circuit's decision – it was correct. Recently, this Court reinforced the importance of the First Amendment in protecting the political speech of all – regardless of corporate form – by making clear that the government's permissible justifications for restricting political speech are very narrow and that any regulation must avoid unnecessary abridgement of First Amendment rights in order to survive review. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340-42 (2010).

As a result, when confronted with a restriction on political contributions, the burden of justification shifts to the government. *McCutcheon*, 572 U.S. at 210. Here, the State did not carry its burden. Just as in *McCutcheon*, here the State has an insufficient corruption/appearance of corruption interest in banning PAC-to-PAC transfers. *McCutcheon* made clear that while the State may have a compelling interest in regulating "direct" contributions to candidates, its interest in regulating contributions to PACs is not the same. The only recognized legitimate government interest is the prevention of *quid pro quo* corruption or the appearance thereof, and "the Government may not seek to limit the appearance of mere influence or access." *Id*. at 208.

A. The Eighth Circuit Correctly Found the State Does Not Have a Sufficient Interest in Banning PAC-to-PAC Transfers

Citizens United and *McCutcheon* clarified what may not have been clear in prior case law – the government interest sufficient to justify an intrusion on constitutional speech and associational rights is limited *only* to the prevention of *quid pro quo* corruption or the appearance thereof. *Citizens United*, 558 U.S. at 359. Further narrowing the potential government interest, this Court explained "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." *McCutcheon*, 572 U.S. at 211 (quoting *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 310 (2003)).

> [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. When an individual contributes to a candidate, a party committee, or a PAC, the individual must by law cede control over the funds. The Government admits that if the funds are subsequently re-routed to a particular candidate, such action occurs at the initial recipient's discretion – not the donor's. As a consequence, the chain of attribution grows longer, and any credit must be shared among the various actors along the way. For those reasons, 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 210-11 (internal citations omitted).

That is certainly the case in Missouri. PACs may not accept a contribution to "pass it through" to a candidate. *See* MO. CONST. Art. VIII Section 23.3(7) (prohibiting contributing "through another person" to conceal the identity of the actual source); *see also* MO. CONST. Art. VIII Section 23.3(14) (prohibiting transferring funds with the "intent to conceal . . . the identity of the actual source"). As a result, it is illegal for a PAC to contribute to a candidate when the funds actually come from someone, other than the PAC, who is attempting to circumvent contribution limits.

In addition, one PAC cannot be corrupted, or appear to be corrupted by contributions from another PAC because PACs have no governmental decision-making authority to corrupt. The entire premise of contribution restrictions is to prohibit a *quid pro quo* transaction (or the appearance thereof) between contributors and office-holders (or would-be office-holders) who can offer government action in exchange for a contribution. While reducing the appearance of a corrupt government is certainly a worthy goal in a democracy, there is no such risk here because a PAC receiving a contribution has no *quo* to offer for the contributing PACs *quid*. Absent coordination between a candidate and the PAC, the government may not constitutionally restrict PAC expenditures. *Citizens United*, 558 U.S. at 357.

B. The Eighth Circuit Correctly Found the PAC-to-PAC Transfer Ban is Not Appropriately Tailored to Any State Interest

Even if there was a governmental interest in limiting contributions to PACs that might engage in candidate contributions, Subsection (12) is not appropriately tailored to the State's asserted interests. This Court will "assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon*, 572 U.S. at 199. And "if a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, it cannot survive 'rigorous' review." *Id*. Under the "closely drawn" standard applied by the courts below,[9] Article VIII, Section 23.3(12)'s ban on PAC-to-PAC transfers is unconstitutional because – as the District Court and the Eighth Circuit found – there is a substantial mismatch between the State's minimal legitimate interests and the means selected to achieve it. Petitioners argue the PAC-to-PAC transfer prohibition is closely drawn to serve the State's interests in reducing the fact and appearance of public corruption, promoting election transparency, and avoiding the circumvention of contribution limits. Pet. 27-28. Even if there was a governmental interest in limiting contributions to

[9] Petitioners allege the Eighth Circuit applied "a standard that resembled strict scrutiny." Pet. 16. However, the Eighth Circuit was clear that it was analyzing the measure under the "exacting scrutiny" standard established in *McCutcheon*, which requires the challenged law to advance a sufficiently important state interest and employ means closely drawn to avoid unnecessary abridgment of First Amendment freedoms." Pet. App. A5.

PACs that might engage in candidate contributions, Subsection (12)'s total ban on any contribution from one PAC to another in any amount is not appropriately tailored to the State's asserted interests.

1. The PAC-to-PAC Transfer Ban is Not Closely Drawn to the State's Asserted Anti-Corruption Interest

Petitioners again rely on the Eleventh Circuit's decision in *Alabama Democratic Conference*, 838 F.3d 1057, in arguing that a ban on PAC-to-PAC transfers will prevent corruption or the appearance thereof. However, as discussed above, there is a critical distinction between Alabama and Missouri law – Alabama allows unlimited contributions from individuals, businesses and PACs. In Missouri, as in *McCutcheon*, there are limits (currently $2,600 per election cycle) on contributions from PACs to candidates that are almost half of the $5,000 that the Supreme Court deemed so minimal "that it hardly raises the specter of abuse that concerned the court in *Buckley*." *McCutcheon*, 572 U.S. at 201; MO. CONST. Art. VIII, Section 23.3(1)(a).

Because Missouri has limited the amount a PAC may contribute to a candidate and has also imposed a ban on contributions to PACs to allegedly address the same interest, the measure is "prophylaxis-upon-prophylaxis," which requires that the Court be "particularly diligent in scrutinizing the law's fit." *McCutcheon*, 572 U.S. at 221. And as in *McCutcheon*, there are sufficient other limitations in place – or that could be put

in place – such that a total ban on PAC-to-PAC transfers is inappropriate. *See Republican Party of New Mexico v. King*, 741 F.3d 1089, 1097 (10th Cir. 2013) ("Any anti-corruption interest posed by candidate contributions are resolved by the limitation on those contributions . . . ."). "[A] hybrid PAC must respect both direct contribution limits and anti-coordination laws. These measures satisfy the government's anti-corruption interest with respect to hybrid PACs." *Id*. at 1101.

2. The PAC-to-PAC Transfer Ban is Not Closely Drawn to the State's Asserted Interest in Preventing Circumvention of Limits

Petitioners argue the ban on PAC-to-PAC transfers advances the State's interest in preventing circumvention of contribution limits. Pet. 28-33. But, "there can be no freestanding anti-circumvention interest . . . [instead] there must be an underlying risk of corruption that justifies a contribution limit, and there must be a real possibility of evading those valid limits through unlimited contributions." *Republican Party of New Mexico*, 741 F.3d at 1102; *Federal Election Comm'n v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 456 (2001) (analyzing whether there is a risk of corruption or its appearance through circumvention of valid contribution limits and stating "circumvention is a valid theory of corruption"). The District Court and the Eighth Circuit properly found PAC-to-PAC transfers do not create a real

possibility of evading contribution limits adequate to justify a complete ban.

As in *McCutcheon*, there are sufficient other limitations in place such that a *total ban* on PAC-to-PAC transfers is inappropriate. 572 U.S. at 210. Importantly, the unchallenged campaign finance limitations in Missouri law – including individual contribution limits to PACs and candidates, limits and reporting requirements for earmarked contributions, and disclosure requirements for contributions (including PAC-to-PAC transfers) – are similar, and in some instances stronger, than the limitations the Supreme Court examined in *McCutcheon*. *See McCutcheon*, 572 U.S. at 210-18. As the District Court recognized, under Missouri law a PAC is an independent actor. *See* Article VIII, Section 23.7(20). The "[l]imits on contributions to political committees consequently create an additional hurdle for a donor who seeks both to channel a large amount of money to a particular candidate and to ensure that he gets the credit for doing so." *McCutcheon*, 572 U.S. at 201.

Missouri also has provisions that serve the same purpose as the earmarking provisions in *McCutcheon*. As discussed above, Missouri prohibits contributions made in any manner as to conceal the identity of the actual source of the contribution. Article VIII, Section 23.3(7). Missouri also places an extremely low limit on anonymous contributions. Article VIII, Section 23.3(8)-(9). As in *McCutcheon*, these additional provisions make it "hard to believe that a rational actor would" use PAC-to-PAC transfers to avoid the individual

contribution limits or disclosure laws to funnel money to a candidate when instead the donor could simply spend unlimited funds on independent expenditures in support of his or her preferred candidate. *See McCutcheon*, 572 U.S. at 213-14.[10]

Missouri's asserted interest in the ban on PAC-to-PAC transfers is the exact same as the government interest asserted in the $25,000 aggregate contribution limit found unconstitutional in *McCutcheon*. *See id*. Therefore, as in *McCutcheon*, Missouri's PAC-to-PAC ban is "poorly tailored to the Government's interest in preventing circumvention of the base limits, [and thus] impermissibly restricts participation in the political process." *Id*. at 218. This Court has said all that needs to be said on the issues presented in this Petition. There is no reason to grant it in order to say more of the same.

3. The PAC-to-PAC Transfer Ban is Not Closely Drawn to the State's Asserted Interest in Transparency

Finally, Petitioners argue that the ban on PAC-to-PAC transfers promotes transparency because "PAC-to-PAC contributions have been used for years to obscure the source of large contributions in Missouri elections." Pet. 34. Petitioners present no *actual*

[10] Petitioners allege Missouri has seen large PAC-to-PAC transfers since the District Court's opinion enjoining the ban. Pet. 31-32. As Petitioners rightfully point out, this is not part of the record and, even if it was, it does not implicate any nefarious intent to circumvent the contribution limits Missouri has in place.

evidence of this assertion, instead again citing to newspaper articles that are not part of the record. The Columbia Tribune article cited by Petitioners does not discuss PAC-to-PAC transfers at all. Pet. 34. And the KCUR article does not discuss any actual occurrence of PAC-to-PAC transfers being used to obscure transparency, but instead discusses a hypothetical created by a politician. Pet. 34.

More importantly, both of Petitioners' cited sources fail to account for the unchallenged portions of Article VIII, Section 23 that place limits on the ability of donors and politicians to engage in the conduct they describe. For example, the KCUR article hypothesizes that it would be legal for a politician to accept a $1 million contribution and "launder" the funds to hide the source of the donation. But Missouri law already requires the disclosure of both contributions from a donor and contributions from one PAC to another. *See* Mo. Rev. Stat. § 130.011(11)(f); § 130.011(13); § 130.025. The disclosure requirements in Missouri law thus already protect the State's transparency interest, eliminating the necessity of a PAC-to-PAC transfer ban. *Republican Party of New Mexico*, 741 F.3d at 1101.

Nor is the "laundering" scenario legal under existing, unchallenged Missouri law. As the Missouri Ethics Commission explained in one of its advisory opinions regarding Article VIII, Section 23 (*see* Advisory Opinion No. 2017.02.CF.003), Missouri law – specifically Mo. Rev. Stat. § 130.041(10) – requires committees to report contributions that are restricted or designated

for a particular candidate. All Missouri PACs – including those that make both candidate contributions and independent expenditures – are thus required to report those contributions so that they can be tracked. This requirement still applies when a restricted or designed contribution is transferred to another PAC.

Further, the law clearly prohibits a contribution made "directly ***or indirectly*** . . . by or through another person in such a manner as to conceal the identity of the actual source of the contribution or the actual recipient." Article VIII, Section 23.3(7) (emphasis added).[11] "Person" is defined in the law to include PACs. *See* Article VIII, Section 23.3(7). The law also prohibits all committees – whether it is a candidate committee, party committee, or a PAC – from accepting an anonymous contribution over $25, and committees may not accept aggregate anonymous contributions over $500 or 1% of all contributions. *See* Article VIII, Section 23.3(8)-(9). And all committees are required to file reports identifying receipts and expenditures, including showing all persons who contribute over $100. *See* Mo. Rev. Stat. § 130.041.1. These reports are publicly available on the Missouri Ethics Commission's website. *See* Missouri Ethics Commission Candidate or Committee Name Search, www.mec.mo.gov/MEC/Campaign_Finance/CF11_SearchComm.aspx (last visited March 12, 2019).

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[11] This provision protects against another of the State's fears: that a candidate could conceal the money's original source by routing it between PACs, while quietly telling the candidate who put up the money. Pet. 17. The measure expressly prohibits that exact scenario.

Thus the law already prohibits what the State fears – using PACs to funnel money to candidates in a non-transparent manner. Put simply, if Missouri wants to protect its questionable governmental interest related to PACs, it should enforce the laws that it has, not continue to enact sweeping total bans that infringe the First Amendment's protections.

McCutcheon and *Citizens United* do not permit total bans in order to further transparency. Rather, they struck down contribution and expenditure limits as unconstitutional while upholding disclosure requirements as a "less restrictive alternative to more comprehensive regulation of speech." *Citizens United*, 558 U.S. at 369; *see McCutcheon*, 572 U.S. at 223. To the extent Petitioners find the current disclosure rules insufficient to provide transparency, the answer – the proper fit – is further disclosure requirements, not a total prohibition on transfers between PACs. *See Missourians for Fiscal Accountability v. Klahr*, 2017 WL 58588 at *4 (W.D. Mo. Jan. 5, 2017) ("If the State wants to educate voters, it can employ more effective means that are less violative of First Amendment rights – that is, disclosure requirements.").

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted this March 15, 2019,

CHARLES W. HATFIELD
Counsel of Record
STINSON LEONARD STREET LLP
230 W. McCarty Street
Jefferson City, MO 65101
Tel: 573.636.6263
Fax: 573.636.6231
chuck.hatfield@stinson.com

ERIN M. NAEGER
STINSON LEONARD STREET LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
Tel: 816.691.2364
Fax: 816.412.8128
erin.naeger@stinson.com

Attorneys for Respondents Missouri Electric Cooperatives; David Klindt; Association of Missouri Electric Cooperatives-PAC; and Legends Bank