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

REPLY BRIEF

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INTRODUCTION

Nowhere do respondents grapple with the critical issue underlying the circuit split: transparency. The courts disagreed about whether a state may avert the fact or appearance of quid pro quo corruption by imposing a source restriction that channels convoluted and commingled committee transfers into simple transfers that allow disclosure requirements to work. Because of this disagreement of law, Alabama and the two other states of the Eleventh Circuit may enact a provision that Missouri and the six other states of the Eighth Circuit may not. This Court should intervene.

I. The circuit courts disagree whether a state may prohibit PAC-to-PAC transfers to achieve transparency and to deter the fact or appearance of quid pro quo corruption.

A. The courts disagree about whether restricting PAC transfers advances a state's anticorruption interests.

1. The Eighth and Eleventh circuits disagree about whether PAC-to-PAC transfer prohibitions prevent actual or apparent quid pro quo corruption by promoting transparency in committee transfers. Pet. 18–26.

The Eleventh Circuit held that transparency alone can justify a PAC-to-PAC transfer restriction. *Ala. Democratic Conference v. Attorney Gen. of Ala.*, 838 F.3d 1057, 1064–65 (11th Cir. 2016) (citation omitted). Voters "can only assess whether there has been a *quid pro quo* exchange if [they are] able to identify the party making the payment." *Id.* A PAC-to-PAC transfer prohibition thus averts the fact or appearance of quid pro quo corruption by bringing contributions into channels that the public can

observe through traditional disclosure requirements. *Id*. at 1064–65. (At points the respondents seem to deny that the Eleventh Circuit held this, FFEF BIO 17–18, but elsewhere they concede that Alabama enacted its law to avert committee transfers that defeated disclosure, FFEF BIO 1, 19–20, 22.)

But, even though Missouri has the same disclosure interests—plus contribution caps that committee transfers could evade—the Eighth Circuit held that a PAC-to-PAC transfer prohibition does not "materially" advance transparency or avert the fact or appearance of corruption. App. A7–9.

2. In response, the respondents would cabin a state's interest to merely avoiding the fact of corruption through actual circumvention of contribution caps. FFEF BIO 14, 19–23, 29–31. Under this theory, the circuits would not have considered the same issue. FFEF BIO 14–18. But this stunted conception of a state's interests ignores the real and broader state interests on which the courts disagreed.

Respondents also claim that the Eleventh Circuit said nothing about the validity of an anti-circumvention interest. FFEF BIO 17–18. But the Eleventh Circuit recognized the importance of anti-circumvention interests in the abstract, even if Alabama had no caps to circumvent. Pet. 20–21. Under exacting scrutiny, the people may "'anticipate and respond to concerns about circumvention of regulations.'" *Ala. Democratic Conference*, 838 F.3d at 1063 (quoting *McConnell v. FEC*, 540 U.S. 93, 137 (2003)).

B. The courts disagree about whether a law restricting PAC transfers is closely drawn to a state's anticorruption interests.

The courts also disagree about the fit between

these state interests and a transfer prohibition. Pet. 21–26.

Respondents incorrectly claim that the circuits disagreed neither in the elements of exacting scrutiny nor how to apply it. FFEF BIO 2–3, 13–14, 18, 24–26; MEC BIO 2, 22–24. But they did.

The Eleventh Circuit held that a PAC-to-PAC transfer prohibition has a reasonable fit to a state's anticorruption interests because it achieves disclosure of complicated committee transfers. *Ala. Democratic Conference*, 838 F.3d at 1065, 1069–70. Even if committees are legal entities separate from candidates, committees can coordinate and commingle funds, which creates the fact or appearance of quid pro quo corruption. *Id.* at 1062, 1070. And no less restrictive alternative "would still address" this interest by promoting disclosure of convoluted committee transfers. *Id.* at 1070.

But the Eighth Circuit, applying something closer to strict scrutiny, brushed aside these benefits, overestimated the burdens, and insisted on other, "less restrictive" means to achieve this state interest. App. A7–10.

The Eighth Circuit's conclusion rests on its adoption of elements of strict scrutiny: "the availability of less restrictive alternatives." App. A9–10; FFEF BIO 29–31; MEC BIO 19–20. It did not adhere to the intermediate, "less rigorous standard," *McConnell*, 540 U.S. at 137, which requires only a reasonable fit, not the least restrictive means, *Ala. Democratic Conference*, 838 F.3d at 1070.

C. These disagreements are neither imaginary nor exaggerated.

The Eighth and Eleventh Circuits purported to

apply the same scrutiny, considered the same disclosure interests, and came to conflicting conclusions about the constitutionality of PAC-to-PAC transfer restrictions. Pet. 24–26; FFEF 13–14.

Respondents assert that any differences stem only from each state's unique record. FFEF BIO 2–3, 12, 18, 25–27; MEC BIO 2, 5–6. But nothing in the split turned on a state's history or particular evidence. The only difference between the cases is that Missouri had even stronger state interests supporting its law than Alabama did, because it has anti-circumvention interests as well as transparency interests.

1. To begin with, the respondents suggest that Alabama did not really enact a PAC-to-PAC transfer restriction because it restricted only certain PACs. MEC BIO 7–8. But both states enacted a PAC-to-PAC transfer restriction; both exclude candidates from directing PACs; and both make clear that candidate committees are not PACs. *Ala. Democratic Conference*, 838 F.3d at 1060, 1070; App. A2–A3. (They also claim that the petition from the Eleventh Circuit case concerned only independent expenditures, FFEF BIO 28, MEC BIO 8–9, but a question presented there concerned the lawfulness of the PAC-to-PAC transfer restrictions, *Ala. Democratic Conference*, Petition, 2016 WL 7494807 at i. (U.S. Dec. 27, 2016)).

2. Respondents and the Eighth Circuit next claim no split exists because Missouri has contribution caps, and the very existence of the caps prevents any circumvention of the caps. App. A9; FFEF BIO 2–3, 12, 19–21; MEC BIO 1, 5, 7–11, 19. But this contention does nothing to disprove the existence of a circuit split on the transparency question.

3. The respondents next assert that each state is

"unique," and so, each state's special history should yield different results under exacting scrutiny. FFEF BIO 2–3, 12, 18, 25–27; MEC BIO 1, 5–6, 9–11. But this claim overlooks that the Eighth Circuit applied something resembling strict scrutiny; this claim ignores that the same transfer restrictions were under review in each case; and this approach welcomes a national lack of First Amendment uniformity. After *Citizens United v. FEC*, 558 U.S. 310 (2010), the Montana courts tried to exempt their state from this Court's holding, claiming, as a dissent put it, that Montana's "unique history and unique qualities" somehow "make Montana uniquely susceptible to the corrupting influence of unlimited corporate expenditures." *W. Tradition P'ship, Inc. v. Attorney Gen. of State*, 271 P.3d 1, 17 (Mont. 2011). This Court summarily reversed because exacting scrutiny applies the same no matter how much each state thinks itself unique. *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516 (2012). Much the same principle applies here.

In response, the respondents claim that just as this Court may overrule its precedents or limit it to its facts, so too may circuit courts distinguish or disregard other circuits' cases. FFEF BIO 24–25. All that may be true, but it hardly refutes the circuit split.

4. Respondents also fault Missouri for not having let this issue percolate more and yield a deeper split, but they also volunteer that no further percolation is likely or possible. FFEF BIO 12, 14, 25–26, 28; MEC BIO 9–11. And Missouri's situation, which pairs caps with disclosure rules, is by far the likeliest scenario for a state to restrict PAC-to-PAC transfers in the future.

D. Nothing in the record suggests that the Eighth Circuit did not split from the Eleventh Circuit.

Finally, like the Eighth Circuit, the respondents claim that the records in each case differ so much that no split exists. These assertions are really merits arguments, and they do not disprove a split or suggest a vehicle problem.

1. First, the respondents fault Missouri for having no "real-world" evidence that its citizens viewed PAC-to-PAC transfers as "a tool for concealing donor identity." App. A8–A9. Or, they say that Alabama had stronger evidence. FFEF BIO 22; MEC BIO 6–7, 12, 15–24. They claim that this means that the cases did not concern the same issues. FFEF BIO 2, 10, 14–18; MEC BIO 9–14.

But Missouri has evidence—even better evidence than Alabama—about the views of citizens on secretive committee transfers. Pet. 24. Nearly seventy percent of Missourians voted for Amendment 2 because of concerns about actual or apparent corruption throughout the campaign finance system: they said so, in the law's preamble. Mo. Const. art. VIII, § 23.2.

2. Second, the respondents fault Missouri for lacking proof that PAC-to-PAC transfers led to the circumvention of contribution limits in Missouri. FFEF BIO 2, 10, 15–18, 21–23; MEC BIO 12–14, 23–24. But Missouri did not *have* contribution limits before Amendment 2. Pet. 31–32. So it cannot prove a counter-factual.

Nor need the States prove past circumvention: it has "sufficient room to anticipate" circumvention concerns, not just room to react. *McConnell*, 540 U.S. at 137. After all, the interest in avoiding the fact or appearance of corruption rests not on district court fact-finding, but on a voter judgment "that good government requires greater transparency." *Nat'l*

Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 16 (D.C. Cir. 2009).

3. The respondents also claim that they never before saw the news articles cited in the Petition. FFEF 11, 23–24, 33; MEC BIO 14.

But the State repeatedly relied on both articles. Pet. 11, 29, 34; Opening Brief, No. 17-2239, at 5–6, 19 (8th Cir.); JA209–10, 216; JA251–52 (Dkt. 31, consolidated merits trial brief); JA1733–34 (Dkt. 36, state sur-reply to preliminary injunction motion); Dkt. 62, No. 2:16-cv-04332 at 6–7, 48–50 (W.D. Mo.) (state proposed findings of facts and conclusions of law). Some respondents even responded to them at the time. JA329 (Dkt. 34, MEC's reply brief).

The State also introduced at trial sixteen further news articles that documented the public perception of corruption that led to Amendment 2's adoption. JA454–56, Dkt. 74, No. 2:16-cv-04332 at 2–3 (W.D. Mo.) (Defendants' exhibit list). And, contrary to the respondents claim, FFEF BIO 22, the State need not use live testimony rather than this evidence subject to judicial notice. Pet. 32–33.

These articles reflect public frustration with non-transparent committee transfers of all kinds. This frustration led to Amendment 2's comprehensive regulation of committees and candidates. The respondents assert that some articles focus on certain kind of non-profit or legislative-focused committees, FFEF BIO 23–24, but the public problems with non-transparent transfers transcended individual committee types, which is why Amendment 2 restricts all political action committees.

4. Fourth, the respondents claim that the State has not hypothesized how evasion could occur. In their estimation, any circumvention of disclosure or

contribution caps is implausible. FFEF 9, 11, 17–18; MEC BIO 21–22.

But the Missouri public perceived its possibility, and Alabama did, too. *See Ala. Democratic Conference*, 838 F.3d at 1065, 1070. Other disclosure laws, like Missouri's "purpose" of concealment provision and other fraud provisions at best "reach[ed] only the most clumsy attempts to pass contributions through to candidates." *FEC v. Col. Republican Fed. Campaign Comm.*, 533 U.S. 431, 462 (2001). The public is not so naïve as the respondents: even if the final amount from one committee to one candidate is not much, the original donor can still conceal his identity with only a few committees, and the same donor could have a great effect with many committees for many candidates.

Anyway, the respondents agree or assume that circumvention is possible; they just disagree with Missouri about its likelihood and amount. FFEF BIO 10–11, 34. The respondents admit that the existence and force of the state interests are a matter of law, not fact. FFEF BIO 32–33. And they admit that the Eleventh Circuit had proof that committee transfers concealed donor identities. FFEF BIO 16.

In sum, nothing disproves the split or requires deciding this case on grounds unique to Missouri. FFEF BIO 18.

II. Prohibiting transfers among political action committees satisfies intermediate, exacting scrutiny.

A. Missouri's restriction advances the State's interest in preventing the fact and appearance of quid pro quo corruption by ensuring transparency.

On the merits, Amendment 2's prohibition of transfers among political action committees satisfies intermediate scrutiny. Pet. 26–41. The respondents would have this Court disregard the key role that disclosure plays in averting the fact or appearance of quid pro quo corruption. FFEF BIO 29–33; MEC BIO 16–24. But Missouri's limitation on PAC-to-PAC contributions ensures the transparency necessary to identify and deter potentially improper transactions as well as to preserve public confidence in the integrity of Missouri's elections. Pet. 33–35.

The respondents claim that it is implausible that committees could conceal anything, because no candidate is in charge of committee transfers, and each committee is an independent entity. FFEF BIO 6–8; MEC BIO 1, 7–8, 16–17, 21–24. But, without a transfer restriction, a motivated donor could split and scramble funds among ostensibly independent committees, making it impossible to know which committee is the source. *See Ala. Democratic Conference*, 838 F.3d at 1065, 1070.

And "independent" does not mean out-of-communication. Just because a candidate is not in charge of the transfers, and just because each committee is a separate entity, does not mean that experienced and motivated donors will not pay off candidates if they can hide it. *See id.*

The respondents also argue that a transparency

interest extends only to disclosure of transactions, not to source restrictions. App. A8; FFEF BIO 15; MEC BIO 13–14. But that just underscores the Eighth Circuit's conflict with the Eleventh Circuit.

B. Missouri's restriction advances the State's interest in preventing the fact and appearance of quid pro quo corruption by preventing circumvention of contribution caps.

Missouri's anti-corruption interests are also more compelling than Alabama's because Missouri has contribution limits to circumvent and Alabama does not. Missouri's PAC-to-PAC limitation hedges against circumvention by preventing savvy donors from using PACs to evade contribution limits. Pet. 28–33.

The respondents seek to distinguish this Court's anti-circumvention precedents on their facts. FFEF BIO 31–32. But these cases, although about other rules, show the importance of avoiding circumvention of valid caps. *FEC v. Beaumont*, 539 U.S. 146, 155 (2003); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197–99, 201 (1981).

Respondents also make the novel suggestion that laundering small amounts of money beyond the caps' limit is not a corruption problem. FFEF BIO 2, 11. But not every election requires record-breaking sums.

C. Missouri's restriction is closely drawn to the State's interests.

Amendment 2's limitation on PAC-to-PAC contributions is closely drawn to the State's interests. Pet. 35–41. Amendment 2 does not limit how much PACs can raise or spend. Pet. 39.

Respondents claim that the Eighth Circuit's contrary holding is not an impermissible under-

inclusiveness limitation, just an assessment of the strength of the state's interests and fit to the law. FFEF BIO 11, 35; MEC BIO 9, 11–12. But that assessment is quintessentially an impermissible under-inclusiveness analysis. Pet. 38. Moreover, if there was a problem with the State not pursuing transfers aggressively enough, then its recent ballot initiative tightened the fit. Pet. 33.

Of course, Amendment 2 does not and could not apply to committees that only engage in independent expenditures. That said, the Eighth Circuit did not rule on what an independent expenditure committee must do to be free of coordination concerns. This question thus remains for it on remand. FFEF BIO 35.

Some respondents argue that the law's application to independent expenditures should "end the analysis," MEC BIO 5, 9–10, but the Association of Missouri Electric Cooperatives-PAC does not just make independent expenditures, so this point would not resolve its facial challenge, Pet. 41. And contrary to their claim, MEC BIO 8 n.5, the Eighth Circuit did not resolve any as applied challenges. Pet. A11.

III. This important question warrants review.

The court of appeals' decision invalidates the considered judgment of the Missouri people. The lower courts have given the Constitution a different meaning in Missouri than in Alabama. Only this Court can intervene. Pet. 42–43.

Respondents dismiss these federalism concerns, suggesting that this Court need only concern itself with chills on speech. FFEF BIO 3, 12, 27–28.

But this Court exercises great respect for states' prerogatives to enact their own laws. *Alfred L. Snapp & Son, Inc. v. P.R., ex rel., Barez*, 458 U.S. 592, 601

(1982). As with Congress, it does not lightly let laws fall without review. Pet. 25–26, 41–42. This Court often reviews decisions holding a federal statute unconstitutional, even with no circuit split. *E.g.*, *Patchak v. Jewell*, 138 S. Ct. 897 (2018); *United States v. Stevens*, 559 U.S. 460 (2010); *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. Morrison*, 529 U.S. 598 (2000). It often does the same for state laws. *E.g.*, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018). After all, judging the constitutionality of a democratically passed law is "'the gravest and most delicate duty that this Court is called upon to perform.'" *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

State restrictions on PAC transfers are either constitutional or they are not. If they are constitutional, then the state suffers a sovereign injury by having its law enjoined. But, if they are not, then this Court should say so, if only to make sure that the First Amendment applies the same way in all states.

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

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