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 UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS FREE AND FAIR ELECTION FUND, MISSOURIANS FOR WORKER FREEDOM, AMERICAN DEMOCRACY ALLIANCE, HERZOG SERVICES, INC., FARMERS STATE BANK AND JOHN ELLIOTT

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## CORPORATE DISCLOSURE STATEMENT

Appellee American Democracy Alliance is a private, nonprofit corporation with no stock or stockholders, and, accordingly, no publicly-held corporation owns 10% or more of its stock. American Democracy Alliance does not have any parent corporations and does not have any subsidiary corporations, except for wholly-owned subsidiary corporations. American Democracy Alliance does not have any affiliates that have issued shares to the public.

Appellee Farmers State Bank is not publicly held and no publicly-held corporation owns 10% or more of its stock. Farmers State Bank's parent corporation is FSC Bancshares Inc., a Missouri Corporation. Farmers State Bank does not have any subsidiary corporations, except for wholly-owned subsidiary corporations. Farmers State Bank does not have any affiliates that have issued stock that is publicly traded.

Appellee Herzog Services, Inc. is not publicly held and no publicly-held corporation owns 10% or more of its stock. Herzog Services, Inc.'s parent corporation is William E. Herzog Enterprises, Inc. Herzog Services, Inc. does not have any subsidiary corporations, except for wholly owned subsidiary corporations. Herzog Services, Inc. does not have any affiliates that are publicly held.

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## INTRODUCTION

Only two states in the Union ban PAC-to-PAC contributions: Alabama and Missouri. How did these two Southeastern Conference-mates stray into this seldom-trod corner of campaign finance regulation, and why should this Court care?

Alabama's story is simple. It is one of very few states that neither limits contributions to candidates nor prohibits corporate contributions; it regulates campaign finance by disclosure only. It enacted its PAC-to-PAC ban because its real-world experience showed that donors passed large, undetected contributions to candidates through chains of PACs, thus defeating disclosure—Alabama's only line of defense against perceived corruption.

Missouri's route was quite different. In 2016, it joined the federal government and a majority of states by enacting two major reforms: limits (of $2,600) on individual and PAC contributions to candidates, and bans on corporate giving to candidates. Its reform included a series of measures designed to prevent circumvention of these new rules—extending to an outer ring of bans on transfers between various entities. Much of this outer ring was haphazard, illogical, and constitutionally suspect because it was far removed from the core of the state's candidate anti-corruption interest. For example, bans on corporate contributions to ballot measure committees and to independent expenditure-only PACs like Appellee Free and Fair Election Fund were either invalidated below and not appealed, or are otherwise not at issue here.

But the Appellant Missouri Ethics Commission ("MEC") still seeks to revive Missouri's PAC-to-PAC ban, invalidated below as an undue burden on Appellants' First Amendment rights to associate with each other by sharing resources for bigger-ticket campaign expenses. The MEC's best efforts only confirmed, however, that Missouri is not Alabama. The MEC could provide no plausible hypothetical examples in which a Missouri donor would "launder" millions of dollars from PAC to PAC, let alone real-world examples, as in Alabama. The reason was simple: in Missouri, unlike in Alabama, the end of the spigot is controlled by the $2,600 limit. In Missouri, scores of robot PACs would have to be assembled—to meaningfully circumvent the limits—an irrational and inefficient expense and legal risk, given that all contributions and expenses are reported and electronically searchable.

This was the Eighth Circuit's reasoning. It merely followed this Court's roadmap in *McCutcheon v. FEC*, which showed how to apply "closely drawn" scrutiny when the government bans one class of contributions as a purported prophylaxis to protect candidate contribution limits. 572 U.S. 185 (2014). That the Eleventh Circuit's "closely drawn" review upheld Alabama's PAC-to-PAC ban two years ago is no indictment of either circuit. It merely shows that Alabama, a disclosure-only and limit-free state where donors *do use* PAC-chains to transfer millions of corporate dollars directly to a candidate, is not Missouri. Appellants' claimed Eighth-Eleventh split, recent and razor-thin even on Appellants' terms, is a chimera.

Nor is this an important problem that demands a nationwide solution. The only two affected states now have answers from courts of appeal that applied the correct legal standard: "closely drawn" scrutiny. In the unlikely event some other state sparks litigation by following either of Missouri's or Alabama's distinct routes into this seldom-visited corner of campaign finance law, it will have the light of the decisions below and *McCutcheon*'s roadmap. That will have to be enough, because there can never be a nationwide, one-size-fits-all "answer" to Appellants' Question Presented: whether states can ban PAC-to-PAC transfers. Still, should another voice ever ask this question again, there is an appropriate "response:" run closely-drawn scrutiny against the state's unique history of campaign practices and background of other campaign finance restrictions.

This may never satisfy the MEC, which closes its Petition by warning this Court that unidentified regulators are being "chilled" from crafting new restrictions on speech, and badly need a nationwide up-or-down. Petition ("Pet.") 43. This is the same mindset that demands prophylaxis-upon-prophylaxis and craves the "protection" of the PAC-to-PAC ban, whether it prevents corruption or not. It is heedless of injury to Appellees' political speech. And it gets the Constitution exactly backward: the First Amendment exists to protect political speech for citizens, not to carve out safe havens for regulation. The Petition should be denied.

## STATEMENT OF THE CASE

### A. The Appellees

Appellees are Missouri individuals, entities, and political action committees ("PACs") who are active in state candidate and ballot measure campaigns. Petition Appendix ("App.") A17, A18. They exercise their First Amendment rights to associate with each other in order to magnify the effect of their speech in those races. *Id.*

Free and Fair Election Fund ("FFEF") is an Appellee PAC that makes independent expenditures, including expenditures to other PACs. App. A4. The ability of PACs like FFEF to associate with and contribute to one another is fundamental to effective political speech. Eighth Circuit Oral Arguments, Apr. 10, 2018 ("Oral Argument") at 37:58-39:00, available at https://ecf.ca8.uscourts.gov/cgi-bin/oaByCase.pl?caseno=17-2239&getOA=Search. That is because a single PAC's constituency may lack the wherewithal to contribute sufficient funds to enable that PAC – alone – to effectively advance its position. *Id.* As a result, PACs contribute to other PACs with whom they share a political message in a particular ballot measure or candidate campaign. *Id.* Such association is integral to each PACs' effectiveness as a political speaker.

### B. Missouri's Amendment Two

In 2016, Missouri enacted a sweeping campaign finance measure known as Amendment 2. App. A2. The Amendment's comprehensive preamble, now part of the Missouri Constitution, consumes 136 words. Eighth Circuit Joint Appendix ("J.A.") 885. It includes

the drafters' statements about policy goals they hoped to address through Amendment 2, but contains no mention of the only issue presented in Appellants' Petition: contributions between Missouri PACs. Instead, the preamble focuses its attention on "excessive" and "large campaign contributions," "wealthy individuals, corporations, and special interest groups," corporate and union contributions that can "unfairly influence" election outcomes, and "the rising costs of campaigning." Pet. 12.

Reflecting these priorities, the core of Amendment 2 imposed a uniform $2,600 limit on contributions from both individuals and PACs to candidate campaigns. J.A. 885. It also banned corporate and union contributions to candidates and parties. *Id.* Beyond this, the Amendment built an inner ring of prophylactic and "anti-circumvention" measures, imposing other limits on contributions to party committees and prohibiting various transfers among candidate committees, and from party and candidate committees to PACs. *Id.* The Amendment left in place Missouri's comprehensive campaign finance disclosure and administrative and criminal enforcement schemes, which were creatures of statute. App. A8; *see generally* Chapter 130, RSMo.

Beyond these inner rings of prophylaxis, Amendment 2 constructed outer rings of additional "anti-circumvention" provisions. App. A9. These included outright bans on several types of committee transfers that did not involve candidates or parties, but directly burdened the Appellees. They included bans on: (1) corporate contributions to ballot measure committees; (2) PAC contributions to independent expenditure-only PACs; (3) certain types of corporations' and entities'—but not others'—contributions to PACs; and,

most sweepingly, (4) any PAC contribution to another PAC. J.A. 885-88. FFEF and the other Appellees, believing they had become the collateral damage of an overzealous effort to build rings of protection around Missouri's new contribution limits and corporate source bans, filed their challenge in December 2017. J.A. 28-93.

### C. District Court Proceedings

After a trial in March 2017, the District Court struck down each of the challenged outer-ring prophylactic measures as violative of the Appellees' First Amendment rights. App. A20, A66-68. The Missouri Ethics Commission defended the PAC-to-PAC ban—the only loss it ultimately appealed—but focused much of its effort on attacking the standing of FFEF and the other plaintiffs, arguing that Amendment 2 did not actually ban Appellees' proposed transactions, that FFEF might not be a true independent expenditure committee, or that the Missouri Ethics Commission would choose not to enforce parts of the Amendment. App. A55-64.

With respect to the PAC-to-PAC transfer ban, Appellees' claims presented a challenge to the MEC. The MEC was faced with the need to present either a logical, common-sense example, or some actual report from Missouri's prior experience, explaining how a PAC-to-PAC transfer fosters *quid pro quo* corruption or its appearance. Under Missouri's new law, where corporations are prohibited from giving to candidates, and where even a well-funded PAC can only give $2,600 to a single candidate, Appellees argued that no succession of PAC-to-PAC transfers could circumvent Amendment 2's ironclad $2,600 limitation on the "final" transfer from a PAC to a candidate.

At best, Appellees argued, a donor's lengthy chain of risky and already-illegal PAC-to-PAC earmarking transactions would, at the end of the day, add exactly $2,600 to his already-disclosed $2,600 direct contribution. A donor wishing to exceed this limit to any meaningful degree—that is, to a degree likely to raise concerns of corruption—would have to use a different tactic. Instead of opening a chain of PACs to unlawfully pass through a single $2,600 contribution, he would open and directly fund a broadside of perhaps one hundred PACs, and then unlawfully direct each PAC to donate $2,600 to the candidate. Of course, this transaction does not require a PAC-to-PAC contribution at all. And even if the donor added a series of new PACs between himself and each of the hundred ultimate-contributor PACs, creating one hundred new PACs and causing one hundred PAC-to-PAC transfers, the resulting hundred illegal earmarked (or straw man) transactions could hardly escape notice.

This much, Appellees argued, was common sense. However, Appellees also recognized that the MEC had been tasked for decades with investigating campaign finance complaints and referring serious matters for criminal prosecution. J.A. 730. Discovery and trial in the district court focused, therefore, on finding a logical example of potential circumvention, or some real-world reports of this phenomenon in Missouri. *See* District Court Transcript, J.A. 591-93 (objections to exhibits as lacking evidence of PAC-to-PAC circumvention and corruption).

The MEC failed to adduce any evidence of actual or perceived corruption from PAC-to-PAC transfers in Missouri. It failed to do so not only under Missouri's recently-abandoned disclosure-only system, but also

under the cap-and-control system that prevailed until 2008. It brought no witnesses, focusing its attack on the question of whether certain plaintiffs, including FFEF, had legal standing. *See id.* at 580-735.

Appellants' efforts in discovery and at trial did not yield any finding from the District Court that PAC-to-PAC transfers are a reasonably likely means of hiding contributions or circumventing limits. In fact, the District Court found the opposite: "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.*" App. A64 (emphasis added). In other words, the tight nozzle at the end of the contribution hose will only allow $2,600 through per transaction, providing little incentive to shift money between PACs for purposes of circumvention.

**D. The Eighth Circuit**

Appellants fared no better in the Eighth Circuit. In briefing and oral argument, they struggled to provide plausible hypothetical or real-world examples of circumvention that the PAC-to-PAC ban would address. *See* Oral Argument at 12:38-16:27. Appellants also abandoned their attack on the standing of Appellee FFEF, admitting it only made independent expenditures. *Id.* at 41:40-42:08.

Ultimately, Appellants were left to argue that any "circumvention" would be committed by a donor contributing large sums of money "to a candidate by

laundering it through a series of PACs that he controls." App. A6. *See also* Oral Argument at 5:15-7:00. Like the District Court, the Eighth Circuit saw the problem with this example, recognizing that "the transfer ban, however, does little, if anything, to further" the anti-corruption interest. App. A7. It based this conclusion on the MEC's twin failings of evidence and logic. *Id.*

First, the MEC "did not 'provide any real-world examples of circumvention' along the lines of its hypothetical." *Id.* (citing *McCutcheon*, 572 U.S. at 217). Second, as a matter of common sense, the Eighth Circuit recognized that "[t]he 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 candidate." *Id.* Or, to stay within the law, the donor could simply engage in $1 million in independent spending. "Why establish 385 separate PACs to donate $2,600 each to a preferred candidate when the donor can spend $1 million independently to support the candidate?" *Id.* at A8 (citing *McCutcheon*, 572 U.S. at 213-14).

The Eighth Circuit also held that transparency is not meaningfully advanced by banning PAC-to-PAC contributions, since "large" donations in excess of $2,600 are already banned by Amendment 2. *Id.* at A7. Every donation to and from a committee is also subject to mandatory disclosure, and Amendment 2 prohibited donors from contributing to PACs with the purpose of concealing the source. *Id.* at A8.

### E. Appellants' Statement of the Case Mischaracterizes the Eighth Circuit's Decision

1. Appellants claim the Eighth Circuit "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.'" Pet. 16. The Eighth Circuit agreed with them this far, Appellants claim, and the court's point of departure was simply that "it did not agree that this circumvention of the contribution limits creates a risk of *quid pro quo* corruption or its appearance." *Id.* That is false.

Appellants omit the Eighth Circuit's complete sentence, which actually begins, "**The evasion would occur, the argument goes, because** a donor could contribute large, unearmarked sums…" *Id.* (emphasis added). In other words, the Eighth Circuit was simply reciting Appellants' own hypothetical—not itself jumping to the conclusion that such conduct would likely occur. And in the succeeding sentences, the court made clear that it found Appellants' hypothetical unsupported by real-world examples or bare logic. App. A7-8. The court assuredly did *not* take the unreasonable position Appellants now assign to it: that actual circumvention of the limits would occur, but would not create a risk of corruption.

2. Appellants next suggest that the Eighth Circuit insisted upon a particular format for evidence. The court nowhere "faulted the record for lacking real-world examples by donor name or other identifying transaction of this circumvention." Pet. 16. Instead, the court's point was that the MEC had flatly failed to provide real-world examples. App. A6-7. There was no technical problem with the format of evidence or "the record."

3. Finally, Appellants falsely claim that the Eighth Circuit "appeared to fault" Amendment 2 for being "underinclusive" when the court suggested other avenues—one legal and one illegal—for donors to affect elections. Pet. 16 (citing App. A7). Far from it. The Eighth Circuit was simply tracking the identical point made by this Court: that other, more easily-available options meant that rational donors would not likely engage in Appellants' hypothetical circumvention. *See McCutcheon*, 572 U.S. at 213-214 (explaining how donors would be better off simply funding independent expenditures than engaging in costly and inefficient schemes using a network of controlled PACs).

### F. Appellants' New Certiorari Evidence

Appellants' Statement of the Case also cites two new articles they never introduced or cited below. *See* Pet. 11, fn. 1-2. Appellants also now claim to know that when Missouri voters approved Amendment 2, they agreed with selected quotes from those articles, or that the articles are otherwise factual. *Id.* at 12. Yet the articles provide no factual information, let alone an example of the type requested by the Eighth Circuit. This new material does not identify any plausible PAC-to-PAC circumvention theory or recount the example they presented to the Eighth Circuit. The remainder of Appellants' Statement recycles a limited repertoire of clichés ("the shuttling of money among political action committees," Pet. 13, or "routing [money] back and forth through various committee transfers," *Id.* at 17) rather than identifying the place in the record where Appellants presented a plausible scenario of limit-circumvention or donor cover-up.

## THE PETITION FOR CERTIORARI SHOULD NOT BE GRANTED

There is no circuit split. The only two states with PAC-to-PAC bans, Alabama and Missouri, enacted their bans within starkly different campaign finance regimes: Alabama has no limits and allows corporate contributions, relying wholly on disclosure; Missouri has the full panoply of disclosure requirements but relies mainly on contribution limits and corporate source bans. Each state also had different histories: Alabama had evidence of past use of PAC-to-PAC transfers to circumvent Alabama's disclosure rules; Missouri had no such evidence, and besides, such transfers made little sense given that PACs, too, were subject to $2,600 contribution limits. Missouri and Alabama are simply different, and Appellants' "split" between the Eighth and Eleventh Circuits is imaginary. *See* Section I, *infra*.

Nor is this issue—which involves only Alabama and Missouri—of nationwide importance. It is not even capable of a single nationwide solution, since a PAC-to-PAC ban will impose different burdens in each state, will interact with a different background of other laws, and will spring from a different evidentiary record regarding each state's campaign practices. Put another way, there has been no percolation, and because of the state-specific nature of the issue, there never will be. *See* Section II, *infra*.

Finally, although of less importance at this stage, the Eighth Circuit's decision was correct. The largest part of Appellants' Petition is simply an effort to re-argue the case. *See* Section III, *infra*. The Petition should be denied.

## I. There Is no Circuit Split on How to Apply the First Amendment to State Bans on Transfers Between PACs

### A. Appellants do not deny that both the Eighth and Eleventh Circuits recognized that exacting scrutiny applies.

1. Both circuits recognize that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon*, 572 U.S. at 210. *See* App. A5 (the Eighth Circuit decision below); *Alabama Democratic Conference v. Attorney Gen. of Alabama ("ADC")*, 838 F.3d 1057, 1063 (11th Cir. 2016). Both recognize that laws regulating contributions are subject to exacting scrutiny. App. A5; *ADC*, 838 F.3d at 1063. And both circuits, relying on *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), recognize that in order to meet its burden under exacting scrutiny, the government must first show that the challenged law must advance or further a "sufficiently important" state interest. App. A5; *ADC*, 838 F.3d at 1063. The only sufficiently important state interested is "preventing corruption or the appearance of corruption." App. A5-6; *ADC*, 838 F.3d at 1064.

2. Both circuits agree, too, on the second prong of the test: the government must show that the law is "closely drawn" to serve the state interest while avoiding unnecessary abridgement of First Amendment freedoms. App. A5; *ADC*, 838 F.3d at 1063. This ground is well-trod, and Appellants do not argue that the Eighth, Eleventh, or any other circuit recognizes a different standard.

### B. There is also no circuit split regarding *how* exacting scrutiny is applied to PAC-to-PAC bans.

Even on their own terms, Appellants identify the narrowest of splits: the Eleventh Circuit applied exacting scrutiny to uphold Alabama's PAC-to-PAC ban, while the Eighth applied the same legal test to invalidate Missouri's PAC-to-PAC ban. Anticipating the objection that such differences in outcome are not *prima facie* "splits" requiring resolution by this Court, Appellants attempt to add gravity to their claim by arguing that the two courts also resolved each *prong* of exacting scrutiny differently.

Tellingly, Appellants are unable to demonstrate that any other circuit has yet lined up with either side of what it claims is a binary choice: either the laws stay or they fall. That is true not only as to the overall *result* of exacting scrutiny, but also as to the intermediate conclusions that Appellants claim courts "should" universally reach under each prong of the test. This alone is an important clue that there can never be—and, even with percolation, will never be—nationwide, binary positions on the constitutionality of the states' various anti-corruption tactics in the field of campaign finance, including PAC-to-PAC bans.

### C. The Eighth and Eleventh Circuits do not disagree about "whether PAC transfer prohibitions advance state interests."

Neither circuit considered this question—and neither should have considered it—as a generic point of law. *See* Pet. 19-21. Appellants nonetheless claim to know that the two circuits harbor a philosophical difference, unbound

from the facts, about whether the transfer bans advance the objectives of transparency and anti-circumvention and thereby "advance" states' anticorruption interests. They are wrong.

1. There is no disagreement on transparency. Below, the MEC argued that Missouri's PAC-to-PAC ban furthered transparency and therefore promoted its anti-corruption interest. App. A8. Without providing examples, the MEC reasoned that Missouri "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.'" *Id.* Exposing the source "of these large donations" would ergo discourage corruption and allow the MEC to "detect" violations of Missouri's $2,600 contribution limit. *Id.*

The Eighth Circuit rejoined that "the transfer ban does not materially advance these objectives" because Missouri "already prevent[s] 'large' donations" via its $2,600 limits, and "other provisions serve the State's interest in revealing efforts to contribute more" than those limits. App. A8. These included laws that prohibit contributions to PACs with an intent to conceal the original source, and laws that "ensure that both the public and the Commission know the source of each donation." *Id.* The MEC never provided evidence that using "chains" of PACs or other multistep transfers has successfully obscured donors from the MEC or the public.

The Eleventh Circuit panel that decided *ADC* correctly observed that "transparency" and "disclosure requirements" can deter and detect corruption. *ADC*, 838 F.3d at 1065 (citing *Buckley*, 424 U.S. at 67). This is

true enough so far as it goes; the Eighth Circuit found it unnecessary to repeat it as a holding or in dicta. That is because standing alone, this general principle says nothing about whether a particular state's *PAC-to-PAC transfer ban* can actually function in the same way as disclosure laws, advancing transparency and therefore combatting corruption. After all, as the Eighth Circuit found, Missouri's $2,600 contribution limit and disclosure laws do the work a transfer ban is supposed to do, "ensur[ing]" that the public and MEC have the requisite knowledge. App. A8.

The Eleventh Circuit, like the Eighth, had to reach beyond the general to the specific: to decide that Alabama's PAC-to-PAC transfer ban did indeed fulfill the same role as a disclosure requirement and advance transparency in Alabama. Unlike the Eighth, it had the facts to do so. Indeed, it had remanded to the district court for precisely this reason after reversing an earlier grant of summary judgment against the state. *Alabama Democratic Conference v. Broussard*, 541 Fed. Appx. 931, 936 (11th Cir. 2013) (observing that even in 2013, the state had already "presented ample evidence of possible corruption through PAC-to-PAC transfers to withstand summary judgment"). By 2016, Alabama had accumulated evidence that "[d]onors were able to conceal these donations by making "a contribution to one PAC, which in turn made a contribution to another PAC, which then made a contribution to yet another PAC and so on, such that by the time the money was delivered to a candidate there was no way to effectively trace the contribution from the original donor to the ultimate recipient." *ADC*, 838 F.3d at 1070, fn. 1. The Eighth Circuit noticed this, too (App. A8-9), making the absence of similar evidence in Missouri all the more glaring.

Appellants well seem to be out of bullets. But grasping for some major "transparency" holding from which the Eighth Circuit could then have allegedly split, Appellants craft an entirely new and fanciful section of *ADC*. Appellants claim that at page 1065, *ADC* discussed an information "asymmetry" between "big money donors and political candidates," who "know more about how to trace donations than the average voter does." Pet. 20. Supposedly, voters in every state lack the motivation to review disclosure reports to see where "big money" is coming from; only PAC operators and candidates do that. *Id*. Appellants claim the Eleventh Circuit held that disclosure laws are not enough to deal with these gaps in disclosure purportedely know-how and motivation, while the Eighth Circuit disagreed. *Id*. The problem is that none of this analysis or argument appears anywhere in either opinion. If evidence of such nationwide phenomena exists, it should first see a district court.

2. Appellants incorrectly posit that the Eighth and Eleventh Circuits also disagree regarding "anti-circumvention" interests. In fact, *ADC* undertook no analysis distinct from its "transparency" review; this certainly did not occur at page 1160 of *ADC*, where Appellants claim to locate it. App. Pet. 21. At any rate, because Alabama is a disclosure-only state, "anti-circumvention" of disclosure rules is indistinguishable from transparency.

In contrast, Missouri regulates primarily by its universal contribution limit of $2,600 and its ban on corporate contributions to candidates. The MEC tried and failed to "provide any real-world examples of circumvention along the lines of its hypothetical," which was that donors

would evade the contribution limits by "contribut[ing] large, unearmarked sums of money to a candidate by laundering it through a series of PACs that he controls." App. A7. And as the Eighth Circuit pointed out, a rational Missouri donor would evade limits not by the unwieldy means of PAC-to-PAC transfers, but instead, by giving to a broadside of PACs "with the expectation that these PACs would support the donor's preferred candidate." App. A7. The Eleventh Circuit, reviewing a disclosure-only state like Alabama, never confronted the question of what "circumvention" of Missouri's contribution limit would look like: how would donors accomplish it and what measures might conceivably deter them? The circuits could not have split when they did not consider the same issue.

### D. The Eighth and Eleventh Circuits do not disagree about "whether PAC transfer prohibitions are closely drawn."

Contrary to Appellees' claim, neither circuit considered the question of fit—and neither should have considered it—as a generic point of law. Pet. 21-26. In fact, the two circuits are in accord on the only question upon which they are required to agree: the generic legal conclusion that exacting scrutiny requires a "reasonable" but not "perfect" fit, and that the means selected must be in proportion to the interest served. *See* App. A9 (citing *McCutcheon*, 572 U.S. at 218); *ADC*, 838 F.3d at 1069 (citing same portions of *McCutcheon*).

What Appellants do not grasp is that the "burden" and "benefit" of Alabama's and Missouri's PAC-to-PAC bans can and do differ based on the interplay between those bans and: (1) the rest of each state's campaign finance law; and (2) the state's political environment and history.

1. Each state, Missouri and Alabama included, has decided to run a different experiment in campaign finance law. As the Eleventh Circuit recognized, "[u]nlike many other states, Alabama's campaign finance law does not limit the amount a person, business, or PAC may contribute directly to a candidate's campaign." *ADC*, 838 F.3d at 1060 (internal citations omitted). Alabama "instead relies on a system of disclosure that requires regular reporting of campaign contributions and spending by candidates, corporations, and PACs." *Id.* A database of those reports is electronically searchable. *Id.*

*Alabama.* A PAC-to-PAC ban under a disclosure-only model—Alabama's current, and Missouri's former, model—has a unique function. It is the first and *only* line of defense. The system hopes to stymie *quid pro quo* corruption purely by disseminating information about the original sources of funds that reach candidates. Multimillion-dollar corporate contributions directly to candidates—something forbidden in Missouri—are perfectly legal in Alabama.

But Alabama is willing to take this step solely on the faith that these massive corporate contributions will be disclosed. Further, Alabama lets a corporation make this same massive contribution to a PAC, which can forward it immediately to a candidate. But again, Alabama permits this relying wholly on the cleansing power of disclosure. The *only* line of defense is disclosure of both transactions.

From the perspective of a donor or candidate wishing to circumvent disclosure, Alabama's PAC-to-PAC transfer ban has a limited and targeted function. As the Eleventh Circuit recognized, Alabama donors need not devise ways to overcome contribution limits or bans on

corporate contributions. Both transactions are already permitted. Thus, the last remaining temptation is secrecy: the possibility of clandestinely transferring a massive contribution through a string of compliant PACs to an entity that can itself contribute in unlimited amounts. If evidence shows—as it did in *ADC*—that the electronic filing and disclosure system is insufficient to track this activity and detect or deter corruption, then a PAC-to-PAC ban becomes necessary. On those facts, as the *ADC* court suggested, there may well be no "less restrictive means" to the anti-corruption end. *ADC*, 838 F.3d at 1070.

*Missouri*. Missouri used Alabama's system until Amendment 2. The Show-Me State ended its experiment with a disclosure-only regime and instead opted for the cap-and-control federal model. Under the new model, disclosure is just the picket line. The MEC and voters know that the large contributions possible under its old system—and still possible in Alabama—are no longer legal. The corporation directing millions of dollars to a PAC knows that contribution limits ensure that only $2,600 can ever reach any one candidate from a PAC.

The Eighth Circuit recognized that under Missouri's system, no rational donor would use PAC-to-PAC transfers to circumvent the cap-and-control system's main line of defense: contribution limits. App. A7. Instead, he would spread a massive sum by making direct contributions to a large number of PACs, directing or expecting them to give to one or more preferred candidates. *Id*. Without a horizontal broadside of such final-donor PACs, an Alabama-style vertical chain of PAC-to-PAC transfers could only succeed in making it too time-consuming to trace the upstream source of a single $2,600 contribution between the last PAC in the chain and the candidate—

hardly worth the effort in time and legal risk, since each earmarked contribution would create a new legal violation involving new witnesses. Given the MEC's implausible scenarios and lack of "any real-world examples," the Eighth Circuit could not help but notice the same "improbability of circumvention" this Court found when striking down the federal aggregate contribution limits in *McCutcheon*. 572 U.S. at 217.

Further, the Eighth Circuit did not have *ADC*-like evidence that Missouri's disclosure and other anti-circumvention laws were ineffective—a factual finding that, along with the litigants' apparent failure to present alternatives, contributed to the Eleventh Circuit's *dicta* that a blanket ban might be the only means to advance its transparency interest. Given its record, the Eighth Circuit could rightly ask whether anti-proliferation and other laws, singly or in combination, might serve as less-restrictive alternatives to Missouri's total ban. App. A9-10. This Court did the same in *McCutcheon*, 572 U.S. at 220-23. That the Eleventh Circuit did not need to undertake an analysis like this Court in *McCutcheon* and the Eighth Circuit below is attributable to the facts and arguments before it, not a circuit split.

2. The second area of complexity is the political system that campaign finance law tries to regulate, at least as courts are able to perceive it through evidence admitted into the record.

*Alabama*. In states like Alabama, PACs such as the Alabama Democratic Conference apparently evolved to serve much the same function as parties; focusing on black voters, its activities are "intertwined with" the Democratic Party, even if the organization is independent

of the party. *ADC*, 838 F.3d at 1061. Perhaps that is because, unlike in Missouri, PACs like *ADC* rival parties by sitting at the center of the solar system. In unlimited amounts, they can give to and take from *all* players. *Id.* at 1060. They can not only receive unlimited funds from the two major parties and from candidates—again, something prohibited in Missouri—they can also contribute and spend in unlimited amounts. *Id.*[1]

In a disclosure-only state, hiding the sources of funding for such entities would not only cripple the state's only anti-corruption measure, it could also be quite tempting to some funders. The only method for hiding contributions, of course, would be transfers through a chain of PACs. Not surprisingly, the Eleventh Circuit pointed out that the state at trial was able to adduce precisely this evidence. *ADA*, 838 F.3d at 1070, fn. 1.

*Missouri.* In contrast, the Missouri Ethics Commission presented no testimony. Its exhibits were newspaper articles opining on generalized criticisms of Missouri's pre-2016, disclosure-only regime, and its own publicly-available campaign finance reports which fully disclosed some of the same PAC contributions that members of the media duly covered in newspaper articles. It presented no evidence that Missouri donors, as had Alabama donors, made "a contribution to one PAC, which in turn made a contribution to another PAC, which then made a contribution to yet another PAC and so on, such that by

1. As part of the same special legislation that enacted PAC-to-PAC bans, Alabama also prohibited PACs like ADC from receiving contributions from the major parties. *ADC*, 838 F.3d at 1061.

the time the money was delivered to a candidate there was no way to effectively trace the contribution from the original donor to the ultimate recipient." *Id.*

Perhaps recognizing their failure of proof, Appellants cite two articles that appear nowhere in the record, claiming they are evidence of PAC-to-PAC transfer corruption during Missouri's pre-2008 campaign finance regime, which did have contribution limits. Pet. 29, 34. The articles are not readily accessible, but Appellees have obtained copies. They do not stand for the propositions cited.

Appellants' cite to the first article misfires on several levels. It actually references the pre-2008 use of "legislative district committees," not Missouri "continuing committees," or PACs. *See* Jason Rosenbaum, *Senate Leaders Dislike Campaign Donor Limits*, Columbia Trib. Sept. 20, 2008. Further, the "glaring loophole" was not a reference to the alleged "Byzantine clump of legislative district committees," but rather a characterization of how the committees would have been used under the just-instituted, post-2008 disclosure-only regime: "The new law didn't limit or outlaw the committees. Some candidates… receive campaign money from the committees. Opponents of unlimited contributions say that's a glaring loophole in the system." *Id.* That, of course, was Missouri's prior system.

In the second article, a former officeholder criticized the creation of non-profit entities that under then-existing and current law do not have to file reports identifying their contributors. *See* Steve Bell, *Missouri Politics: Hiding Big Donations is Easy and Legal*, KCUR 89.3, May 3,

2012. The officeholder explained how this laundering supposedly worked immediately after the sentence selectively quoted by Appellants: "…a tactic often used to cover up where the campaign money is coming from is to launder it through a non-profit committee that has a stated mission of doing something beneficial to the state…. Such a committee is not required to disclose its donors because it is not registered as a campaign committee." *Id.* The circumvention here did not involve PACs at all.

In conclusion, the state law and facts do not overlap, and there is no "split" between these two circuits on any level.

### E. Appellants' argument misconceives the role of courts in adjudicating First Amendment challenges to campaign finance laws.

1. As shown above, Appellants' argument rests on the faulty premise that when federal courts apply exacting scrutiny to different states' PAC-to-PAC bans, they must all reach precisely the same result: either every law stands, or every law falls. Pet. 26. But federal courts' review of state campaign finance laws has never worked that way. That is because specific provisions of law do not exist in isolation, but instead, work within a complex web of other provisions to impact the speech of political actors—and either advance or frustrate state anti-corruption interests. Thus, courts do not simply affix a label to a specific statutory tactic—"PAC-to-PAC bans"—and then uniformly hold that every political actor under every state campaign finance scheme either does or does not have a valid First Amendment challenge.

2. Nor does it work this way even when this Court is reviewing federal law. In *McCutcheon,* a plurality of this Court recognized that in assessing a challenge to the 2014 version of the federal aggregate contribution limits, it was not bound to simply adopt the "ultimate conclusion" of *Buckley v. Valeo*, which had upheld the $25,000-per-year aggregate limit on all contributions from an individual to candidates or PACs enacted in 1974. *McCutcheon*, 572 U.S. at 200. In *Buckley*, this Court had applied closely-drawn scrutiny to uphold the aggregate limits as an anti-circumvention device in support of the base-limits. 424 U.S. 1, 38.

Forty years later, the *McCutcheon* plurality catalogued various other anticircumvention measures enacted in the 1970s and 1980s, including limits on individual contributions to PACs, antiproliferation measures limiting a single person's use of multiple committees, and tougher earmarking definitions. *Id.*, 572 U.S. at 200-03. As *McCutcheon* recognized, *Buckley* was useful but did not control: "[w]e are confronted with a different statute and different legal arguments, at a different point in campaign finance regulation." *Id.* Under exacting scrutiny, even the same provision must be re-reviewed when the rest of the law has changed.

## II. This Is not an Issue of Major Importance

### A. No Court Can, Should, or Will Answer Appellants' "Question Presented"

It is unlikely the question presented by Appellant will be presented again, but even if it were, there is no nationwide "yes" or "no" answer. Appellant asks,

"Under the First Amendment, may the state prohibit political action committees from transferring money to other political action committees?" As explained above, *McCutcheon* teaches that answering this question under exacting scrutiny will depend on at least the following: (1) the role of PAC contributions within the state's broader array of contribution limits and prohibitions; (2) evidence or at least plausible hypothetical examples of how circumvention would occur without the restriction, and (3) the availability of multiple alternatives.

In *McCutcheon*, this Court considered all of these factors within the context of federal law, 572 U.S. at 211-221, but each state would also have its own answer if similar cases are ever filed—an unlikely prospect, as shown below. This Court can add little to the roadmap it has already provided to lower courts. Put another way, even if Appellants were right that two circuit courts really do disagree, it would merely mean that one panel of the Eighth Circuit or one of the Eleventh has accepted "erroneous factual findings" or engaged in "the misapplication of a properly stated rule of law," errors for which a "petition for writ of certiorari is rarely granted." Rule 10, Rules of the Supreme Court of the United States.

### B. Few, if Any, States Ban PAC-to-PAC Contributions

1. A looming struggle regarding state PAC-to-PAC bans is not in the offing. No state of which Appellees are aware, other than Missouri and Alabama, has mandated in its constitution or statutes a total ban on PAC-to-PAC contributions. Certainly, no other state with a cap and control system like Missouri bans PAC-to-PAC contributions.

And after losing its PAC-to-PAC ban in the proceedings below, Missouri passed a more closely tailored anti-circumvention measure, which Appellants admit "makes circumvention harder." Pet. 33, fn. 3. Now, there is a rebuttable presumption that a PAC receiving over half of its funds from one donor is illegally circumventing the limits when it contributes to a candidate to whom its large donor is maxed out. Mo. Const. art. III § 2(d). Even Missouri has moved on.

2. This Court grants petitions "only when the circumstances of the case satisfy [it] that the importance of the question involved, the necessity of avoiding conflict [in the lower courts], or some matter affecting the interests of this nation demand[]" it. *Camreta v. Greene*, 563 U.S. 692, 709 (2011) (internal ellipses and quotations omitted). A single state's exercise of its ability to control campaign contributions within its own borders is not so important to demand Supreme Court intervention. This issue is not likely to recur or have widespread impact. This Court has recognized a "longstanding principle of judicial restraint [that] requires . . . courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Id.* at 705. "In general, courts should think hard, and then think hard again, before turning small cases into large ones." *Id.* at 707. That is precisely what Appellants seek to have this Court do - turn an unusual state-specific question into an unnecessary, nationwide holding.

### C. Appellants exaggerate and misstate the issues at stake.

1. Appellants chose to appeal just one of their several losses in a campaign finance challenge, but now seek to

elevate that single issue into high drama that shakes the very core of Missouri's sovereignty. Pet. 42-43. Rhetorical excess aside, Appellants are simply wrong on the law: their cases concern functions of state government structure like district-drawing and officer qualifications, not speech restrictions on PACs. *Id.*

2. In the First Amendment context, too, Appellants have it backwards. The balance swings in favor of protecting speech, not regulators. Courts intervene to eliminate a vague statute's chill on citizens' First Amendment rights, *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)—not, as Appellants strangely suggest, to help "chilled" regulators feel more confident in devising new ways to police speech. Pet. 43. The "urgency" of judicial intervention arises from the need to "protect political campaign speech despite popular opposition," *McCutcheon*, 572 U.S. at 191—not from politicians' urgent need to know "whether a state may pass this kind of law." Pet. 43. And as noted above, it appears few if any state regulators are chomping at the bit to ban PAC-to-PAC transfers, but feel "chilled" by the Eighth Circuit's vindication of Appellees' First Amendment rights.

3. Appellants' final overreach is their claim that FFEF has already urged this Court to grant certiorari "on this very question of committee transfers." Pet. 43. The Court should not be misled by this deliberate misstatement. In fact, FFEF urged this Court to grant a petition on a question unaddressed below: the Eleventh Circuit's mistaken adoption in *ADC* of a test to decide whether independent expenditures could nonetheless be treated as coordinated, and thus outside of the rule of *Citizens United*. This remains a serious concern, but has nothing to do with the briefing or argument in this case.

## III. The Eighth Circuit's Decision Was Correct

This Court should also consider that the Eighth Circuit's decision was correct, and to the extent a state PAC-to-PAC ban is implemented and then challenged in any of the states that follow Missouri's cap-and-control model, it will likely serve as a reliable guide for analysis.

### A. The Eighth Circuit correctly followed *McCutcheon*'s narrow-tailoring roadmap to invalidate Missouri's PAC-to-PAC ban.

1. The court recognized that PAC-to-PAC bans burden not only speech but also the groups' own "associational rights under the First Amendment." App. A5 (citing *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 492-96 (1985)). As Appellees argued in the Eighth Circuit, PACs may have limited constituencies and may need to associate with one another when, for example, neither has sufficient funds to undertake an expensive spending project. *See* Oral Argument at 41:40-42:08.

2. As this Court did in *McCutcheon*, the Eighth Circuit then asked whether the transaction sought to be banned actually advanced the state's proffered interest in preventing circumvention of contribution limits. App. A6-9; compare *McCutcheon*, 572 U.S. at 210 (before engaging in "closely drawn" analysis, examining hypothetical scenarios and purported real-life examples to determine whether the aggregate limits prevent circumvention of the base limits "in a meaningful way"). Tracking closely to (and citing) *McCutcheon*, the Eighth Circuit considered both the MEC's attempts to give hypothetical examples of how PAC-to-PAC transfers could circumvent contribution

limits, and the MEC's citation to record evidence, finding it did not in fact give "real-world examples." App. A7 (citing *McCutcheon*, 572 U.S. at 217). Finally, the Eighth Circuit noted that other existing provisions served the state's asserted transparency and anticircumvention concerns, rendering it even less plausible that a PAC-to-PAC ban truly advanced the state's anti-corruption interests. App. A8. *Compare McCutcheon*, 572 U.S. at 211-17.

3. The Eighth Circuit correctly applied closely-drawn scrutiny to find that a complete PAC-to-PAC ban was disproportionate to the alleged goal of preventing donors' circumvention of Missouri's $2,600 limits. App. A8-11. It properly considered multiple alternatives to a blanket ban, not because it was errantly requiring the "least restrictive means," but because the existence of less restrictive alternatives—including disclosure requirements, which promote transparency without actually imposing "flat bans" on speech or association—is critical to closely-drawn scrutiny. *See McCutcheon*, 572 U.S. at 221-23.

4. Finally, the Eighth Circuit's ultimate conclusion—that a blanket ban on PAC-to-PAC contributions is not "closely drawn" to deal with concerns about policing the $2,600 donor-to-candidate contribution limit—simply makes sense. In Missouri as at the federal level, "[r]eports and databases are available" at the campaign finance authority's website "almost immediately after they are filed," and "massive quantities of information can be accessed at the click of the mouse," by individual citizens, the MEC's investigators, and our vigilant press. *McCutcheon*, 572 U.S. at 224. Absent some evidence—which the MEC was unable to provide—it defies common sense that a ban on PAC-to-PAC contributions, which

seriously burdens groups who must frequently aggregate resources, is necessary to prevent circumvention. Perhaps for that reason, as discussed above, Missouri may be the only cap-and-control state that enacted a PAC-to-PAC ban. The Eighth Circuit was right.

### B. Appellants' merits argument fails again.

Appellants consume 15 pages—by far, the largest section of their Petition—arguing that the Eighth Circuit was wrong on the law and facts. They are mistaken.

1. Appellants first restate their prior legal and factual argument that the PAC-to-PAC ban advances the state's interests in combatting corruption because it promotes transparency and blocks circumvention of Missouri's contribution limits. Appellants' legal argument suggests that rather than *McCutcheon*, two prior decisions of this Court should control. By not "following" them, Appellants claim, the Eighth Circuit arrogated to itself the power to overrule decisions of this Court. *See* Pet. 30-31. This is nonsense.

*Beaumont* simply reaffirmed the longstanding federal ban on direct contributions by corporations to federal candidates, clarifying that this applied equally to nonprofits. *Beaumont v. FEC*, 539 U.S. 146, 163 (2003) ("Nonprofit advocacy corporations are no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals."). *Beaumont*'s narrow holding rested on a line of authority and "historical prologue" that "the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 155-56. *Beaumont*

certainly does not reach around *McCutcheon* to hold that the state has no burden to prove that a PAC-to-PAC ban (just like the ban on making more than the aggregate contribution limit in *McCutcheon*) must actually advance its anti-corruption interest.

*Cal Med*, decided just five years after *Buckley* and relying on it, upheld $5,000 contribution limits—not a blanket ban—on contributions to a candidate-giving PAC. *California Med. Ass'n v. FEC*, 453 U.S. 182, 202-03 (1981) (Blackmun, J., concurring). Indeed, the anti-circumvention power of that limit is one reason this Court struck down the $25,000 cap in *McCutcheon*, which exhaustively showed the "improbability of circumvention" at the federal level by donations exceeding the $25,000 cap. *McCutcheon*, 572 U.S. at 218. But *Cal Med* does not teach that PAC-to-PAC bans survive merely because the state claims they are one additional form of anti-circumvention, and it is hard to believe that Justice Blackmun, whose concurrence supplied the necessary fifth vote to sustain the judgment, would have simply accepted a blanket ban as comporting with the First Amendment.

2. Tied together, these two cases don't make a thin reed, yet Appellants divine an "approach endorsed in both *Beaumont* and *California Medical Association*," that somehow relates to PAC-to-PAC bans. Pet. 30. This "approach," apparently, consists of simply accepting the state's "value judgment" and finding as a matter of law not only that the state has a valid anti-corruption interest, but that the PAC-to-PAC ban effectively advances it. Pet. 32.

Appellants' argument noticeably avoids *McCutcheon*, which counsels precisely the opposite approach: the

question of what state interests are permissible is a matter of law (572 U.S. at 206-09), but on the question of whether those interests are advanced by the state's speech restriction, "the Government bears the burden of proving the constitutionality of its actions." *Id.* at 210. Appellants could have cited hypotheticals plausible in the light of "experience and common sense," *id.* at 216, or real-world examples. *Id.* at 217. Knowing they have little to stand on, Appellants instead try a shortcut: excerpting incomplete phrases from old cases that didn't consider PAC-to-PAC bans. Under *McCutcheon*, the decision below, and even the 11th Circuit's *ADC* decision upon which Appellants rely so heavily, that approach cannot work.

3. Appellants do briefly claim to have presented facts to show a real risk of circumvention—or more accurately, the perception thereof—that could be remedied with a PAC-to-PAC ban. Pet. 32, 34. But as shown above, Appellants' two news articles are not actually in the record and don't stand for the propositions cited. *See* Section I(D)(2), *supra.* The articles that are in the record fail to address PAC-to-PAC transfers, which is also true of Appellants' only other source of proof: Amendment 2's voter-approved preamble.

Appellants also float a claim, again without evidence, that in fact, the MEC and voters cannot trace contributions through Missouri's public reporting system, but donors sneak behind the scenes to give candidates a "tip" that they have directed money to them. Pet. 35. It was never plausible to believe that the MEC, voters, and media cannot quickly find Missouri's largest donations as they make their way through PACs before being divided into small $2,600 increments. But even if that were the case,

it is even less plausible to believe that a donor would take the risk of actually earmarking the contributions and creating evidence of the violation by making direct candidate contact.

4. The second prong of Appellants' argument, fit, is wrong for similar reasons. Appellants cite the Eleventh Circuit as if it had made controlling global pronouncements about the usefulness of all PAC-to-PAC bans, rather than the Alabama ban before it. Pet. 35-36. They posit without reason or evidence that even contribution caps, disclosure, or anti-coordination laws won't work, insisting—but not showing how—this money will be "commingled, split up, and routed," all in wanton violation of the law. *Id.* at 36-37.

Indeed, the MEC even claims Missouri has no law ensuring that candidates and donors cannot control committees or "route" donations through them. This is false. *See, e.g.*, Mo. Const. art. VIII, section 23.3(7) ("No contribution shall be made or accepted, directly, or indirectly… by or through another person in such a manner as to conceal the identity of the actual source… or actual recipient"); *id.* at section 23.7(6)(b) (a candidate "shall have only one candidate committee for the elective office sought, which is controlled directly by the candidate"); section 23.5 (penalties for those who conceal contributions or make illegal contributions); Missouri Ethics Commission Opinion 2017.09.CF.018 (candidates cannot request contributions for committees with the express purpose of passing them through to the candidate; committees cannot make expenditures in coordination with candidates; corporations cannot give to committees they control). And this is just the beginning.

5. Appellees' remaining criticisms and points are wide of the mark. The Eighth Circuit did not "question the importance of the anti-circumvention interest" by examining under-inclusiveness. Pet. 37-38. *Compare* App. A10-11 ("We thus need not explore other concerns, such as whether the ban is… underinclusive…") Nor did it oppose a least-restrictive means test. Pet. 38. Appellees puzzlingly try to resuscitate their convoluted argument that Amendment 2 never did cover contributions to independent expenditure-only PACs—an argument that failed to persuade the District Court. *Id.* at 39-41. They even suggest that Free and Fair must prove "on remand" the very point the District Court already found and that Appellants conceded at oral argument: that Free and Fair is an independent expenditure-only committee. Oral Argument Recording at 41:40-42:08. This Court is not the place for Appellants to resuscitate claims or reinvent the litigation.

6. Putting all of this aside, Appellants' argument is wrong for a more fundamental reason. If they are right about their *de minimis* legal burden and about the usefulness of their evidence, then on precisely the same law and facts, Amendment 2 could have completely banned all non-connected PACs. The state's supposed "value judgment" that PACs could be used for circumvention, coupled with articles claiming generalized public disgruntlement about corruption and large campaign donations, would provide sufficient justification. This Court should not review the Eighth Circuit's decision, even if it is to ultimately reject an MEC theory that meanders so far from the mainstream of First Amendment and campaign finance law.

## CONCLUSION

For the foregoing reasons, this Court should deny Appellants' Petition.

Respectfully submitted,

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