No. _____

In The
Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,

Petitioners,

v.

ATTORNEY GENERAL, STATE OF ALABAMA, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BOB BAUER
PERKINS COIE LLP
700 13th St., NW, Suite 600
Washington, DC 20005

ABHA KHANNA
BEN STAFFORD
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101

CATHERINE SIMONSEN
PERKINS COIE LLP
1888 Century Park E.,
Suite 1700
Los Angeles, CA 90067

RICHARD H. PILDES
Counsel of Record
40 Washington Square S.
New York, NY 10012
(212) 998-6377
pildesr@
mercury.law.nyu.edu

EDWARD STILL
429 Green Springs Hwy.,
Suite 161-304
Birmingham, AL 35209

JOHN K. TANNER
3743 Military Rd., NW
Washington, DC 20015

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

QUESTIONS PRESENTED

Alabama criminally bans any political group from contributing any funds to any other political group for any purpose, including for independent spending. The State defines a political group as any association of "one or more persons" that receives contributions and engages in election spending. Alabama defends this criminal *ban* as a means to ensure effective *disclosure* of the true source of election funds.

Alabama's ban raises fundamental First Amendment issues concerning the rights of political expression and association. As the courts below expressly recognized, a widespread split exists among the federal courts of appeals over whether the First Amendment protects the right of a political group, such as the Alabama Democratic Conference (ADC), to receive unrestricted contributions that will be held in a segregated account for independent-spending use only. In the D.C., Fourth, and Tenth Circuits, the First Amendment does protect that right; in the Second, Fifth, and now Eleventh Circuits, it does not. The questions presented are:

1. Does the First Amendment permit government to ban or limit independent-spending donations to a political committee that segregates those donations in a separate bank account to be used only for independent spending?

2. Is a complete ban on any political committee's financial contribution to any other political committee for any purpose an adequately tailored constitutional means to achieve a State's interest in effective campaign-finance disclosure?

PARTIES TO THE PROCEEDING

Petitioners are the Alabama Democratic Conference, Dr. Eddie Greene, James Griffin, Bob Harrison, Emmitt E. Jimmar, and Jimmie Payne, plaintiffs and appellants below.

Respondents are Luther Strange, in his official capacity as Attorney General of Alabama, Robert L. Broussard, in his official capacity as District Attorney for the 23rd Judicial Circuit, and Bryce U. Graham, Jr., in his official capacity as District Attorney for the 31st Judicial Circuit, defendants and appellees below.

CORPORATE DISCLOSURE STATEMENT

The Alabama Democratic Conference has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

PETITION FOR A WRIT OF CERTIORARI

The Alabama Democratic Conference and several of its members respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit (App. 1a-27a) is reported at 838 F.3d 1057. The opinion of the U.S. District Court for the Northern District of Alabama (App. 28a-63a) is unreported but is available at 2015 WL 4626906.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit was entered on September 27, 2016. This court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Alabama Code Section 17-5-15(b) provides:

> It shall be unlawful for any political action committee or tax exempt political organization under 26 U.S.C. § 527, including a principal campaign committee, or any person authorized to make an expenditure on behalf of such political action committee or 527 organization, to make a contribution,

expenditure, or any other transfer of funds to any other political action committee or 527 organization. It shall be unlawful for any principal campaign committee or any person authorized to make an expenditure on behalf of such principal campaign committee to make a contribution, expenditure, or other transfer of funds to any other principal campaign committee, except where the contribution, expenditure, or any other transfer of funds is made from a principal campaign committee to another principal campaign committee on behalf of the same person. Notwithstanding the foregoing, a political action committee that is not a principal campaign committee may make contributions, expenditures, or other transfers of funds to a principal campaign committee; and a separate segregated fund established by a corporation under federal law, if the fund does not receive any contributions from within this state other than contributions from its employees and directors, is not restricted by this subsection in the amount it may transfer to a political action committee established under the provisions of Section 17-5-14.1 by the same or an affiliated corporation.

Alabama Code Section 17-5-19(a) provides:

Except as otherwise provided in this section, a person who intentionally violates any provision of this chapter shall be guilty, upon conviction, of a Class A misdemeanor.

INTRODUCTION

Alabama criminalizes petitioner's receipt of any financial support from other political groups, even when those funds will be used only for independent efforts to educate and mobilize voters. The State bans *any* political-action committee (PAC) from making *any* contribution in *any* amount to *any* other PAC.[1] Even a political group that engages in nothing but independent election activities cannot receive any contribution from another PAC, on pain of criminal sanction.

The Alabama Democratic Conference (ADC) is a longstanding grassroots membership organization that seeks to encourage minority political participation. ADC primarily engages in independent spending for get-out-the-vote (GOTV) drives and also contributes directly to candidates. Other political groups in Alabama that want to associate with ADC have long provided critical financial support for ADC's GOTV efforts. After setting up a segregated bank account for funds to receive and use for independent spending, ADC challenged the constitutionality of Alabama's ban on its right to receive financial support from other political groups.

Alabama's ban severely burdens ADC's associational and expressive rights. As a membership organization with limited access to funds from its

[1] As an exception, a PAC that is not designated as a "principal campaign committee," i.e., a candidate's campaign organization, may "make contributions, expenditures, or other transfers of funds to a principal campaign committee." Ala. Code § 17-5-15(b).

overwhelmingly moderate-income constituents, ADC has worked for decades with other major political organizations in Alabama. Nearly half of ADC's resources come from these other groups, which desire to support ADC's GOTV and related independent political efforts.

The State defends its ban as necessary to ensure its interest in an effective campaign-finance disclosure regime. But a ban on PAC-to-PAC contributions is a draconian means to realizing this disclosure interest. Alabama's law is equivalent to banning all individual contributions to candidates because some people make illegal "straw" contributions. The State does not allow PAC contributions even to political groups that engage in nothing but independent spending. Nor does the State permit such contributions for independent spending to groups, such as ADC, that maintain those contributions in segregated accounts to be used only for independent spending.

Numerous federal courts of appeals are divided on the question at the center of this case: whether the First Amendment protects the right of a political group, such as ADC, to receive unrestricted contributions that will be held in a segregated account for independent-spending use only. The D.C., Fourth, and Tenth Circuits hold that the First Amendment prohibits government from limiting – let alone banning – such contributions. In the decision below, the Eleventh Circuit joined the Second and Fifth Circuits in reaching the opposite conclusion. All seven federal judges involved in the decisions below expressly acknowledged this widespread conflict among the courts of appeals.

The First Amendment requires that Alabama use more narrowly tailored means to realize its interest in effective disclosure. In both the federal system and other states, such alternative means are commonly used to address Alabama's concerns without unnecessarily abridging First Amendment rights.

STATEMENT OF THE CASE

A. The Alabama Democratic Conference

1. The Alabama Democratic Conference (ADC) is a non-profit grassroots political organization that has long sought to encourage minority political participation in Alabama. *See* App. 4a, 82a. It was founded in 1960 by, among others, Dr. C. G. Gomillion, the lead plaintiff in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

ADC is highly decentralized, with local chapters in over 60 Alabama counties, and approximately 3,000 members. App. 36a. Membership dues are $15 a year.[2] Since its founding, ADC's fundamental mission has been to educate, organize, mobilize, and communicate with minority voters in order to give greater effect to their political and electoral efforts. *See* App. 36a-37a, 82a. In 1970, ADC began to engage in the separate function of formally screening and endorsing candidates of all races for public office; ADC publicizes its endorsements in several ways, including through its

[2] *See* Pls. Second Mot. for Preliminary Injunction, Exh. DD (Deposition of Joe Reed) at 43:15-44:2, No. 5:11-cv-02449-JEO (N.D. Ala. April 4, 2014), ECF No. 43-4.

well-known yellow sample ballot that ADC distributes to voters across the state. *Id.* at 37a.

ADC's primary political activities are to run voter registration and get-out-the-vote drives (GOTV). ADC's GOTV efforts include printing and distributing its sample ballot; attending churches or ministers' meetings to promote ADC's message; promoting the use of absentee ballots; making calls and running radio spots encouraging people to vote; conducting phone bank campaigns; and paying for rides to the polls in rural areas. *Id.* ADC informs voters about voter registration, the diverse methods of casting a ballot, the implications of election practices and procedures in their communities, the opportunity to serve as poll workers, the right to be free from discriminatory treatment at the polls, and the right of citizens to receive lawful assistance in voting. *Id.* at 82a. ADC has also sponsored public forums at its twice-yearly conventions to enable its members to communicate with candidates on issues of the day.

ADC is technically a hybrid PAC because it engages in both independent election spending and a small amount of direct support to candidates. Its candidate contributions are minor. In the five years preceding enactment of the Alabama law at issue, ADC allocated 71% of its resources to GOTV efforts; 24% to administration; and 1.84% to contributions directly to

candidates. Over that time, ADC spent $877,409 on GOTV efforts and $22,839 on candidate contributions.[3]

2. ADC's independent-spending efforts require, of course, financial support. The median income for black households in Alabama is $29,854 (for white households, $51,401),[4] and as noted above, ADC's membership dues are $15 a year.

To fund these efforts, ADC had, prior to passage of the Act being challenged, relied on critical financial support from other groups that shared ADC's political mission. In the five years preceding Alabama's new law, these other PACs contributed more than half of ADC's funds. App. 83a.[5] These organizations contribute funds for ADC's GOTV work because of ADC's well-recognized credibility and experience in minority communities and the efficiency of having one GOTV

---

[3] *See* Declaration of Dr. Joe L. Reed in Support of Mot. for Partial Summ. J., Att. B, No. 5:11-cv-02449-JEO (N.D. Ala. Aug. 16, 2011), ECF No. 9-3. ADC also spent 3.3% on "GOTV via Candidate"; ADC sometimes relies on candidates to do GOTV when the local organization is not very organized. Pls. Second Mot. for Preliminary Injunction, Exh. DD (Deposition of Joe Reed) at 148:3-149:9, No. 5:11-cv-02449-JEO (N.D. Ala. April 4, 2014), ECF No. 43-4.

[4] These are 2015 figures. *See* U.S. Census Bureau, 2015 American Community Survey 1-Year Estimates, Median Income in the Past 12 Months (in 2015 Inflation-Adjusted Dollars), Alabama, Table S1903, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S1903&prodType=table (last visited Dec. 17, 2016).

[5] *See* Declaration of Dr. Joe L. Reed in Support of Mot. for Partial Summ. J., Att. A, No. 5:11-cv-02449-JEO (N.D. Ala. Aug. 16, 2011), ECF No. 9-2.

organization, rather than many, working among minority voters.

B. Enactment of the Alabama Law

1. In 2010, Alabama banned any PAC contribution in any amount to any other PAC for any purpose. This so-called "PAC-to-PAC transfer ban" makes it "unlawful for any political action committee * * * to make a contribution, expenditure, or any other transfer of funds to any other political action committee." Ala. Code § 17-5-15(b). ADC qualifies as a PAC under Section 17-5-2(a)(13).

The PAC-to-PAC transfer ban was not passed to prevent circumvention of contribution limits because there are no such limits in Alabama. App. 32a. Nor does Alabama impose dollar limits on money spent in coordination with candidates and their campaigns. Instead, Alabama's ban was passed in response to concerns that PAC-to-PAC transfers could be used to hide the original source of political funds. *Id.* at 15a n.1, 33a-34a. That is, to ensure effective disclosure, Alabama banned all PAC-to-PAC donations, even if the receiving PAC engaged in nothing but independent election spending or was a hybrid PAC in which those donations would be held in a segregated account and used only for independent political spending. *Id.* at 34a.

At the time Alabama's PAC contribution ban was passed, the State chose to rely on a paper-based system of campaign finance reports and required only infrequent reporting. *See id.* at 35a. This system made it less convenient to trace the source of PAC contributions. But not long after enactment of its PAC transfer ban, Alabama modernized its campaign-finance disclosure system in two important ways. First, Alabama now requires far more frequent filing of campaign-finance reports; at least 15 pre-election reports must be filed, including within two days following receipt of contributions of $20,000 or more. Ala. Code § 17-5-8.1(c). Indeed, Alabama now requires more frequent campaign-finance reporting than all states other than Florida.[6] Second, the same law required the Secretary of State to establish an electronic filing system to ensure that reports are integrated into a publicly-accessible database searchable by (1) recipient's name, (2) contributor's name, (3) PAC officer, (4) zip code, or (5) date of contribution. Ala. Code § 17-5-8.1(b). Since 2013, most candidates and PACs file their reports electronically. This modernization has made it much easier to quickly trace the source of PAC contributions and receipts. In addition, Alabama, like virtually all states,

---

[6] *See* Nat'l Conference of State Legislatures, *State Campaign Finance Disclosure Requirements: 2015-2016 Election Cycle* (July 17, 2015), http://www.ncsl.org/Portals/1/documents/legismgt/elect/StateCampaignFinanceDisclosureRequirementsChart2015.pdf. Other states range from one report (Mississippi, Wisconsin, and Wyoming) to 12 (Colorado and Washington). *Id.*

prohibits making contributions "in the name of another person." *Id.* § 17-5-15(a). This law prevents PACs as well as persons from giving a contribution under a false name.[7]

2. Alabama's law severely burdened ADC's ability to carry out its political activities. In response to the Act's passage, ADC restructured itself to create separate, segregated bank accounts for its independent-spending funds and its candidate contribution funds. App. 41a, 83a-84a. This restructuring followed the roadmap laid out by decisions of the D.C. Circuit and the D.C. District Court, as well as by the Federal Election Commission (FEC) in guidelines it established in light of those cases. *Id.* In *Emily's List* v. *Federal Election Commission*, 581 F.3d 1 (D.C. Cir. 2009), and *Carey* v. *Federal Election Commission*, 791 F. Supp. 2d 121 (D.D.C. 2011), the federal courts held that Congress could not constitutionally impose source or amount limitations on independent-spending donations to hybrid PACs that segregate those donations in a separate account dedicated to use only for independent spending.

In settlement of *Carey*, the FEC acknowledged that "*Carey*" committees are not subject to source or

[7] *Id.* § 17-5-2(a)(11) (defining a "person" as "[a]n individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons").

amount limitations if the PAC deposits those contributions into a "Non-Contribution Account" used for independent expenditures.[8] ADC restructured itself as a *Carey*-like committee, with segregated accounts, to protect its First Amendment right to accept PAC contributions for independent spending only.

C. Proceedings Below

1. After restructuring itself as a *Carey*-like committee, ADC sued to enjoin enforcement of Section 17-5-15(b) as applied to PAC contributions to ADC's segregated, independent expenditure-only account. The district court had jurisdiction under 28 U.S.C. Sections 1331 and 1343 and 42 U.S.C. Section 1973*l*. The district court declared Alabama's law unconstitutional as applied to ADC because the law was not properly tailored to realize the State's legitimate objectives without unnecessarily infringing upon ADC's First Amendment rights of speech and association. App. 84a-104a.

2. On appeal, the Eleventh Circuit vacated and remanded. *Id.* at 75a. The Eleventh Circuit held that "whether the establishment of separate bank accounts by ADC, a hybrid independent expenditure and campaign contribution organization, eliminates all corruption concerns is a question of fact." *Id.* at 73a. The court

---

[8] *See* Press Release, Fed. Election Comm'n, FEC Statement on *Carey* v. *FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account, http://www.fec.gov/press/press2011/20111006postcarey.shtml (Oct. 5, 2011); Stipulated Order and Consent Judgment, *Carey* v. *Fed. Election Comm'n*, No. 11-259-RMC (D.D.C. Aug. 19, 2011), ECF No. 28.

remanded for determination of "[w]hether the anti-corruption interest is sufficient in light of the evidence in the record in this case, and whether the transfer ban is a closely drawn means of furthering that interest, given ADC's dual account proposal." *Id.* at 75a.

3. On remand, the district court made an about-face and upheld the constitutionality of Section 17-5-15(b) even as applied to ADC. *Id.* at 41a-62a. The court acknowledged that "[t]he Circuit Courts are split on how to treat limitations on contributions to hybrid organizations when the contribution in question will solely fund independent expenditures." *Id.* at 47a-49a. The court then sided with those circuits that have held segregated bank accounts insufficient to give hybrid PACs a First Amendment right to receive unrestricted donations for their independent-spending only accounts. *Id.* at 51a-52a.

4. The Eleventh Circuit affirmed, while also acknowledging that the circuit courts are split on the constitutional question at issue. *Id.* at 17a-18a. Endorsing one side of this conflict, the Eleventh Circuit held that, "[t]o create the necessary independence, an organization must do more than merely establish separate bank accounts for candidate contributions and independent expenditures." *Id.* at 22a. The Eleventh Circuit was not overly concerned with the burden on ADC's associational rights; even though the organizations that have long contributed to ADC's GOTV drives no longer can do so, the Court implied ADC could find wealthy new individual donors instead. As the Eleventh Circuit put it: "ADC can still receive unlimited

contributions from individuals and make both unlimited contributions to candidates as well as unlimited independent expenditures." *Id.* at 8a; *see id.* at 26a.

Because Alabama's ban imposes a severe burden on ADC's ability to engage in independent political action in association with other political groups, this petition followed.

REASONS FOR GRANTING THE WRIT

The justification for certiorari in this case is straightforward and compelling. As the courts below expressly recognized, a widespread conflict exists among numerous federal courts of appeals on a First Amendment question concerning fundamental rights of political expression and association. The courts of appeals uniformly hold that the First Amendment forbids government from imposing limits on contributions to PACs that engage only in independent spending. The D.C., Fourth, and Tenth Circuits similarly hold that hybrid committees with segregated bank accounts also have a First Amendment right to receive uncapped donations for independent spending. In the decision below, the Eleventh Circuit joined the Second and Fifth Circuits in holding to the contrary. In addition, the decision below conflicts with federal law; the Federal Election Commission recognizes that hybrid committees have the right to receive uncapped donations to their segregated, independent-spending accounts.

This important constitutional issue is a recurring one for federal, state, and local election law, as the number of courts of appeals that have addressed the issue attest. These decisions all arose within the last decade, further demonstrating the pressing nature of the doctrinal issue. The question presented strikes at the heart of grassroots political organizations at the state and local level, such as ADC, which often seek both to make contributions to candidates and to engage in independent spending for GOTV efforts, voter registration, and similar activities.

In addition to this circuit split, the decision below is wrong and conflicts with this Court's precedents. Alabama's law takes a blunderbuss approach in an area where strict or heightened scrutiny requires a more careful effort. The State's interest in effective disclosure can be adequately served through more properly tailored measures that do not tread so heavily and unnecessarily on ADC's First Amendment rights. Neither Congress nor the FEC finds it necessary to flatly ban independent-spending donations to hybrid committees with segregated accounts, from PACs or any other source. Nor do nearly all other states. Alabama can satisfy its legitimate interests without shutting down over half the funding that ADC receives to engage in independent political action.

To resolve a widespread conflict, and to correct the Eleventh Circuit's decision on this recurring First Amendment issue of fundamental importance, this Court should grant certiorari.

I. THE FEDERAL COURTS OF APPEALS ARE DIVIDED ON A RECURRING FIRST AMENDMENT QUESTION OF NATIONAL IMPORTANCE

Two different panels of the Eleventh Circuit and the district court below all expressly recognized the conflict among numerous courts of appeals on the question presented. Six courts of appeals have addressed the issue; they are evenly divided on the appropriate constitutional resolution.

As the Eleventh Circuit explicitly noted in the opinion below, "[t]hree of our sister Circuits have addressed the question we face here. * * * They have split in answering the question of whether keeping separate bank accounts for independent expenditures and campaign contributions is sufficient to eliminate the possibility of corruption or its appearance so as to render contribution limits unconstitutional for the independent-expenditure accounts." App. 17a-18a. In the first appeal in this case, a different panel of Eleventh Circuit judges made the same observation about this pervasive conflict. *See id.* at 70a n.3 ("Several courts in other circuits have addressed whether the establishment of separate bank accounts for independent expenditures and campaign contributions by a hybrid organization, such as ADC, sufficiently eliminates the possibility of corruption or the appearance of corruption to render contribution limits unconstitutional. *These courts have reached conflicting conclusions*.") (emphasis added). The district court below also noted this clear conflict. *See id.* at 47a ("The Circuit Courts

are split on how to treat limitations on contributions to hybrid organizations when the contribution in question will solely fund independent expenditures.").

In fact, the conflict is even broader than the courts below appreciated. The Eleventh Circuit noted a conflict between the Second, Fifth, and Tenth Circuits and then announced that it was siding with the former two circuits against the Tenth Circuit. *Id.* at 17a-22a. But the D.C. Circuit has also squarely addressed the question presented; like the Tenth Circuit – and unlike the court below – the D.C. Circuit holds that the First Amendment prohibits governments from limiting those contributions to committees that will hold them in segregated bank accounts to be used only for independent spending. *Emily's List*, 581 F.3d at 4. In addition, the Fourth Circuit has addressed this issue in a similar context, *N.C. Right to Life, Inc.* v. *Leake* (*NCRL III*), 525 F.3d 274 (4th Cir. 2008), and reached the same conclusion as the D.C. and Tenth Circuits concerning the First Amendment rights of hybrid committees such as ADC.

A. The First Amendment Position of the D.C., Fourth, and Tenth Circuits

The leading case on the application of the First Amendment to campaign finance regulation of hybrid committees is perhaps Judge Kavanaugh's extensive opinion for the D.C. Circuit in *Emily's List*. Emily's List

is a non-profit that supports abortion rights and pro-choice Democratic women candidates in federal and state elections. Like other hybrid committees, it makes direct campaign contributions to candidates and parties, but also spends money on voter-registration drives, GOTV efforts, and independent campaign advertisements.

Emily's List held unconstitutional five provisions of FEC regulations as applied to the independent spending activities of Emily's List. 581 F.3d 1.[9] These provisions failed to recognize that the First Amendment guarantees that "non-profit entities are entitled to make their expenditures – such as advertisements, get-out-the-vote efforts, and voter registration drives – out of a soft-money or general treasury account that is not subject to source and amount limits." *Id.* at 12. That is, government cannot impose limits on the amount or source of donations to hybrid committees to be used only for independent spending. Indeed, the D.C. Circuit considered this conclusion to "follow ineluctably" from this Court's precedents, particularly *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *Emily's List*, 581 F.3d at 12.

Under the D.C. Circuit's view, Alabama's ban would be unconstitutional as applied to ADC: "A non-profit that makes expenditures to support federal candidates does not suddenly forfeit its First Amendment

[9] These provisions required, for example, that non-profits use their hard-money accounts for 50% of various independent expenditures, such as GOTV efforts or generic communications that referred to a political party. *Emily's List*, 581 F.3d at 16-18.

rights when it decides also to make direct contributions to parties or candidates." *Id.* at 12. As *Emily's List* holds, hybrid organizations "simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account." *Id.* ADC seeks to do precisely that: to set up separate bank accounts, so that donations received for candidate contributions are held and used separately from donations received to support GOTV efforts and other forms of independent expenditures.

The FEC did not petition the Supreme Court for certiorari in *Emily's List* and ultimately withdrew the challenged regulations. *See* 11 C.F.R. § 106.6(c), (f), *removed by* 75 Fed. Reg. 13224 (Mar. 19, 2010). *See also Stop This Insanity, Inc. Emp. Leadership Fund* v. *Fed. Election Comm'n*, 761 F.3d 10, 15 (D.C. Cir. 2014) (in *Emily's List* "we held 'hybrid' political action committees are entitled to unlimited expenditure accounts"), *cert. denied*, 135 S. Ct. 949 (2015).

In an important application of *Emily's List*, the D.C. District Court also preliminarily enjoined, as likely unconstitutional, the FEC's demand that hybrid committees break themselves into two entirely separate political committees before their independent-spending arms could raise donations free of federal contribution caps. *Carey*, 791 F. Supp. 2d 121. Just as in this case, a hybrid committee proposed to maintain separate bank accounts that segregated (uncapped) donations to be used for independent spending and (capped) donations used to contribute to candidates.

The FEC instead insisted that federal law required a non-profit to break itself up into two separate committees before its independent-spending arm was free of federal source and amount limitations.

Carey held that the First Amendment required rejecting, as unnecessarily burdensome, the FEC's demands. The FEC could not adequately explain why separate bank accounts did not "satisfy the same objective as separate political action committees in a less burdensome manner." *Id.* at 131. As the Court concluded, "maintaining two separate accounts is a perfectly legitimate and narrowly tailored means to ensure no cross-over between soft and hard money, as opposed to the Commission's overly burdensome alternative." *Id.* at 131-32.

The FEC did not appeal *Carey* and instead entered into a consent judgment in which it acknowledged that hybrid committees are entitled to receive uncapped donations for independent spending if they use separate bank accounts to segregate those funds from funds used to make contributions.[10]

Indeed, the FEC itself now formally recognizes these hybrid committees as "*Carey* Committees." The FEC defines a *Carey* committee as:

> A political committee that maintains one bank account for making contributions in connection with federal elections and a separate

[10] *See* Press Release, Fed. Election Comm'n, *supra* note 8.

> "non-contribution account" for making independent expenditures. The first account is subject to all of the limits and prohibitions of the Act, but the non-contribution account may accept unlimited contributions from individuals, corporations, labor organizations and other political committees.[11]

There are currently 159 such hybrid committees for federal elections registered with the FEC.[12]

Despite ADC's extensive briefing concerning *Emily's List* and *Carey*, the Eleventh Circuit did not acknowledge these decisions, let alone explain why it was rejecting the analysis of these key cases from the D.C. Circuit. Nor did the Eleventh Circuit explain why *Carey* committees are sufficient in the federal system, but not in Alabama.

The Eleventh Circuit did acknowledge that its decision was in direct conflict with the Tenth Circuit. As the decision below observed: "On one side of the debate, the Tenth Circuit concluded that, where an organization makes both candidate contributions and independent expenditures, separate bank accounts are sufficient to alleviate corruption concerns." App. 18a.

---

[11] *E.g.*, Fed. Election Comm'n, *FEC Terminology for Candidate Committees* (2013), http://www.fec.gov/info/conference_materials/2013/candidateterminologymarch13.pdf.

[12] The FEC lists these *Carey* committees as "Committees with Non-Contribution Accounts." *See* Fed. Election Comm'n, *Political Committees with Non-Contribution Accounts* (last updated Dec. 15, 2016), http://www.fec.gov/press/resources/PoliticalCommitteeswithNonContributionAccounts.shtml.

See Republican Party of N.M. v. *King*, 741 F.3d 1089, 1097 (10th Cir. 2013). As in this case, *King* involved a hybrid committee that established separate bank accounts for its independent-expenditure funds and its candidate-contribution funds. New Mexico law capped contributions to hybrid committees, even for donations to be used only for independent spending and funded from a segregated account. The Tenth Circuit enjoined enforcement of that law, as applied to hybrid committees, because "no anti-corruption interest is furthered as long as [the hybrid committee] maintains an account segregated from its candidate contributions." *Id*. Thus, the Tenth Circuit concluded that a hybrid committee would likely prevail on its First Amendment challenge to limits on its ability to accept funds segregated for independent spending.

The decision below also conflicts with the leading precedent from the Fourth Circuit or is, at the least, in substantial tension with it. *See NCRL III*, 525 F.3d 274. There, North Carolina Right to Life, which had made contributions directly to candidates, set up a related affiliate, NCRL-Committee Fund for Independent Political Expenditures (NCRL-FIPE). The latter was designed to receive donations to be used only for independent expenditures. *Id.* at 278-79. The two entities shared facilities, directors, staff, and other resources; the same officers planned strategy and activities and raised funds for both NCRL entities. *Id.* at 336 (Michael, J., dissenting). NCRL-FIPE sought to raise and spend donations that would be used only

for independent spending and held separately from legitimately-capped donations that would be used for candidate contributions. But North Carolina law nonetheless capped the size of donations, even those used only for independent spending. *Id.* at 279 (majority opinion).

Writing for the Fourth Circuit, Judge Wilkinson held the North Carolina law unconstitutional as applied to NCRL-FIPE. Because this arm of NCRL used donations only for independent spending, North Carolina had no legitimate anti-corruption interest in capping donations to it. *Id.* at 293-95.

As the district court in this case found, ADC modeled its response to Alabama's law on these constitutional precedents, particularly those from the D.C. Circuit, and on the FEC's recognition that *Carey* committees are entitled to accept uncapped donations for their independent-spending accounts. *See* App. 41a ("Upon the enactment of the PAC-to-PAC transfer ban, the ADC sought to restructure its activities in a manner consistent with those upheld by the court in *Emily's List* * * * ."). Indeed, ADC is a *Carey*-type committee for state-level political participation. As with the hybrid committees in these cases, ADC set up separate, segregated bank accounts for funds to be used for candidate contributions and those used for its far more extensive GOTV, voter registration, and other independent, grassroots mobilization efforts.

B. The Conflicting Position of the Second, Fifth, and Eleventh Circuits

In contrast to the D.C., Tenth, and Fourth Circuits, the Second, Fifth, and now Eleventh Circuits have concluded that the First Amendment permits governments to cap independent-spending donations to hybrid political committees even if those committees employ segregated bank accounts that entirely separate these donations from those used to make candidate contributions.

In *Vermont Right to Life Committee, Inc.* v. *Sorrell*, 758 F.3d 118 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015), the Second Circuit acknowledged putting itself into conflict with the D.C. and Fourth Circuits on the question presented here. The Second Circuit explicitly announced that it would "decline to adopt the reasoning of the Fourth Circuit in *NCRL III*." *Id.* at 141. In addition, the Second Circuit – citing *Emily's List* – also acknowledged that "some courts have held that the creation of separate bank accounts is by itself sufficient" to tender unconstitutional any caps on donations to hybrid committees for independent spending. *Id.* But the Second Circuit then rejected the D.C. Circuit's conclusion and held that the First Amendment does permit government to cap independent-spending donations to hybrid committees, even when those donations will be held in a segregated bank account dedicated to independent expenditures. *Id.* at 141-42.

Vermont Right to Life Committee involved the same constitutional challenge posed here. Vermont

Right to Life Committee (VRLC) was a non-profit Vermont corporation; VRLC-Fund for Independent Political Expenditures (VRLC-FIPE) was a distinct political committee that sought to engage only in independent election spending. The two closely related entities maintained separate bank accounts, yet Vermont law capped donations made to VRLC-FIPE. *Id.* at 122. In contrast to the D.C., Tenth, and Fourth Circuits, the Second Circuit held that the First Amendment permitted Vermont to do so. *Id.* at 140-45.

The Second Circuit rejected the First Amendment position endorsed in other circuits on the basis of its generalized concern that a lack of an "informational barrier" existed between VRLC and VRLC-FIPE and that the two entities shared overlapping staff. *Id.* at 145. The Second Circuit did not specify the additional measures, beyond segregated bank accounts, that political committees must use to protect the First Amendment right of their independent-spending arms to receive uncapped contributions. The suggestion, apparently, is that a hybrid committee such as ADC must employ completely different staff for its independent-spending arm and its candidate-contribution arm, as well as construct a Chinese wall of some undefined height between these arms.

The Second Circuit recognized that its rule would impose significant burdens on small, grassroots political organizations. As that court said: "We acknowledge, though, that especially with committees that operate with low funding levels, small staff, and few resources, it will be difficult at times to maintain separation

among those committees." *Id.* Nevertheless, that court concluded, government can cut off the flow of donations to the independent-spending arms of these hybrid committees.

The court below also invoked the Fifth Circuit as being on its side in this sharp conflict among the circuits. In *Catholic Leadership Coalition of Texas* v. *Reisman*, 764 F.3d 409 (5th Cir. 2014), the Fifth Circuit upheld Texas's ban on corporate donations as applied to a hybrid committee with segregated accounts that sought to use the donations only for independent spending. *Id.* at 443-45. *Catholic Leadership Coalition* differs somewhat from the other cases in this area: a nonprofit corporation sought to donate not funds, but an email contact list to be used only for raising funds for independent spending by its PAC. *Id.* at 419. Like the Second Circuit, the Fifth Circuit held that the First Amendment permits a state to limit contributions to hybrid committees, despite those contributions being used only for independent spending and held in segregated accounts. *Id.* at 443-45. Indeed, the Second Circuit, like the Eleventh Circuit below, also relied on *Catholic Leadership Coalition*. *See Vt. Right to Life Comm.*, 758 F.3d at 142 (citing district court opinion).

Alabama's law is even more extreme than those involved in the conflicting decisions described above. While those laws *limited* the amount that could be donated to hybrid committees for independent spending, Alabama completely bans *any* PAC-to-PAC donation, even when those donations will be held in segregated accounts and used for GOTV drives, voter education,

and other forms of independent spending. If Congress enacted such a ban, D.C. Circuit precedent would hold it unconstitutional. So too if Alabama's ban had been enacted in the Fourth or Tenth Circuits.

Certiorari is warranted to resolve this conflict over a vital First Amendment question.

II. A COMPLETE BAN ON ALL PAC CONTRIBUTIONS FOR INDEPENDENT SPENDING TO ADC VIOLATES RIGHTS OF POLITICAL ASSOCIATION AND EXPRESSION AND CONFLICTS WITH THIS COURT'S PRECEDENTS

On the merits, the decision below is wrong and conflicts with this Court's campaign-finance precedents, including the keystone decision of *Buckley* v. *Valeo*.

Alabama's law prohibits the transfer of *any* money from *any* PAC to *any* other PAC for *any* purpose. Moreover, Alabama expansively defines a PAC as "[a]ny * * * group of one or more persons" that plans to receive or spend money for the purpose of influencing a state election. Ala. Code § 17-5-2(a)(13). Thus, no group "of one or more persons" can associate with ADC by providing financial support for ADC's independent election activities, such as its GOTV drives. Even if ADC made no contributions at all to candidates and were a pure independent-spending PAC, Alabama law would still bar it from receiving any PAC contributions. As it is, ADC essentially *is* an independent-spending

PAC, since only 1.8% of its funds go to candidate contributions. As a hybrid PAC with segregated bank accounts, ADC has a First Amendment right to receive PAC contributions to be used only for independent spending.

1. *The State's Interest.* Alabama's law is based on its interest in effective disclosure of campaign spending and contributions. The specific problem that motivated the law was "incidents in which there was at least an appearance that PAC-to-PAC transfers were operating to disguise the true source of contributions" to candidates. App. 12a.

States have, of course, a legitimate interest in creating an effective, constitutionally appropriate disclosure system. As this Court has concluded, campaign-finance disclosure laws can be justified based on governmental interests in (1) providing information about the sources of election-related spending, (2) deterring corruption and avoiding the appearance of corruption by making financing transparent, and (3) enabling enforcement of various campaign-finance laws. *See, e.g.*, *McCutcheon* v. *Fed. Election Comm'n*, 134 S. Ct. 1434, 1459 (2014); *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 367 (2010); *McConnell* v. *Fed. Election Comm'n*, 540 U.S. 93, 196 (2003), *overruled in part by Citizens United*, 558 U.S. 310; *Buckley*, 424 U.S. at 66-68.

But this Court has never upheld a sweeping *ban* on political speech or association as a means of ensuring effective *disclosure*. In Orwellian fashion, Alabama

proclaims that to promote transparent PAC-to-PAC contributions, it will simply prohibit them altogether. Indeed, simply to state that juxtaposition is to demonstrate that the means-ends fit of the Alabama law is too loose to survive the heightened or strict judicial scrutiny required. "In the First Amendment context, fit matters" – even when government is merely regulating direct contributions to candidates. *McCutcheon*, 134 S. Ct. at 1456. Proper tailoring matters all the more when donations are made to support independent political expression.

This Court's precedents typically endorse disclosure laws because they "impose no ceiling on campaign-related activities," *Buckley*, 424 U.S. at 64, and are "a less restrictive alternative to more comprehensive regulations of speech," *Citizens United*, 558 U.S. at 369. But when it comes to Alabama's "disclosure" law, none of that is true. A flat prohibition on PAC-to-PAC contributions is a direct prohibition on political association and speech.

To satisfy its legitimate interest in effective disclosure, this Court's precedents require that Alabama use more narrowly drawn means. Many such means are available, as the federal system and other states have recognized.

2. *The Standard of Review.* As this Court is well aware, *Buckley* v. *Valeo* subjects laws limiting independent election spending to strict scrutiny. 424 U.S. at 64, 66; *see also McCutcheon*, 134 S. Ct. at 1444. Laws that limit contributions *to candidates* are instead

judged under a form of heightened scrutiny, which requires such laws to be "closely drawn to [serve important interests and] avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444 (quotation marks omitted).

(a) The courts of appeals are uncertain as to which of these standards applies to laws, like Alabama's, that ban *contributions* that are not given to candidates or political parties, but to non-party PACs for independent *spending*.[13] This lower-court uncertainty exists because this Court has not directly addressed the appropriate standard of review for such laws.[14] Clarifying that question is yet a further reason this Court's review would be beneficial.

---

[13] *See, e.g.*, *Emily's List*, 581 F.3d at 15 n.14 (indicating that strict scrutiny is most likely the proper standard, but avoiding deciding the question); *Texans for Free Enter.* v. *Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013) (court was "agnostic" as to whether strict or heightened scrutiny applied); *Wis. Right to Life State Political Action Comm.* v. *Barland*, 664 F.3d 139, 154 (7th Cir. 2011) (avoiding deciding standard of review).

[14] With respect to political parties, this Court has upheld limitations on contributions to parties to be used for independent spending and applied "closely drawn" scrutiny, rather than strict scrutiny, to do so. *See McConnell*, 540 U.S. at 138-41; *see also Citizens United*, 558 U.S. at 359 ("Citizens United * * * has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."). The Court has concluded that political parties pose a unique risk of being conduits for candidate corruption; it is this unique "close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on the relationship, that have made all large soft-money contributions to national parties suspect." *McConnell*, 540 U.S. at

Most analogous are the cases that strike down limits on contributions to PACs that spend to support or oppose ballot measures; applying "exacting scrutiny," this Court has held that no permissible state interest supports limiting contributions for independent spending to non-party PACs. *See Citizens Against Rent Control/Coal. for Fair Hous.* v. *City of Berkeley*, 454 U.S. 290, 298 (1981). Indeed, *Citizens Against Rent Control* rejected the kind of "disclosure" argument Alabama makes here: an informational interest in "identifying the sources of support for and opposition to" a political position is not enough to justify limiting the amount a contributor can donate. *Id.* The same principle should apply here.

(b) Nonetheless, the Eleventh Circuit upheld Alabama's ban on PAC contributions for independent spending, and in doing so, also applied the lower standard of review used to assess limits on contributions to candidates. App. 9a-10a, 24a-27a. But the "character and magnitude" of Alabama's complete ban on PAC contributions constitutes a "severe restriction" on ADC's associational rights, and strict scrutiny is

---

154-55. As a three-judge federal court recently put it: "The potential for *quid pro quo* corruption stemming from soft-money contributions to political parties not only distinguishes them from spending *by* independent-expenditure organizations, but it also distinguishes them from contributions *to* independent-expenditure organizations." *Republican Party of La.* v. *Fed. Election Comm'n*, No. 15-cv-01241 (CRC-SS-TSC) (D.D.C. Nov. 7, 2016). This case does not require the Court to address independent-spending contributions to political parties.

therefore the appropriate standard of review. *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992).[15]

The courts below rejected strict scrutiny by trivializing the extent of this burden. They characterized this burden as "not severe enough" to warrant strict scrutiny because, they suggested, ADC could start seeking out donations from sources other than the organizations with which ADC has long associated. App. 94a; *see id.* at 24a-27a, 62a. But the First Amendment burden to ADC is not somehow offset because ADC, denied the right to associate with its longstanding supporting groups, could instead raise funds (in theory) from supportive wealthy individuals – if such individuals exist and are prepared to give ADC large contributions. Just as "the response that a speaker should just take out a newspaper ad, or use a Web site, rather than complain that it cannot speak through a broadcast communication is too glib," *Fed. Election Comm'n* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007), it is too glib to conclude that ADC's associational rights are not severely burdened when it is denied association with supportive political groups, on the grounds

[15] The district court noted in its first opinion in this case that ADC asserted either that "strict scrutiny, or alternatively, closely drawn scrutiny should apply" and then went on expressly to reject application of strict scrutiny. App. 91a-94a. In ADC's first appeal, ADC argued that the court should apply the strict scrutiny standard of *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978). *See* Appellees' Br. at 10-11, No. 11-16040 (11th Cir. May 1, 2012). The state responded to ADC with a section of its brief devoted specifically to rejecting application of strict scrutiny. *See* Reply Br. at 19-22, No. 11-16040 (11th Cir. May 15, 2012).

that it can try to associate instead with wealthy individuals or businesses. Indeed, it is perverse to tell ADC that moderate-income people like teachers cannot band together in organizations to support ADC's political goals, but that ADC should not complain because it can rely on wealthy individuals and businesses to fund it in unlimited amounts instead.

The Eleventh Circuit therefore erred in failing to apply strict scrutiny, and this Court's review would help clarify the proper standard of review for restrictions on contributions that fund non-party PAC independent spending. But whether under heightened or strict scrutiny, Alabama's blanket ban on PAC contributions is an unconstitutionally blunt instrument.

3. *Proper Tailoring.* Under either heightened or strict scrutiny, Alabama bears the burden of proving its law is constitutional. *McCutcheon*, 134 S. Ct. at 1452. But Alabama cannot prove that its law is the least restrictive means or is closely drawn to further its interest in effective disclosure without unnecessarily abridging associational freedoms.

(a) Alabama has banned all PAC-to-PAC transfers because some transfer scheme *could* be used to obscure the true source of the money. As noted above, this is akin to banning all individual contributions to candidates because some contributions *could* be used – indeed, have been used – as straw-man contributions.

Alabama's law was primarily designed to address the use of PAC-to-PAC transfers to hide the source of money that would get into the hands of candidates. As

the State told the court below, the law was aimed at "denying donors a covert way to deliver campaign money to candidates" through multiple "shell" PACs.[16] This was not done to circumvent contribution caps in Alabama; as noted above, Alabama does not limit the amount that any person or entity can contribute to candidates. App. 32a. Instead, the concern was that Alabama's disclosure requirements were being undermined by obscuring the true source of money.

But as the Eleventh Circuit noted, the reason that a serial PAC transfer scheme could occur in Alabama was that, unlike other states, Alabama does not limit the number of PACs any one individual can create. As the State argued and the Eleventh Circuit noted: "a single campaign operative could control all of the PACs in a contribution chain and carry out a scheme to conceal the source of a campaign contribution by simply moving money from one PAC to another." App. 15a n.1 (quoting *id.* at 34a).[17]

Yet the "closely drawn" solution to that problem is obvious. As in the federal system, Alabama can adopt antiproliferation rules that prohibit contributors from creating or controlling multiple affiliated PACs. *See* 52 U.S.C. § 30116(a)(5); 11 C.F.R. § 100.5(g)(4); *see also*

---

[16] Appellees' Br. at 34, No. 15-13920 (11th Cir. Dec. 9, 2015); App. 15a n.1, 33a-34a.

[17] *See also* Appellants' Br. at 9, No. 11-16040 (11th Cir. Apr. 2, 2012) ("These tactics . . . included putting multiple PACs under the control of a single operative, who could then transfer the funds scores of times just by moving credits from one ledger to another.").

McCutcheon, 134 S. Ct. at 1446-47 (discussing these rules). As *McCutcheon* noted, an antiproliferation rule "blocks a straightforward method of achieving the circumvention that was the underlying concern in *Buckley*." *Id.* at 1447. Antiproliferation rules are a more narrowly tailored means of protecting the State's disclosure regime than a blanket ban on all PAC contributions to ADC.

Further, if Alabama is concerned about multiple transfers through "shell" PACs, it can restrict "shell" contributions in much the same way they are restricted in other states and in the federal system. To deter this sort of conduct, Congress passed 52 U.S.C. § 30122 (formerly 2 U.S.C. § 441f). This "heartland" provision of federal campaign finance law prohibits contributions in the name of another – for example, "laundering contributions through straw donors" – and it carries severe criminal penalties. Craig C. Donsanto and Nancy L. Simmons, Federal Prosecution of Election Offenses 166-68 (7th ed. 2007).[18] Similarly, federal law requires that a contribution to a political party which is "earmarked" to benefit a particular candidate be treated – and reported – as a contribution to that

[18] States also explicitly prohibit efforts to conceal the true source of contributions. *See, e.g.*, Wash. Rev. Code § 42.17A.715 (prohibiting attempts to obscure the true source of a contribution through various means, including making the contribution "through an agent, relative, or other person in such a manner as to conceal the identity of the source of the payment or in any other manner so as to effect concealment"); Fla. Stat. § 106108.(5)(a) (same, as to "any contribution [made] through or in the name of another, directly or indirectly, in any election").

candidate. *See McCutcheon*, 134 S. Ct. at 1447 (discussing 2 U.S.C. § 441a(a)(8)). Alabama could also adopt rules against earmarking of PAC contributions, but has not. "Closely drawn means" require the State to "properly refocus the inquiry on the delinquent actor," *McCutcheon*, 134 S. Ct. at 1459, not to simple-mindedly ban all PAC contributions.

FEC regulations further curb concealment by limiting the circumstances in which a donor may give both to a candidate and to a PAC supporting that same candidate. For example, two PACs may give to one another while supporting the same candidate, but not with the knowledge that a substantial portion of the funds given will be contributed to, or spent on behalf of, the candidate – and not while retaining control of the funds. *See* 11 C.F.R. §§ 110.1(h)(2)-(3), 110.2(h)(2)-(3). The FEC has enforced this ban on using PACs for "shell contributions" against both the donor and the ultimate recipient.[19] Of course, the major PACs that have contributed to ADC – the state Democratic Party, the Alabama Education Association, and the Alabama Trial Lawyers Association – are genuine entities that have a longstanding existence for independent purposes.

---

[19] *See* Fed. Election Comm'n Matters Under Review 4568, 4633, 4634, 4736 (Robert Riley, Jr.), Gen. Counsel's Br. (Feb. 22, 2001), http://eqs.fec.gov/eqsdocsMUR/28044192215.pdf; Fed. Election Comm'n Matters Under Review 4568, 4633, 4634, 4736 (Robert Riley, Jr.), Conciliation Agreement (Dec. 19, 2001), http://eqs.fec.gov/eqsdocsMUR/28044192740.pdf.

To provide a lawful means for PAC contributions, the federal system permits but also closely regulates the disclosed collection and forwarding of contributions through intermediaries or conduits. *See* 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6. Specific reporting and other conditions must be met to ensure intermediary organizations are not used to obscure the true source of contributions. *See* 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(d). This framework enables concerted political action between groups, yet makes full transparency essential.[20]

PAC-to-PAC contributions are common in the federal system and expressly permitted under federal law. *See* 52 U.S.C. § 30116(a)(1)(C)-(D) & (a)(2)(B)-(C).[21] But unlike Alabama, the federal system caps contributions to candidates and to PACs that give to candidates. Thus, the federal system must not only serve the interest in transparency and accurate disclosure, as Alabama seeks to do, but also ensure that circumvention of these contributions caps not occur. Yet while Alabama performs its less burdensome task with a flat

---

[20] Some states flatly prohibit earmarked contributions. *See, e.g.*, Minn. Stat. § 10A.16. Other states (like the federal regime described above) heavily regulate earmarked contributions. Washington, for example, permits earmarked contributions as long as they are reported as stemming from the original contributor (and, in some circumstances, the conduit), Wash. Rev. Code § 42.17A.460, and requires the filing of special disclosure reports, *id.* § 42.17A.270.

[21] The federal system has adopted narrowly drawn specific transfer restrictions to address specific problems, *see McCutcheon*, 134 S. Ct. at 1459, which is a far cry from Alabama's complete ban on all PAC contributions.

ban on *all* contributions *to all* PACs *from all* PACs, the federal system meets its dual burden of ensuring transparency and avoiding circumvention of contribution caps through these more narrowly tailored, and considerably less restrictive, means. States, similarly, employ various means to ensure transparency of PAC contributions without banning them altogether;[22] a full catalogue of such means cannot be provided in a certiorari petition.

Moreover, after enacting its PAC contribution ban, Alabama *did* adopt more narrowly tailored means to ensuring effective disclosure that now address the interests purportedly justifying its PAC contribution ban. As noted above, at the time Alabama enacted its ban, it relied on an antiquated paper-based campaign-finance reporting system with infrequent reporting. No simple way existed to search campaign-finance reports for a particular contributor. But since then, Alabama has brought its system into the modern era. Most candidates and PACs now file their reports electronically; all contributions over $100 must be disclosed. The Secretary of State maintains a website with a database of those reports that can easily be searched by PAC, candidate, contributor, or PAC officer (enabling quick

[22] Some states, for example, require PACs to list their major contributors on advertisements. *See, e.g.*, Wash. Rev. Code § 42.17A.320(2)(b); *see also* Wash. Admin. Code § 390-18-025; Alaska Stat. § 15.13.090(a)(2)(C); Cal. Gov't Code § 84506(a)(2). Other states require that the person in charge of a group sponsoring an advertisement appear in the advertisement and make required disclosures. Conn. Gen. Stat. § 9-621(h); Mass. Gen. Laws ch. 55, § 18G.

identification of all PACs controlled by particular persons).[23] The media and others can now track contributions by individuals and PACs through any transfers with just a few keystrokes. In addition, Alabama's laws now require more frequent pre-election disclosure of campaign-finance contributions and spending than every state but Florida.[24]

This shift to the kind of modernized reporting system that is now common in most states addresses the prior risk that PAC-to-PAC transfers could be used to obscure the original source of funds. A flat-out ban on all PAC donations to other PACs, particularly those used to fund independent spending, is not properly tailored.[25]

(b) Over its 55-year existence, ADC has built up a widely recognized stature, particularly among minority communities in Alabama. Its GOTV efforts and sample "yellow ballot" are well known. There has never been any allegation that ADC or its donors were used to obscure the source of campaign contributions; on the contrary, ADC and its supporting PACs are highly visible.

---

[23] Ala. Code § 17-5-8.1(b). The database also contains scanned copies of any paper filings.

[24] Nat'l Conference of State Legislatures, *State Campaign Finance Disclosure Requirements: 2015-2016 Election Cycle*, *supra* note 6. Other states range from one report (Mississippi, Wisconsin, and Wyoming) to 12 (Colorado and Washington).

[25] Through voter initiative, Missouri recently enacted a PAC-to-PAC transfer ban, which is also already being challenged. *See Mo. Elec. Coops.* v. *Missouri*, No. 4:16-cv-01901-CDP (E.D. Mo.).

It is important for the Court to appreciate the breadth of Alabama's ban, as well as its burden on ADC. Even if ADC were to cease making candidate contributions altogether and engage in nothing but independent spending, Alabama's law would still ban ADC from receiving PAC contributions. But as even the court below observed, the courts of appeals have uniformly invalidated laws that impose source or amount limits on contributions to non-party PACs that engage only in independent spending. *See* App. 16a-17a (cataloging courts of appeals decisions on this issue). As the Second Circuit has said: "Few contested legal questions are answered so consistently by so many courts and judges." *N.Y. Progress & Prot. PAC* v. *Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Yet it is unclear whether the State concedes that Alabama's law is unconstitutional as applied even to pure independent-expenditure PACs. Indeed, as noted, ADC *is*, in effect, an independent-expenditure committee, as only 1.8% of its funds go to candidate contributions.

Moreover, if ADC wants to continue to make candidate contributions, Alabama and the lower courts have left ADC to guess as to what more it would need to do, beyond having made itself into a *Carey*-like committee, to protect its First Amendment right to receive PAC donations for independent-spending. The Eleventh Circuit would not deign to "undertake to make an exhaustive list of necessary safeguards," instead announcing that it would look to a broad range of factors – only some of which it identified – to determine in future cases whether any particular hybrid PAC has a

First Amendment right to receive PAC contributions for independent spending. App. 22a-23a (citing *Vt. Right to Life Comm.*, 758 F.3d at 142; *Catholic Leadership Coal.*, 764 F.3d at 444). The State has not offered any limiting construction of Section 17-5-15(b).

Finally, if to receive PAC contributions for independent spending, ADC must create two separate PACs, with different directors, different treasurers, and different staff, the burden on it and other grassroots political organizations would be substantial. Even for large corporations, this Court has recognized that PACs "are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Citizens United*, 558 U.S. at 337-38; *see also Fed. Election Comm'n* v. *Mass. Citizens for Life*, 479 U.S. 238, 254-55 (1986) ("Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage.").

These burdens on the First Amendment rights of hybrid PACs are gratuitous. Alabama can satisfy its legitimate interest in an effective disclosure regime with more narrowly tailored alternatives that do not unnecessarily impose such severe burdens on ADC's core rights of political expression and association.

CONCLUSION

This Court should grant certiorari to resolve a widespread conflict and to correct the Eleventh Circuit's decision on a recurring First Amendment issue of fundamental importance.

Respectfully submitted.

BOB BAUER
PERKINS COIE LLP
700 13th St., NW, Suite 600
Washington, DC 20005

ABHA KHANNA
BEN STAFFORD
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101

CATHERINE SIMONSEN
PERKINS COIE LLP
1888 Century Park E.,
Suite 1700
Los Angeles, CA 90067

RICHARD H. PILDES
Counsel of Record
40 Washington Square S.
New York, NY 10012
(212) 998-6377
pildesr@
mercury.law.nyu.edu

EDWARD STILL
429 Green Springs Hwy.,
Suite 161-304
Birmingham, AL 35209

JOHN K. TANNER
3743 Military Rd., NW
Washington, DC 20015

DECEMBER 2016

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-13920

D.C. Docket No. 5:11-cv-02449-JEO

THE ALABAMA DEMOCRATIC CONFERENCE,
DR. EDDIE GREENE,
JAMES GRIFFIN,
BOB HARRISON,
EMMITT E. JIMMAR,
JIMMIE PAYNE,

Plaintiffs-Appellants,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
ROBERT L. BROUSSARD,
in his official capacity as District Attorney for the 23rd Judicial Circuit,
BRYCE U. GRAHAM, JR., in his official capacity as District Attorney for the 31st Judicial Circuit,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

---

(September 27, 2016)

Before WILSON, MARTIN and HIGGINBOTHAM,* Circuit Judges. MARTIN, Circuit Judge:

For over fifty years, the Alabama Democratic Conference ("ADC") has been dedicated to communicating with black voters in Alabama and encouraging them to support candidates for public office that the organization believes would best represent their interests. The ADC has grown to become the largest grassroots political organization in Alabama, and it is active throughout the state. As part of the effort to build support for its endorsed candidates, the ADC is actively involved in elections in Alabama and regularly raises and spends money in connection with state elections.

In 2010, Alabama made changes to its election law that impacted the ADC's ability to raise and spend money in state elections. One of these changes prevented the ADC from continuing to raise money from political action committees ("PACs"), which had been an important source of funding for the ADC's election activity. The organization brought a legal challenge to Alabama Code § 17-5-15(b), which limited the ADC's fundraising abilities. This statute is known as the "PAC-to-PAC transfer ban." The District Court upheld this ban against the ADC's constitutional challenge. In this appeal, the ADC challenges the District Court's final judgment in favor of the State of Alabama ("the State"). The ADC argues that the PAC-to-

---

* Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

PAC transfer ban is unconstitutional as applied because the ban violates the ADC's First Amendment right to make independent expenditures. After careful review, and with the benefit of oral argument, we affirm the judgment of the District Court.

I.

A.

In Alabama, the Fair Campaign Practices Act ("FCPA") governs campaign finance requirements for state elections. *See* ALA. CODE §§ 17-5-1 to -21. Under the FCPA, it is "unlawful for any political action committee * * * to make a contribution, expenditure, or any other transfer of funds to any other political action committee." *Id.* § 17-5-15(b). A "political action committee" is defined as "[a]ny committee, club, association, political party, or other group of one or more persons * * * which receives or anticipates receiving contributions and makes or anticipates making expenditures to or on behalf of any Alabama state or local elected official, proposition, candidate, principal campaign committee or other political action committee." *Id.* § 17-5-2(a)(13).

There is an exception to this ban on PAC-to-PAC transfers: a PAC that is not designated as a "principal campaign committee" may "make contributions, expenditures, or other transfers of funds to a principal campaign committee." *Id.* § 17-5-15(b). Thus, if a PAC is set up to give money to several candidates, that PAC cannot make a contribution or expenditure to an-

other PAC that is doing the same thing. It can contribute to or spend for only a specific type of PAC set up by a candidate for the benefit of that particular candidate. The PAC-to-PAC transfer ban is a major feature of the FCPA.

Unlike many other states, Alabama's campaign finance law does not limit the amount of money that a person, business, or PAC may contribute directly to a candidate's campaign. *See generally id.* §§ 17-5-1 to -21. The FCPA instead relies on a system of disclosure that requires regular reporting of campaign contributions and spending by candidates, corporations, and PACs. *See Id.* § 17-5-8. It also creates an electronic searchable database of those reports. *See Id.* § 17-5-8.1.

B.

The ADC is an Alabama-based "grassroots political organization" that was founded in 1960. Its mission is "to communicate with, educate, organize, and unify black voters," which it carries out mostly through its sixty-plus local branches throughout the state. The organization endorses candidates for office, all Democrats, and attempts to get out the vote for its endorsed candidates in various ways, including a "well-known ADC yellow sample ballot distributed to voters at polling places and other locations across the state." Its activities are "intertwined with," but the organization is "independent of," the state Democratic Party.

The ADC also routinely spends money in state elections to support its endorsed candidates. For this reason, the ADC is registered as a PAC with the Ala-

bama Secretary of State. The ADC gets the money it uses for this spending from contributions, including contributions from the Alabama Democratic Party, other PACs, and candidates. The ADC's decision about whether to endorse a candidate is not dependent on whether a candidate contributes to the ADC. Some, but not all, of the candidates the ADC endorses contribute to the ADC through their own candidate committees.

The Alabama legislature adopted the PAC-to-PAC transfer ban during a special session in December 2010. The ban made it illegal for the ADC's organizational PAC to receive contributions from the Alabama Democratic Party and other PACs. Before the 2010 enactment of the ban, the ADC raised about half its funds from these sources. In light of the new law, the ADC restructured its contribution system by establishing separate bank accounts for candidate contributions and independent expenditures. The idea was that the funds ADC raised from other PACs would go only to the account for independent expenditures.

C.

In July 2011, the ADC sued the State to stop enforcement of § 17-5-15(b). It argued that the new law violated its First and Fourteenth Amendment rights. Specifically, the ADC asserted that because a state could not regulate independent expenditures of PACs after *Citizens United* v. *FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010), it followed that neither could a state regulate contributions to PACs used solely for independent expenditures. *Ala. Democratic Conference* v. *Brous-*

sard ("*ADC I*"), 541 F. App'x 931, 932 (11th Cir. 2013) (per curiam) (unpublished). The ADC challenge thus went to funds it got from other PACs and then placed into a separate bank account that was used only for independent expenditures. *Id.*

The District Court granted summary judgment in favor of the ADC. *Id.* The District Court found the PAC-to-PAC transfer ban unconstitutional as it applied to the ADC because the law infringed the organization's First Amendment rights. *Id.* It enjoined the State from enforcing the law against contributions that the ADC intended to deposit directly into the separate account used only for independent expenditures. *Id.*

The State appealed this ruling, and this Court reversed the District Court, stating that "*Citizens United* d[id] not render § 17-5-15(b) unconstitutional as applied" to the ADC, at least on the record then before it. *Id.* at 935. This Court's ruling observed that "[i]n prohibiting limits on independent expenditures, *Citizens United* heavily emphasized the independent, uncoordinated nature of those expenditures, which alleviates concerns about corruption." *Id.* But the independence of an organization like the ADC, which both makes independent expenditures and contributes directly to candidates, "may be called into question and concerns of corruption may reappear." *Id.* The concern is about the appearance of corruption. Even if there is no actual corruption, "the public may *believe* that corruption continues to exist, despite the use of separate bank accounts, because both accounts are controlled and can be coordinated by the same entity." *Id.* (emphasis added).

This Court decided that the question of "whether the establishment of separate bank accounts by ADC * * * eliminates all corruption concerns is a question of fact." *Id.* at 936. In doing so, we refused to "hold as a matter of law that the State's interest in preventing corruption or the appearance of corruption is insufficient to justify contribution limits on funds used for independent expenditures when the receiving organization also makes campaign contributions." *Id.* at 935. Because "the State presented ample evidence of possible corruption" to create a disputed issue of material fact, this Court concluded that summary judgment was inappropriate and remanded the case to the District Court. *Id.* at 936. We instructed the District Court to further develop the facts about "[w]hether the [state's] anti-corruption interest is sufficient in light of the evidence in the record in this case, and whether the transfer ban is a closely drawn means of furthering that interest." *Id.*

On remand, the ADC and the State each sought summary judgment after discovery. The District Court denied both motions, but ruled on the merits that § 17-5-15(b) is constitutional as applied to the ADC. The court observed that under Supreme Court precedent, "the only sufficiently important interest that will support the PAC-to-PAC transfer ban is preventing *quid pro quo* corruption or the appearance thereof." It found that the ADC's organizational structure triggered this concern. Although the ADC operated two bank accounts to keep its candidate contributions separate from its independent expenditures, "these two accounts are controlled by the same entity and people." Neither was there any "evidence to indi-

cate there is any organizational separation with respect to the two accounts to alleviate any potential appearance of corruption" or "any other internal controls to safeguard against the risk that contributions, even if formally earmarked for independent expenditures, could be funnelled to a candidate." On this record, the District Court found that the State had a valid corruption concern with respect to the ADC.

The District Court went on to find that the PAC-to-PAC transfer ban was sufficiently closely drawn to further the State's anti-corruption interest. It found the tailoring sufficient because there was no evidence "that a more narrowly tailored solution, such [as] a limit on the amount another PAC could contribute to [the] ADC, would adequately protect the State's interest" in preventing corruption "[i]n light of [the] lack of evidence of organizational separation or other safeguards" in the ADC's structure. The District Court also found that "the impact of the PAC-to-PAC transfer ban on the ADC's associational rights is minimal" given that the ADC can still receive unlimited contributions from individuals and make both unlimited contributions to candidates as well as unlimited independent expenditures. It is the ADC's appeal of this decision we consider here.

II.

We review the District Court's legal rulings *de novo*, and its findings of fact for clear error. *Tartell* v. *S. Fla. Sinus & Allergy Ctr., Inc.*, 790 F.3d 1253, 1257 (11th Cir. 2015). We will not disturb findings of fact unless "after viewing all the evidence, we are left with

the definite and firm conviction that a mistake has been committed." *Id.* (quotation omitted). Because we are the second Eleventh Circuit panel to review this case, we are bound by the legal conclusions from the earlier decision under the law of the case doctrine. *This That & the Other Gift & Tobacco, Inc.* v. *Cobb Cty.*, 439 F.3d 1275, 1283 (11th Cir. 2006) (per curiam).

Political contributions and spending "both fall within the First Amendment's protection of speech and political association." *FEC* v. *Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440, 121 S. Ct. 2351, 2358 (2001). Limitations on political expenditures "impose significantly more severe restrictions on protected freedoms of political expression and association than do [] limitations on financial contributions." *Buckley* v. *Valeo*, 424 U.S. 1, 23, 96 S. Ct. 612, 636 (1976) (per curiam). Compared to restrictions on spending, which receive a higher level of scrutiny, "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." *FEC* v. *Beaumont*, 539 U.S. 146, 161, 123 S. Ct. 2200, 2210 (2003). This is because "the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley*, 424 U.S. at 21, 96 S. Ct. at 636. Expenditures by a PAC that are coordinated with a candidate are treated as contributions to that candidate. *See id.* at 46-47, 96 S. Ct. at 647-48.

A law limiting contributions is valid "if the State demonstrates a sufficiently important interest" and the law is "closely drawn" to serve that state interest,

even if there is a "significant interference" with political association. *Id.* at 25, 96 S. Ct. at 638 (quotation omitted). This standard is a "lesser demand" than strict scrutiny. Beaumont, 539 U.S. at 162, 123 S. Ct. at 2210; *see also McCutcheon* v. *FEC*, ____ U.S. ____, ____, 134 S. Ct. 1434, 1444 (2014) (plurality opinion) (noting that strict scrutiny would require that the "regulation promote[] a compelling interest and is the least restrictive means to further the articulated interest"). The goal of this "less rigorous standard of review" is to give the legislature "sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell* v. *FEC*, 540 U.S. 93, 137, 124 S. Ct. 619, 656-57 (2003), *overruled on other grounds by Citizens United*, 558 U.S. 310; *see also Beaumont*, 539 U.S. at 155, 123 S. Ct. at 2207 ("[D]eference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption.").

III.

The ADC argues here that the PAC-to-PAC transfer ban is unconstitutional as it applies to the ADC's separate account used only for independent expenditures. The ADC makes its challenge based on each prong of the test in *Buckley* for upholding a law that limits contributions. *See* 424 U.S. at 25, 96 S. Ct. at 638. First, the ADC argues that the District Court erred by placing the burden on the ADC to prove that

the law was not sufficiently closely drawn to serve an important state interest. Second, it argues that the State does not have a sufficiently important interest in banning PAC-to-PAC transfers used only for independent expenditures. Third, it argues that the PAC-to-PAC transfer ban does not actually promote any state interest. Finally, it argues that the law is not sufficiently closely drawn to protect the State's purported interests. We will address each argument in turn.

A.

The ADC first argues that the District Court wrongly placed the burden of proof, requiring ADC to prove that the law was not sufficiently closely drawn to serve an important state interest rather than requiring the State to justify its law. We find no merit in this argument.

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon*, 134 S. Ct. at 1452 (plurality opinion) (quoting *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816, 120 S. Ct. 1878, 1888 (2000)). A state can meet its burden of proof by showing that its law furthers a sufficient state interest, such as preventing *quid pro quo* corruption or its appearance. *See McCutcheon*, 134 S. Ct. at 1444, 1452. To meet this burden, a state must provide evidence that is "enough to show [] the substantiation of the [legislative] concerns" driving its enactment. *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 393, 120 S. Ct. 897, 907 (2000). This substantiation may be made

through pieces of evidence such as newspaper accounts, reports, and affidavits. *See Id.*

In upholding § 17-5-15(b), the District Court found that:

> [T]he ADC operates two bank accounts for purposes of keeping its funds for contributions to candidates separate from its funds to be used for independent expenditures. It is undisputed that these two accounts are controlled by the same entity and people. These two facts are all the court knows about how the ADC runs these separate accounts. *The ADC did not present any evidence* to indicate there is any organizational separation with respect to the two accounts to alleviate any potential appearance of corruption. Additionally, aside from the creation of two accounts, the *ADC has not offered any evidence* to indicate that it has implemented any other internal controls to safeguard against the risk that contributions, even if formally earmarked for independent expenditures, could be funneled to a candidate.

This emphasized language does not demonstrate an improper shift of the burden to the ADC.

The District Court found that the State provided newspaper and other evidence that the appearance of corruption was an issue in Alabama before § 17-5-15(b) was enacted. The court specifically referenced 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. The District Court then engaged in a lengthy analysis of the ADC's organizational structure in an effort to identify any features that

might address the State's anticorruption concern. The District Court properly allocated the burden of proof as between these parties. Although the District Court observed that the ADC presented no evidence to rebut the State's justification for regulating transfers between PACs, we conclude it did not improperly shift the burden of proof to the ADC.

B.

The State advances two interests to justify its decision to regulate contributions through the PAC-to-PAC transfer ban: anti-corruption and transparency. The ADC argues in turn that these interests are not sufficient to justify the law.

The Supreme Court has recognized that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC* v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97, 105 S. Ct. 1459, 1468 (1985). In *Citizens United*, the Supreme Court announced that "independent expenditures * * * do not give rise to corruption or the appearance of corruption" so the state's anti-corruption interest was no longer sufficient to justify certain regulations of independent expenditures. 558 U.S. at 357, 130 S. Ct. at 909. In contrast, anti-corruption concerns are a well-established justification for a state's decision to regulate political contributions. *See Buckley*, 424 U.S. at 26-27, 96 S. Ct. at 638-39. *Citizens United* did not alter this longstanding rule. *See* 558 U.S. at 357, 130 S. Ct. at 908; *see also McCutcheon*, 134 S. Ct. at 1441 (stating, after *Citizens*

United, that "Congress may regulate campaign contributions to protect against corruption or the appearance of corruption"). It is a matter of law, therefore, that the State's interest in preventing corruption or its appearance is sufficiently important to justify its decision to regulate political contributions and those transactions, including donations to PACs, that relate to or appear to relate to such contributions.

The first time this case came to our Court, the panel decided that, because the ADC brought an as-applied challenge to the PAC-to-PAC transfer ban, the issue of whether anti-corruption concerns were a sufficient state interest was a question of fact. *See ADC I*, 541 F. App'x. at 936. The panel observed that "the State presented ample evidence of possible corruption through PAC-to-PAC transfers to withstand summary judgment" and remanded to the District Court to decide "[w]hether the anti-corruption interest is sufficient in light of the evidence in the record in this case." *Id.* On remand, the District Court found sufficient evidence that appearance-of-corruption con-

cerns justified the State's decision to regulate in this area.[1] This finding was not clearly erroneous.

We need not address the issue of whether transparency is alone a sufficient legal justification for a state to regulate campaign contributions, because the District Court rightly found that "transparency plainly is related to and furthers the State's interest in preventing corruption and the appearance of corruption insofar as one can only assess whether there has been a *quid pro quo* exchange if one is able to identify the party making the payment." This finding is in keeping with the Supreme Court's conclusion that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity," because "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be

---

[1] The District Court noted a series of newspaper articles and testimony by the State highlighting that, before the PAC-to-PAC transfer ban, "the appearance in Alabama was that donors were attempting to conceal donations to candidates and other groups by laundering said donations through multiple PACs." Donors 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." Because Alabama does not limit the number of PACs any individual may create, "a single campaign operative could control all of the PACs in a contribution chain and carry out a scheme to conceal the source of a campaign contribution by simply moving money from one PAC to another."

given in return." *Buckley*, 424 U.S. at 67, 96 S. Ct. at 657. The State's proffered interest in transparency thus ties into its interest in preventing corruption to justify regulating transfers between PACs.

C.

The ADC next argues that the PAC-to-PAC transfer ban does not sufficiently serve the State's interest in preventing *quid pro quo* corruption or the appearance of *quid pro quo* corruption. It reasons that, in the wake of the Supreme Court's decision in *Citizens United*, the State no longer has a cognizable corruption-based interest in restricting independent expenditures. Because the ADC has separate bank accounts for candidate contributions and independent expenditures, it argues that the State has no anti-corruption interest in regulating contributions into the account that the ADC uses only for independent expenditures.

It is true that in *Citizens United*, the Supreme Court recognized that "independent expenditures do not lead to, or create the appearance of, quid pro quo corruption." 558 U.S. at 360, 130 S. Ct. at 910. The Court said, "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Id.* This means a state's interest in preventing corruption may no longer justify regulating independent expenditures when there is no other form of contribution to or coordination with a candidate involved.

Other Circuits, applying the logic of *Citizens United*, have uniformly invalidated laws limiting contributions to PACs that made only independent expendi-

tures. *See*, *e.g.*, *Republican Party of N.M.* v. *King*, 741 F.3d 1089, 1097 (10th Cir. 2013); *N.Y. Progress & Prot. PAC* v. *Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enter.* v. *Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm.* v. *Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Thalheimer* v. *City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011); *SpeechNow.org* v. *FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc). These opinions generally reason as follows: "In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The Court has effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'" *SpeechNow.org*, 599 F.3d at 694-95; *see also*, *e.g.*, *Republican Party of N.M.*, 741 F.3d at 1096-97 ("If an entity can fund unlimited political speech on its own without raising the threat of corruption, no threat arises from contributions that create the fund.").

This reasoning does not extend to contributions made to an organization like the ADC that makes both independent expenditures and candidate contributions. Three of our sister Circuits have addressed the question we face here. That is, how to treat contribution limitations when the contribution will be put into a separate bank account used only for independent expenditures. They have split in answering the question of whether keeping separate bank accounts for independent expenditures and campaign contributions is

sufficient to eliminate the possibility of corruption or its appearance so as to render contribution limits unconstitutional for the independent expenditure-only accounts.

On one side of the debate, the Tenth Circuit concluded that, where an organization makes both candidate contributions and independent expenditures, separate bank accounts are sufficient to alleviate corruption concerns. *See Republican Party of N.M.*, 741 F.3d at 1097. In upholding a preliminary injunction, the court examined the facts of the case to conclude that "under the record we have, [the organization at issue] adheres to contribution limits for donations to its candidate account." *Id.* It determined that "no anti-corruption interest is furthered as long as the [organization] maintains an account segregated from its candidate contributions" for the purpose of making independent expenditures. *Id.* The Tenth Circuit observed that the organization could "not pass along the donors' funds to candidates or coordinate with candidates in making expenditures" if it accepted "unlimited contributions for independent expenditures" into a separate account. *Id.* at 1102. And "[b]ecause [the organization] maintains such a segregated account," as evidenced by the record before the court, the Tenth Circuit concluded that the challenged state contribution limits were unconstitutional as applied to the independent expenditure-only account. *Id.* at 1097.

Conversely, the Second and Fifth Circuits both concluded that a state's interest in preventing corruption and the appearance of corruption was a permissible justification for regulating hybrid organizations, even where they had separate bank accounts. The

Second Circuit established that having a separate bank account intended for independent expenditures was not sufficient to alleviate a state's corruption concern when the organization also maintained an "otherwise indistinguishable" candidate contribution account. *Vt. Right to Life Comm., Inc.* v. *Sorrell*, 758 F.3d 118, 143 (2d Cir. 2014). Two organizations were at issue in the Second Circuit's case: a nonprofit entity and a PAC formed by that entity, which purported to exist only to make independent expenditures. *Id.* at 122. The PAC brought an as-applied challenge to the state's contribution limits, arguing that those limits could not be imposed on it when the PAC made only independent expenditures. *Id.* at 125.

The Second Circuit concluded that the state contribution limit was properly applied to the PAC. Although the PAC was intended to make only independent expenditures, it was in fact "enmeshed financially and organizationally" with another PAC controlled by the same organization that made direct contributions to candidates. *Id.* at 141. The court ruled that the creation of separate bank accounts for the two PACs was not by itself sufficient, because—though "[a] separate bank account may be relevant"—the separate account was not "enough to ensure there is a lack of 'prearrangement and coordination'" with candidates standing alone. *Id.* The court concluded that "[s]ome actual organizational separation between the groups must exist to assure that the expenditures are in fact uncoordinated." *Id.* It suggested that, in deciding whether the independent expenditure-only entity was "functionally distinct" from an entity that made direct or coordinated contributions, that court would look to

factors such as "the overlap of staff and resources, the lack of financial independence, the coordination of activities, and the flow of information between the entities." *Id.* at 142.

Examining those factors, the Second Circuit observed that the only proof of separation provided by the organization were the facts that two separate committees existed within its organizational documents, and that the PAC maintained a separate bank account intended only for independent expenditures. *Id.* at 143. The court said, "the fact that there are two separate bank accounts does not mean the funds were actually treated as separate" where there was evidence that funds had been transferred between the related PACs and that fundraising efforts were performed jointly between the PACs. *Id.* The court examined "the organizational structure of the groups," observing that: the same organization maintained control over both PACs' "structure and finances"; they "share[d] a substantial overlap in membership"; and they engaged in joint organizational activities. *Id.* at 143-44. Based on this substantial "overlap of staff and resources, the fluidity of funds, and the lack of any informational barrier between the entities," the court found that the independent expenditure-only entity was not sufficiently distinct from other parts of the hybrid organization, so the state had an anti-corruption interest in imposing its contribution limits on that entity. *Id.* at 145.

The Fifth Circuit also concluded that a state had a valid anti-corruption interest in ensuring that a contribution was used only for independent expenditure purposes, when that contribution would have other-

wise violated state contribution limits. *See Catholic Leadership Coal. of Tex.* v. *Reisman*, 764 F.3d 409, 443 (5th Cir. 2014). In the Fifth Circuit case, a nonprofit organization formed a separate general-purpose PAC to engage in direct political advocacy ahead of an election, and that PAC purported to make only independent expenditures. *Id.* at 418-19. The nonprofit sought to make an in-kind contribution of its email list of supporters to the PAC so the PAC could use the email list in support of its independent expenditures. *Id.* at 419. State law prevented this in-kind contribution, however, because the PAC was not registered as an independent expenditure-only entity. *Id.* The organization and PAC challenged the state law as applied to their attempt to transfer the email list. *See id.* at 442.

The Fifth Circuit concluded that, while the state "does not have an anticorruption interest in limiting contributions intended to support independent expenditures," it "does have an anti-corruption interest in ensuring those donations facilitate only independent expenditures." *Id.* at 443. Even though the organizations said the list would be used only for independent expenditures, the court determined that "the state is permitted to undertake some reasonable measures to ensure that any contribution limitations are not circumvented." *Id.* at 444. It observed that the organizations "seem [ed] almost willful in not explaining what safeguards are in place to ensure the donated email mailing list will only be used in support of independent expenditures other than the [PAC's] own good intentions." *Id.* The court determined this "failure to so explain any actual safeguards beyond potentially opening a separate bank account to deposit contributions

raised with the email list [wa]s dispositive of their as-applied challenge." *Id.* While the Fifth Circuit declined to "weigh in on the precise safeguards that must be present," it held that "the state's interest in preventing *quid pro quo* corruption and its appearance permits the state to insist, at the very least, that there is *some* safeguard before permitting the contribution[]." *Id.*

The well-reasoned approach of the Second and Fifth Circuits provides guidance here. The question of whether a state has a sufficient anti-corruption interest in setting contribution limits like Alabama's PAC-to-PAC transfer ban to regulate contributions made to a hybrid organization but intended only for independent expenditures, can be answered by an examination of the facts about the structure and operations of the hybrid organization. An account set up for independent expenditures can pass muster under a state's interest in anti-corruption only when it is truly independent from any coordination with a candidate.

To create the necessary independence, an organization must do more than merely establish separate bank accounts for candidate contributions and independent expenditures. There must be safeguards to be sure that the funds raised for making independent expenditures are really used only for that purpose. There must be adequate account-management procedures to guarantee that no money contributed to the organization for the purpose of independent expenditures will ever be placed in the wrong account or used to contribute to a candidate. We will not undertake to make an exhaustive list of necessary safeguards here, but we will join the Second Circuit in considering fac-

tors such as "the overlap of staff and resources, the lack of financial independence, the coordination of activities, and the flow of information between the entities" in deciding whether sufficient safeguards exist. *Vt. Right to Life Comm.*, 758 F.3d at 142. We also find guidance from the Fifth Circuit admonition that the safeguards must involve more than the organization's "own good intentions." *Catholic Leadership Coal. of Tex.*, 764 F.3d at 444.

Beyond sufficient structural separations within the organization, it is also necessary that the same people controlling the contributions to candidates are not also dictating how the independent expenditure money is spent. And there must be more than simply naming different treasurers for different accounts. Different people must functionally control the spending decisions for the different accounts. *See Vt. Right to Life Comm.*, 758 F.3d at 143-44. Having the same person in control of both accounts threatens the perceived "independence" of the independent expenditure-only account. How could a person simply "forget," for example, everything she knows about coordinated spending efforts or contributions to candidates when turning her focus to the independent expenditure-only account?

We now examine how the District Court applied this framework. The District Court found that the ADC's separate accounts were not sufficient to alleviate the State's valid corruption concern. The court found that "these two accounts are controlled by the same entity and people" and observed that the ADC "did not present any evidence to indicate there is any organizational separation with respect to the two ac-

counts to alleviate any potential appearance of corruption." It also noted that the ADC did not "offer[] any evidence to indicate that it has implemented any other internal controls to safeguard against the risk that contributions, even if formally earmarked for independent expenditures, could be funneled to a candidate." The record supports the findings of the District Court, which were not clearly erroneous. The District Court properly recognized that the PAC-to-PAC transfer ban served the State's anti-corruption interest as applied to the ADC's account for independent expenditures.

D.

The ADC finally argues that the PAC-to-PAC transfer ban is not sufficiently closely drawn to the State's interest in preventing corruption. In deciding whether a law is sufficiently "closely drawn," we "assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon*, 134 S. Ct. at 1445 (plurality opinion) (citing *Nat'l Conservative Political Action Comm.*, 470 U.S. at 496-501, 105 S. Ct. at 1468-70). There must be "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." *Id.* at 1456-57 (quoting *Bd. of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 3035 (1989)) (alterations adopted). A law can survive this review if it "avoid[s] unneces-

sary abridgment" of First Amendment rights. *Buckley*, 424 U.S. at 25, 96 S. Ct. at 638.

In determining whether a contribution limit is "closely drawn," the Supreme Court has suggested that "the amount, or level, of that limit could make a difference." *Randall* v. *Sorrell*, 548 U.S. 230, 247, 126 S. Ct. 2479, 2491 (2006). A restriction will generally not be overturned when it does not "have a severe impact on political dialogue." *Id.* (quotation omitted). Restrictions with such an impact are suspect because they "prevent [] candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* (quotation omitted). Courts approach a legislature's decision about the scope of a law, and whether it is precise enough to carry out a state's objectives with deference. Typically courts exercise independent judgment on the proper fit only "as a statute reaches th[e] outer limits" of reasonable tailoring. *Id.* at 249, 126 S. Ct. at 2492.

In light of the record developed by the District Court, the limit imposed on the ADC by Alabama's PAC-to-PAC transfer ban is "closely drawn" to the State's interest in preventing corruption. The evidence shows that, as applied to the ADC, the ban serves an important anti-corruption interest while only marginally impacting political dialogue.

The District Court noted ample evidence that, before the law's passage, PAC-to-PAC transfers were viewed by Alabama citizens as a tool for concealing donor identity, thus creating the appearance that PAC-to-PAC transfers hide corrupt behavior. The Alabama legislature acted to prevent this specific category of behavior when it enacted the PAC-to-PAC

transfer ban. And, as discussed above, the ban serves this narrow purpose as applied to the ADC. Because of the ADC's organizational structure, PAC donations to the ADC give rise to concerns about shadowy campaign contribution activity. Under the PAC-to-PAC transfer ban, contributions to the ADC can no longer pass through PACs in a way that could obscure the true source of the funds. *See Buckley*, 424 U.S. at 67, 96 S. Ct. at 657; *Sorrell*, 548 U.S. at 265, 126 S. Ct. at 2501 (Kennedy, J., concurring) (PACs "can manipulate the system and attract their own elite power brokers, who operate in ways obscure to the ordinary citizen.").

As applied to the ADC, the ban serves this important anti-corruption purpose without "severe[ly] impact[ing] * * * political dialogue." *Sorrell*, 548 U.S. at 247, 126 S. Ct. at 2491 (quotation omitted). Under the ban, the ADC can still "amass[] the resources necessary for effective advocacy." *Id.* The ban does not limit the amount of money the ADC can raise; it only limits the ADC's ability to raise money through a specific type of donation—PAC-to-PAC transfers. Moreover, the ban does not directly affect the ADC's campaign contributions or independent expenditures. The ADC can continue to make unlimited contributions and independent expenditures. While the ban does bar the ADC from contributing to other PACs, the ADC has offered no evidence that it contributed to other PACs prior to the ban or that it seeks to now.

For these reasons, we conclude that the PAC-to-PAC transfer ban as applied to the ADC is sufficiently "closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444 (quotation omitted). In light of the ADC's organi-

zational structure, it is difficult to imagine a less restrictive means of regulation that would still address the corruption concerns arising from PAC contributions to the ADC. Of course, the PAC-to-PAC transfer ban does not even have to be the least restrictive means of furthering Alabama's anti-corruption interest in order to survive constitutional scrutiny. Under the less rigorous "closely drawn" standard, the ban need only be "narrowly tailored to achieve [Alabama's] desired objective." *Id.* at 1456-57 (quotation omitted). This standard has been met.

The PAC-to-PAC transfer ban is closely drawn to meet Alabama's interest in preventing *quid pro quo* corruption (or its appearance) as applied to the ADC here. We affirm the District Court's finding on the merits that § 17-5-15(b) is constitutional as applied to the ADC.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

THE ALABAMA DEMOCRATIC CONFERENCE, et al.,	)	
Plaintiffs,	)	
v.	)	Case No.: 5:11-cv-02449-JEO
LUTHER STRANGE, in his official capacity as Attorney General of Alabama, et al.,	)	
Defendants.	)	

(August 3, 2015)

MEMORANDUM OPINION

Alabama's Fair Campaign Practices Act ("FCPA") prohibits a political action committee ("PAC") from making contributions, expenditures, or transfers of funds to another PAC, except that a PAC that is not a "principal campaign committee" may make contributions, expenditures, or transfers of funds to a principal

campaign committee. ALA. CODE § 17-5-15(b). This law was enacted in response to concerns that donors were concealing their contributions to candidates by "laundering" those contributions through multiple PACs before the donation finally arrived with a candidate. The broad language of the statute prohibits all contributions, expenditures, and transfers of funds between PACs, except as noted above, including those from one PAC to a second PAC where the money is to be used solely for "independent expenditures." The Alabama Democratic Conference ("the ADC") asserts the prohibition on its ability to receive contributions to be used solely for independent expenditures violates the PAC's First Amendment rights. At the outset, the court notes that the ADC does not challenge ALA. CODE § 17-5-15(b) on its face, but rather brings an as applied challenge. (Doc. 1 at 29-43).

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

A. PROCEDURAL HISTORY

On July 6, 2011, the ADC, a PAC under Alabama law, and five of its members (collectively "the ADC" or "Plaintiffs") sued the Alabama Attorney General and two District Attorneys (collectively "the State" or "Defendants") to enjoin the enforcement of ALA. CODE § 17-5-15(b), the so-called PAC-to-PAC transfer ban, because it violates the ADC's First Amendment rights and § 2 of the Voting Rights Act, 52 U.S.C. § 10301 (previously codified at 42 U.S.C. § 1973. (Doc. 1). The State moved to dismiss the case (doc. 7) and the ADC

moved for partial summary judgment (doc. 9). The undersigned granted the ADC's motion for partial summary judgment as to the First Amendment claim and granted the State's motion to dismiss the Voting Rights Act claim. (Doc. 24). The State appealed the grant of summary judgment as to the First Amendment claim and the Eleventh Circuit Court of Appeals reversed. (Doc. 34).

On remand, the ADC filed a "Second Motion for Preliminary Injunction" (Doc. 43) and the State filed a "Motion for Summary Judgment and Evidentiary Submission." (Doc. 44). Prior to the filing of these motions, the court, together with the parties, determined that the best way to address the pending issues was to combine the Motion for Preliminary Injunction with a final adjudication on the merits. (Doc. 38).[1] The parties declined the opportunity to present live testimony to the court on these matters, and instead agreed to rely on the evidence submitted with their respective motions. The motions were fully briefed and are now properly under submission before the court.

As previously noted, the court is prepared to proceed to a final adjudication of the matter on the merits. As such, both Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion for Summary Judgment are due to be denied. The court will consid-

---

[1] Because the court is proceeding to a final adjudication on the merits, Plaintiffs' Second Motion for Preliminary Injunction is moot.

er the evidence and arguments offered in its final adjudication of the merits.[2]

B. FINDINGS OF FACT[3]

---

[2] The central question in this case is whether the PAC-to-PAC transfer ban is closely drawn to serve a sufficiently important state interest. Crucial to that determination is whether "the establishment of separate bank accounts by ADC, a hybrid independent expenditure and campaign contribution organization, eliminates all corruption concerns." *Alabama Democratic Conference* v. *Broussard*, 541 F. App'x 931, 936 (11th Cir. 2013). The Eleventh Circuit held that this is a question of fact. *Id.* As such, summary judgment is inappropriate.

[3] This section comprises the undersigned's findings of fact. However, the court notes that the evidence presented by the parties is largely undisputed. (Docs. 45 at 61-77, 46, and 49). Where a fact offered by one party is either admitted or undisputed by the other party, and is also supported by the evidence, the court will cite directly to the numbered fact offered by that party. Where the fact is one that was initially offered by the Plaintiffs, the court will use the citation (PAF No. X), with X standing for the numbered paragraph used by Plaintiffs in their statement of facts, which is located at docket number 46. Where the fact is one initially offered by Defendants, the court will use the citation (DAF No. X), with X standing for the numbered paragraph used by Defendants in their statement of facts, which is located at docket number 45. Before continuing, the court notes that Plaintiffs nominally dispute the vast majority of Defendants' undisputed facts. (Doc. 46 at ¶ 37) ("The statements alleged in * * * Defendants' Numbered Statements of Undisputed Facts relate to the period before the development of a searchable database and have no relevance to the operation of the new system and the exponentially greater transparency it has created.). This statement does not contest the accuracy of the facts offered by Defendant, but rather contests their relevancy. Because Plaintiffs do not contest the accuracy of the facts, or provide contrary evi-

1. The Alabama Fair Campaign Practices Act

Alabama's political campaigns are governed by Alabama's Fair Campaign Practices Act. *See* ALA. CODE §§ 17-5-1, et seq. The FCPA requires disclosure of certain information, but, for the most part, does not contain any limits on the amount of money that an individual, business, or political organization can contribute directly to the campaign of a candidate for office.[4] Under the FCPA, it is

> unlawful for any person, acting for himself or herself or on behalf of any entity, to make a contribution in the name of another person or entity, or knowingly permit his or her name, or the entity's name, to be used to effect such a contribution made by one person or entity in the name of another person or entity, or for any candidate, principal campaign committee, or political action committee to knowingly accept a contribution made by one person or entity in the name of another person or entity.

ALA. CODE § 17-5-15(a).

---

dence, the court will consider these facts admitted. Finally, the court will explicitly note when it is resolving a disputed fact.

[4] While not relevant here, ALA. CODE § 17-5-14(c) prohibits utilities regulated by the Public Service Commission from contributing to a candidate running for a position on the Public Service Commission.

Prior to 2010, the appearance in Alabama was that donors were attempting to conceal donations to candidates and other groups by laundering said donations through multiple PACs. (Doc. 7-4). This was allegedly accomplished when a donor 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 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.[5] (DAF No. 2). Because there are no limits on the number of PACs any one person can cre-

[5] At this juncture, the court would like to note that neither party submitted definitive proof that any donor actually did this with the intent to evade the disclosure requirements. The State submitted an indictment alleging that bribery was facilitated by transactions such as these. (Doc. 45 at ¶¶ 41-53). However, an indictment does not constitute proof. While most of the defendants to that indictment were found not guilty (DAF No. 53), Ronald Gilley pleaded guilty. In doing so he signed a Factual Basis for Plea that admitted that he "attempted to conceal the true nature, source, and control of the payments made to members of the Alabama Legislature in return for favorable votes * * * by engaging in financial transactions and disguising illicit payments through political action committees and using conduit contributors, and other means." *United States* v. *Gilley*, No. 2:10-cr-00186-MHT-WC, Doc. 986 at ¶ 24 (M.D. Ala. April 22, 2011). This admission does not provide enough detail to definitively say he was admitting to funneling money through multiple PACs in the manner noted above. That being said, there is ample evidence in the record by way of numerous newspaper articles and other testimony, especially from Ashley Newman, to support the finding that, at the very least, the public perception prior to 2010 was that donors were laundering money through PACs for the purpose of concealing their identities.

ate in Alabama, a single campaign operative could control all of the PACs in a contribution chain and carry out a scheme to conceal the source of a campaign contribution by simply moving money from one PAC to another. (DAF No. 4; PAF No. 9).[6]

In order to stop this from occurring, the Alabama Legislature amended the FCPA in 2010 to prohibit PACs[7] and tax exempt political organizations[8] from making a contribution, expenditure, or any other transfer of funds to any other PAC or tax exempt political organization. ALA. CODE § 17-5-15(b). The parties, and at times the court, call this provision the PAC-to-PAC transfer ban. That being said, the provision encompasses more than just transfers of funds:

---

[6] In their admitted fact, Defendants cite testimony stating that a campaign operative could accomplish this by moving credits from one of the PACs he controlled to a different PAC. (DAF No. 4). Plaintiffs point out that pursuant to ALA. CODE § 17-5-6, except for expenditures that are less than one hundred dollars, all expenditures must be made with a check from the PAC's checking account. (PAF No. 9). Plaintiffs' point is well taken. However, the details of how a political operative could legally move money between accounts is immaterial. What is relevant is, at the time, the perception was that donors were legally moving money through PACs for the purpose of concealing who was making the contribution and that could be made easier by the fact one political operative could control a number of PACs.

[7] Under the Act, a PAC is defined broadly to include "[a]ny * * * group of one or more persons * * * which receives or anticipates receiving contributions and makes or anticipates making expenditures to or on behalf of any Alabama state or local elected official, proposition, candidate, principal campaign committee or other political action committee." ALA. CODE § 17-5-2(a)(12).

[8] Because the organization at the center of this case is a PAC, the court will use that term in this opinion.

PACs are also prohibited from making contributions or expenditures to other PACs. The Legislature amended this provision in 2013. The relevant portion of the FCPA that is subject to the constitutional challenge before the court now provides:

> (b) It shall be unlawful for any political action committee or tax exempt political organization under 26 U.S.C. § 527, including a principal campaign committee, or any person authorized to make an expenditure on behalf of such political action committee or 527 organization, to make a contribution, expenditure, or any other transfer of funds to any other political action committee or 527 organization * * * . Notwithstanding the foregoing, a political action committee that is not a principal campaign committee may make contributions, expenditures, or other transfers of funds to a principal campaign committee

Id.

In 2011 and 2013, the Alabama Legislature amended the FCPA's disclosure requirements for elections. First, pre-election campaign finance reports must be filed more frequently that before. ALA. CODE § 17-5-8(a). Second, the Secretary of State was required to establish a system of electronic filing of reports such that said reports were made part of a searchable database. ALA. CODE § 17-5-8.1(b). The searchable database provides the ability to search by a recipient's name, a contributor's name, a contributor's or recipient's Zip Code, and date of contribution. *Id.* Finally, any person or entity making an "electioneering com-

munication" must file the same type of reports as PACs file.[9] ALA. CODE § 17-5-8(h).

2. The Alabama Democratic Conference

The ADC was founded in 1960 and operates as a group advocating the rights of black citizens. (PAF No. 18). Its basic mission is to organize and unify the black vote. (DAF No. 57). It is a statewide organization with local chapters in over 60 counties and approximately 3,000 members. (PAF Nos. 18, 26; DAF Nos. 55, 58). These local chapters are not separately incorporated, but are instead internal divisions within the ADC. (DAF No. 59).

The ADC endorses candidates for many state, district, and local positions, in both primary and general elections. (PAF No. 27). Candidates seeking the ADC's endorsement must appear in person to be interviewed. (PAF No. 27). County chapters decide which candidate to endorse for county elections, and the ADC Executive Committee decides which candidate to endorse for statewide positions. (PAF No. 27; DAF No. 66). These endorsements are not based on whether a candidate contributed to ADC: some candidate committees make donations to ADC and others do not. (PAF No. 28).

---

[9] An electioneering communication is an expenditure over one-thousand dollars for a communication made within 120 days of an election that contains the name or image of a candidate and is for the purpose of influencing the outcome of an election. ALA. CODE § 17-5-2(a)(5).

The ADC spends its money by, among other things, providing money to its local chapters, funding get-out-the-vote efforts, and making contributions to candidates. The ADC distributes a base amount of its available funds to each of its chapters. (PAF 30). Remaining funds are distributed based on an independent determination by the Chair of the ADC based on a variety of factors, including the size of the county's black population and the effectiveness of the local chapter. (PAF Nos. 29-30; DAF Nos. 61, 67-68). In addition to distributing money to its chapters, the ADC also covers the cost of printing yellow sample ballots indicting which candidates the ADC endorses. (DAF No. 62). These yellow sample ballots play a role in the ADC's get-out-the-vote efforts, which include: distributing yellow sample ballots, calling people to encourage them to vote, attending churches or ministers' meetings to promote the ADC's message, promoting the use of absentee ballots, running radio spots encouraging people to vote, conducting phone bank and robocall campaigns, and paying for rides to the polls. (DAF No. 63).

The ADC has a close working relationship with the Democratic Party within the State of Alabama. (DAF No. 72). According to its constitution, one of the ADC's purposes is to "advocate and advance the cause of the Democratic Party." (DAF No. 75 (quoting Doc. 44-2 at 2)). The ADC focuses its activities on the Democratic Party because it perceives the Republican Party as hostile to the aspirations of black citizens. (PAF No. 21). The ADC actively seeks to influence the Democratic Party. (PAF No. 20). This is shown in the minutes of ADC Executive Committee meetings

where on multiple occasions the ADC Chair encouraged ADC members and groups to become involved in the Democratic Party and influence the Party's decisions. (DAF Nos. 76, 78, 80-85). For example, in a 2007 Executive Committee meeting, ADC Chair Joe Reed noted that "it is important for ADC members to be involved in the local Democratic Executive Committee meetings since this group will play a very important role in the upcoming elections." (DAF No. 80 (quoting Doc. 44-7 at 8)). In addition, these minutes noted at least two occasions where the Democratic Party provided assistance to the ADC: (1) in a 2006 meeting, Reed announced that Democratic National Committee ("DNC") staffers would be available to assist local ADC chapters in organizing community meetings and (2) in that same meeting, the State Democratic Party Chair gave brief remarks. (DAF Nos. 77, 79).

That being said, the ADC endorses and actively supports certain candidates and actively opposes others in Democratic primary elections. (PAF No. 20). Generally, for the general election, the ADC's yellow sample ballot recommends a straight democratic ticket vote. (DAF No. 88). However, the ADC refuses to endorse certain Democratic candidates in general elections and at times opposes actions and policies of Democratic Party leaders and Democratic elected officials. (PAF No. 23).

As of February 2014, approximately 107 out of 292 total members of the Alabama Democratic Executive

Committee[10] ("ADEC") were also members of the ADC. (DAF No. 92). Additionally, all five of the non-vacant ADC executive officer positions were held by members of the Alabama Democratic Executive Committee. From 2005 through 2010, the ADC received four contributions from the Alabama Democratic Party totaling $87,648.00. (DAF No. 96). The ADC has not received money since then, however. (DAF No. 97).

In addition to having a relationship with the Democratic Party, the ADC also has relationships with current and former public officeholders. As of February 2014, three of the five non-vacant ADC executive officer positions were held by individuals who are current or previous public office holders. (DAF No. 98). Further, the ADC's constitution provides that the Executive Committee includes "nine elected ex-officio members who shall be allocated as follows: three members of the Alabama Legislature, three elected municipal officials, [and] three elected county officials." (DAF No. 99 (quoting Doc. 44-2 at 6)). The minutes from a 2007 ADC Executive Committee meeting note that "[s]ome local organizations are leaving it up to local elected officials to determine the agenda of the [local ADC chapters]." (DAF No. 107 (quoting 44-7 at 5)).

Additionally, the ADC actively solicits contributions from candidates running for public office. From 2005 to 2010, the ADC received approximately

[10] The ADEC is the governing body of the Alabama Democratic Party. *See* http://aldemocrats.org/about (last visited July 31, 2015).

$502,350.95 in contributions from candidates. (DAF No. 123). In 2010, three of the four candidates for state office endorsed by ADC contributed a total of $122,000 to the ADC. (DAF No. 125). On occasion, ADC works with or contributes to candidates to bolster its get-out-the-vote efforts. (DAF No. 112). From 2005 to 2010, the ADC made approximately $42,340.00 in contributions to candidates or their committees for purposes of assisting with its get-out-the-vote efforts. (DAF No. 124).

The ADC performed get-out-the-vote activities in support of each of the candidates that contributed to the ADC in 2010. (DAF No. 104). Candidates give money to the ADC "to turn the vote out to help them get elected." (DAF No. 108 (quoting Doc. 43-4 at 31)). The minutes of a 2010 Executive Committee meeting note that ADC Chair Reed reported that candidates "who do not help pay for [get out the vote] will be left off the [yellow sample] ballot." (DAF 106 (quoting Doc. 44-7 at 15)). The ADC Chair considers a candidate's contribution to ADC's getout-the-vote efforts as helpful to that candidate's own campaign. (Doc. 43-4 at 31). The ADC tells candidates what its "procedure is for getting out the vote and that they are expected to win their own elections." (Doc. 43-4 at 57). The ADC tells the candidate what its plans are and if "the [candidate has] something to suggest to [the ADC], [the ADC] listens to it. And if [the ADC] likens] it, [it'll] do it." (Doc. 43-4 at 57; DAF No. 117). ADC Chair Reed noted: "[One of the things you have to be careful about is that you can't run everybody's campaign. As ADC Chairman, you can't run – once we endorse, we endorse doing our procedure. But we can't be every-

body's campaign manager. And oftentimes they want that." (Doc. 43-4 at 56).

Upon the enactment of the PAC-to-PAC transfer ban, the ADC sought to restructure its activities in a manner consistent with those upheld by the court in *Emily's List* v. *Federal Election Common*, 581 F.3d 1 (D.C. Cir. 2009). (PAF No. 35). Specifically, the ADC has established two bank accounts, one to receive contributions from individuals and businesses for the purpose of making contributions to candidates (the Candidate Account) and the other to receive contributions from any entity, including other PACs, for maintaining ADC infrastructure, for get-out-the-vote efforts, and for other independent expenditures (including contributions to other PACs for use in their get-out-the-vote efforts) (Independent Expenditure Only Account). (Doc. 9-1 at 5; Doc. 43 at 16-17; DAF No. 132). The Independent-Expenditure-Only Account is controlled by the same entity or people that control the ADC's Candidate Account. (DAF No. 133).

II. DISCUSSION

The First Amendment to the United States Constitution declares that "Congress shall make no law * * * abridging the freedom of speech." U.S. CONST. amend. I. "Speech is an essential mechanism of democracy," the Supreme Court has observed, "for it is the means to hold officials accountable to the people." *Citizens United* v. *FEC*, 558 U.S. 310, 339 (2010). The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Ariz. Free Enter. Club's Freedom Club*

PAC v. *Bennett*, ___ U.S. ___, 131 S. Ct. 2806, 2817 (2011) (internal quotation marks omitted). Further, it "is well-established that political contributions are considered to be political speech [and are] protected by the First Amendment." *Alabama Democratic Conference* v. *Broussard*, 541 F. App'x 931, 932-33 (11th Cir. 2013). "Laws restricting campaign contributions are permissible, however, if the State can establish that they are 'closely drawn' to serve a 'sufficiently important interest.'" *Id.* at 933 (citing *Buckley* v. *Vale*, 424 U.S. 1, 23-25 (1976)).

"The Supreme Court has specifically held that 'preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'"[11] *Id.* (quoting *FEC* v. *Natal Conservative*

[11] Both parties discuss the applicability of the State's transparency interest in this case. The ADC even concedes that "transparency is a legitimate and important governmental concern." (Doc. 43 at 31). However, this does not change the fact that preventing corruption or the appearance thereof is the only interest that the Supreme Court has found sufficiently important. Even if the undersigned were inclined to consider this interest based on the ADC's concession, the court is nonetheless bound by the Eleventh Circuit's opinion in this case establishing that the only sufficiently important interest is the prevention of corruption. *This That And The Other Gift And Tobacco, Inc.* v. *Cobb Cnty.*, Ga., 439 F.3d 1275, 1283 (11th Cir. 2006) ("Under the law of the case doctrine, the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal.").

The court does note, however, that transparency plainly is related to and furthers the State's interest in preventing corruption and the appearance of corruption insofar as one can only as-

Political Action Comm., 470 U.S. 480, 496-97 (1985)). The Supreme Court recently said the following about a state's interest in preventing corruption:

> In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. "Ingratiation and access * * * are not corruption." *Citizens United* v. *Federal Election Common*, 558 U.S. 310, 360, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). They embody a central feature of democracy – that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.
>
> Any regulation must instead target what we have called "*quid pro quo*" corruption or its appearance. *See id.*, at 359, 130 S. Ct. 876. That Latin phrase captures the notion of a direct exchange of an official act for money. *See McCormick* v. *United States*, 500 U.S. 257, 266, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991). "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Federal Election Common* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985). Campaign finance re-

---

sess whether there has been a *quid pro quo* exchange if one is able to identify the party making the payment.

> strictions that pursue other objectives, we have explained, impermissibly inject the Government "into the debate over who should govern." *Bennett*, *supra*, at ___, 131 S. Ct., at 2826. And those who govern should be the *last* people to help decide who *should* govern.

McCutcheon v. *Fed. Election Common*, ___U.S.___, 134 S. Ct. 1434, 1441-42 (2014). In other words, the only sufficiently important interest that will support the PAC-to-PAC transfer ban is preventing *quid pro quo* corruption or the appearance thereof.

With that in mind, the court will first address the question of whether the PAC-to-PAC transfer ban "sufficiently implicates the State's anti-corruption interest" before addressing whether the challenged statute is closely drawn to serve that interest. *Alabama Democratic Conference*, 541 F. App'x at 934.

A. Does the PAC-to-PAC Transfer Ban as Applied to the ADC Implicate the State's Anti-corruption interest?

1. The Law

Before delving into the specifics the State's anti-corruption interest in banning contributions from one PAC to another PAC as it applies to ADC, the undersigned will first set out some guideposts.

First, it is unquestionable that a state has an anti-corruption interest in limiting contributions made to a candidate. *Buckley*, 424 U.S. at 29. Further, when an expenditure is made in coordination with a candidate, it functions as a contribution and is treated as such.

See Fed. Election Common v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 447 (2001). Finally, in addition to having an anti-corruption interest in limiting contributions to candidates, a state has an anti-corruption interest in preventing the circumvention of those contribution limits. *Vermont Right to Life Comm., Inc.* v. *Sorrell*, 758 F.3d 118, 140 n.20 (2d Cir. 2014); *Catholic Leadership Coal. of Texas* v. *Reisman*, 764 F.3d 409, 444 (5th Cir. 2014).

Second, independent expenditures do not give rise to corruption or the appearance thereof. *Citizen's United*, 558 U.S. at 357. After *Citizens United*, the Court no longer perceives a

> threat of quid pro quo corruption * * * when independent groups spend money on political speech. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of quid pro quo corruption with which [the Court's] case law is concerned. In short, the candidate-funding circuit is broken. *Citizens United* thus held as a categorical matter that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.

Wis. Right to Life State PAC v. *Barland*, 664 F.3d 139, 153 (7th Cir. 2011) (internal citations and quotation marks omitted).

After the Supreme Court held as a matter of law that independent expenditures do not constitute a

threat of *quid pro quo* corruption, federal courts around the country began invalidating laws that limited *contributions* to independent expenditure only organizations. These various courts agreed that such limits do not withstand First Amendment scrutiny. *Republican Party of New Mexico* v. *King*, 741 F.3d 1089, 1096-97 (10th Cir. 2013); *New York Progress and Protection PAC* v. *Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enterprise* v. *Texas Ethics Common*, 732 F.3d 535, 537-38 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm.* v. *Barland*, 664 F.3d at 154; *Thalheimer* v. *City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011); *Long Beach Area Chamber of Commerce* v. *City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010); *SpeechNow.org* v. *FEC*, 599 F.3d 686, 694-96 (D.C. Cir. 2010) (en banc); *N.C. Right to Life, Inc.* v. *Leake*, 525 F.3d 274, 292-93 (4th Cir. 2008) (pre-*Citizens United*). In fact, the Second Circuit Court of Appeals observed that "few contested legal questions are answered so consistently by so many courts and judges." *Walsh*, 733 F.3d at 488.

With the foregoing in mind, the court turns to the nature of the ADC, a PAC that, through two separate accounts, proposes to make both direct contributions to candidates and independent expenditures. The court will refer to these types of political committees and other organizations that engage in both independent expenditures and direct contributions to candidates as hybrid organizations or hybrid PACs. The question before the court is whether the State can permissibly restrict the ADC from receiving contributions from other PACs when those contributions will be used exclusively for independent expenditures.

The Circuit Courts are split on how to treat limitations on contributions to hybrid organizations when the contribution in question will solely fund independent expenditures. The Tenth Circuit found that segregated bank accounts for candidate contributions and independent expenditures were sufficient to alleviate a state's corruption concerns so long as the organization adhered to direct contribution limits and anti-coordination laws.[12] *Republican Party of New Mexico*, 741 F.3d at 1101. The court found that a "hybrid PAC's direct contribution does not alter the uncoordinated nature of its independent expenditures; there still must be some attendant coordination with the candidate or political party to make corruption real or apparent." *Id.*

On the other hand, the Second and Fifth Circuits have found that the fact that an organization has separate bank accounts for independent expenditures and candidate contributions is not enough to alleviate a state's anti-corruption interest on its own. In *Catholic*

---

[12] In *Emily's List*, 581 F.3d 1, the District of Columbia Circuit found unconstitutional a Federal Election Commission regulation dictating that a large percentage of certain election-related activities, such advertisements, get-out-the-vote efforts, and voter registration drives be funded from a group's hard-money account. The court stated:

> A non-profit that makes expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates. Rather, it simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account.

Id. at 12.

Leadership Coal. of Texas, 764 F.3d 409, the court upheld an as-applied challenge to a law preventing a hybrid PAC from accepting an email distribution list from a nonprofit corporation (donating the email distribution list would have been considered a contribution). *Id.* at 418-19. The email list was to be solely used in support of the PAC's independent expenditures. *Id.* In determining that the state had an anti-corruption interest in preventing the hybrid PAC from accepting the email distribution list, the court first noted that Texas law prohibits corporate contributions to candidates and that the ban on corporate contributions to PACs that contribute to candidates was a valid "anticircumvention measure to prevent corporations from using a political committee to do an end-run around Texas's direct contribution ban." *Id.* at 443. The court then reasoned that "[e]ven if the state does not have an anti-corruption interest in limiting contributions intended to support independent expenditures * * * the state does have an anti-corruption interest in ensuring those donations facilitate only independent expenditures." *Id.* at 443. In short, it was constitutionally permissible for Texas to ban corporate contributions to hybrid organizations that "lack[] sufficient internal controls to safeguard against the risk that the corporate contributions, even if formally earmarked for independent expenditures, could be funneled to a candidate." *Id.* at 445.

Similarly, the Second Circuit upheld an as applied challenge limiting contributions to an independent-expenditure-only group when that group was enmeshed financially and organizationally with a closely related group that made contributions to candidates.

Vermont Right to Life Comm., 758 F.3d 118. The court found that because of the lack of organizational separation between the two groups, the fact that they had separate bank accounts was insufficient to eliminate the risk of coordinated expenditures between candidates and the independent-expenditure-only group. *Id.* at 144-45.

The Eleventh Circuit has also provided guidance with how the undersigned should proceed.[13] Most importantly, it found that the fact that ADC is operating two accounts, one for independent expenditures and another for contributions to candidates, is not enough, on its own, to eliminate the State's concerns about corruption or the appearance thereof. *Alabama Democratic Conference*, 541 F. App'x at 935. Specifically, the Eleventh Circuit stated that

> [w]hen an organization engages in independent expenditures as well as campaign contributions, as ADC does, its independence may be called into question and concerns of corruption may reappear. At the very least, the public may believe that corruption continues to exist, despite the use of separate bank accounts, because both accounts are controlled and can be coordinated by the same entity.

---

[13] As noted earlier, while the Eleventh Circuit's earlier opinion in this matter is unpublished, and thus does not constitute precedent in other cases, it is nevertheless the law of this case. As such, the undersigned is bound by it. *This That And The Other Gift And Tobacco, Inc.*, 439 F.3d at 1283 ("Under the law of the case doctrine, the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal.").

> Consequently, we cannot hold as a matter of law that the State's interest in preventing corruption or the appearance of corruption is insufficient to justify contribution limits on funds when the receiving organization also makes campaign contributions.

Id. The court went on note that whether the anti-corruption interest is sufficient in light of the record in this case, and whether the transfer ban is a closely drawn means of furthering that interest, is a mixed question of law and fact to be determined by the undersigned.

The State offers several arguments explaining its anti-corruption interest in prohibiting the transfer of funds between PACs. The arguments can generally be grouped into three categories: (1) how the State's anti-corruption interest is implicated when one PAC makes a contribution to another PAC, even if the PACs involved only make independent expenditures; (2) how the State's anti-corruption interest is implicated when one PAC is allowed to make contributions to a hybrid PAC's independent expenditure only account; and (3) how the State's anticorruption interest is implicated by the nature of ADC and the way it conducts business. Because the court finds that the nature of ADC as an organization implicates the State's anti-corruption interests, the undersigned will not address the State's broader anti-corruption arguments. Accordingly, the court will focus on the third category of the State's arguments.

The State makes three arguments for why the nature of ADC specifically implicates its anti-corruption interest: (1) the lack of organization separation be-

tween the independent expenditure only side and the candidate contribution sides lends itself to the appearance of corruption; (2) the ADC is analogous to a political party or political party affiliate; and (3) the ADC's purported independent expenditures are actually coordinated expenditures. The court will address each in turn.

1. Does the ADC's Lack Organizational Separation Between the People that Control the Candidate Account and the Independent Expenditure Only Account?

As previously discussed, the ADC operates two bank accounts for purposes of keeping its funds for contributions to candidates separate from its funds to be used for independent expenditures. It is undisputed that these two accounts are controlled by the same entity and people. These two facts are all the court knows about how the ADC runs these separate accounts. The ADC did not present any evidence to indicate there is any organizational separation with respect to the two accounts to alleviate any potential appearance of corruption. Additionally, aside from the creation of two accounts, the ADC has not offered any evidence to indicate that it has implemented any other internal controls to safeguard against the risk that contributions, even if formally earmarked for independent expenditures, could be funneled to a candidate.

Bearing in mind the finding by the Eleventh Circuit that "[a]t the very least, the public may believe corruption continues to exist, despite the use of sepa-

rate bank accounts, because both accounts are controlled and can be coordinated by the same entity," *Alabama Democratic Conference*, 541 F. App'x at 936, the undersigned finds that the State's "interest in preventing *quid pro quo* corruption and its appearance permits the [S]tate to insist, at the very least, that there is *some* safeguard" in place to guard "against the risk that [contributions], even if formally earmarked for independent expenditure, could be funneled to a candidate." *Catholic Leadership Coal. of Texas*, 764 F.3d at 444-45. In light of the lack evidence of some organizational division at the ADC such to ensure "that the independent expenditures are truly spent independent of any coordination with a candidate," *Vermont Right to Life Comm.* v. *Sorrell*, 758 F.3d at 145, or evidence of any other safeguard, the court finds that the State has a valid corruption concern with respect to the ADC. Thus, the next question to be asked is whether the PAC-to-PAC transfer ban is closely drawn to that sufficiently important interest. However, before addressing that question, the court will briefly discuss the State's other corruption arguments as applied to the ADC.

2. Is the ADC is Analogous to a Political Party?

The State theorizes that because the ADC has a close relationship with public officeholders and the Alabama Democratic Party, it should be treated as a political party for purposes of analyzing the State's anti-corruption interest. (Doc. 45 at 44-47); (Doc. 48 at 12-13). As explained below, this argument fails.

Before addressing the merits of this argument, the court will briefly restate some of the relevant facts. These facts fall into two categories: (1) facts concerning the ADC's relationship with the Alabama Democratic Party and (2) facts concerning the ADC's relationship with candidates and officeholders.

While the ADC is not a formal branch of the state Democratic Party, the two groups have a close relationship and pursue similar goals. One of the ADC's stated purposes is to advocate and advance the cause of the Democratic Party and it actively seeks to influence that party. Further, a large percentage of the members of the Alabama Democratic Executive Committee are also members of the ADC. There is also evidence showing the Alabama Democratic Party's support of ADC. As of February 2014, five of the nonvacant executive officer positions for the ADC were held by members of the Alabama Democratic Executive Committee. In a 2006 ADC meeting, the Chair announced that the DNC would be available to assist local ADC chapters in organizing community meetings and the State Democratic Party Chair gave brief remarks. Between 2005 and 2010, the ADC received $87,648.00 in contributions from the Alabama Democratic Party.

Part of what the ADC does is endorse parties for office and coordinate get-out-the-vote efforts that including publishing and distributing a yellow sample ballot highlight which candidates it endorses. Candidates often donate to the ADC to support the get-out-the-vote efforts. The ADC tells candidates what its get-out-the-vote procedures are and will listen to any ideas the candidates may have and, if the ADC likes

the ideas, implement said ideas. With respect to officeholders, as of February 2014, three of the five non-vacant ADC Executive Officer positions were held by current or previous officeholders. The ADC constitution provides for nine current officeholders to be included as ex-officio members of the ADC Executive Committee. Finally, the minutes from a 2007 Executive Committee meeting note there was some discussion about how some local organizations were leaving it up to local officials to determine the agenda of the local ADC chapters.

The Supreme Court upheld contribution limits to national political parties' "soft money" accounts, accounts that are not used to make contributions to candidates, based on a vast amount of evidence indicating the corruptive nature of these contributions. *McConnell* v. *Federal Election Common*, 540 U.S. 93, 143-154 (2003). Specifically, the Court found that candidates and officeholders enjoy a special relationship and unity of interest with the national political parties.[14] *Id.* at 145. The Court further found that the national political parties, donors, and candidates exploited this relationship as follows:

> candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create

[14] To the extent the State points to evidence of the ADC's efforts to influence the Alabama Democratic Party as evidence of why it should be treated like a political party, that point is not well-taken. The relevant question concerns the ADC's relationship to candidates and officeholders, not the Alabama Democratic Party.

debt on the part of officeholders, with the national parties serving as willing intermediaries. Thus, despite FECA's hard-money limits on direct contributions to candidates, federal officeholders have commonly asked donors to make soft-money donations to national and state committees solely in order to assist federal campaigns, including the officeholder's own * * * . Parties kept tallies of the amounts of soft money raised by each officeholder, and "the amount of money a Member of Congress raise[d] for the national political party committees often affect[ed] the amount the committees g[a]ve to assist the Member's campaign * * *. Donors often asked that their contributions be credited to particular candidates, and the parties obliged, irrespective of whether the funds were hard or soft * * * . National party committees often teamed with individual candidates' campaign committees to create joint fundraising committees, which enabled the candidates to take advantage of the party's higher contribution limits while still allowing donors to give to their preferred candidate * * * . Even when not participating directly in the fundraising, federal officeholders were well aware of the identities of the donors: National party committees would distribute lists of potential or actual donors, or donors themselves would report their generosity to officeholders * * * .

For their part, lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the ex-

> *press purpose of securing influence over federal officials.*
>
> ****
>
> The record in the present cases is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations* * * .
>
> So pervasive is this practice that the six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access. For example, the DCCC offers a range of donor options, starting with the $10,000-per-year Business Forum program, and going up to the $100,000-per-year National Finance Board program. The latter entitles the donor to bimonthly conference calls with the Democratic House leadership and chair of the DCCC, complimentary invitations to all DCCC fundraising events, two private dinners with the Democratic House leadership and ranking Members, and two retreats with the Democratic House leader and DCCC chair in Telluride, Colorado, and Hyannisport, Massachusetts.

McConnell, 540 U.S. at 146-51 (Internal citations and quotation marks omitted) (emphasis added). There is some question as to what extent *McConnell* remains good law after *Citizen's United. See Republican Nat. Comm.* v. *Fed. Election Common*, 698 F. Supp. 2d 150, 159 (D.D.C.), *aff'd*, 561 U.S. 1040 (2010). However, to

whatever extent the limitations on contributions to a Political Party's soft money account are still valid under *McConnell*, the anti-corruption concerns that were raised in that case do not apply to the ADC, at least not on the record before the court. While there is some relationship between the ADC and candidates for office and current officeholders, unlike in *McConnell*, there is no evidence of the corruptive nature of those relationships. There is no evidence that ADC is providing donors access to candidates in exchange for their donations, that donors are donating to the ADC's get-out-the-vote efforts for purposes of securing access over a candidate for office, or that donors are donating to the ADC in order to circumvent contribution limits to a candidate, because, as noted previously, Alabama does not have limits on the amount a donor can donate to a candidate. In *McConnell* there was overwhelming evidence in the record to supports the Court's finding of the corruptive nature of donations to a National party's soft money account. The evidence in this case does not rise to that level.[15]

---

[15] To the extent the State argues that it is the ADC's relationship with the Alabama Democratic Party, as opposed to its relationship with candidates and officeholders, that is corruptive, that argument is not well-taken either. There would certainly be something to consider if the evidence supported a conclusion that the Alabama Democratic Party was controlling the ADC. *Republican Party of New Mexico* v. *King*, 741 F.3d at 1103 ("If the political committees are indirectly controlled by political parties, that would raise a separate issue-coordination"). However, the evidence does not support that conclusion. The evidence does show that the five ADC Executive Committee members are also

3. Are the ADC's Purported Independent Expenditures are Actually Coordinated Expenditures?

Finally, the State argues that it has an anti-corruption interest as applied to the ADC because its alleged independent expenditures are actually coordinated with candidates. (Doc. 45 at 48-49). In short, the argument is that because the ADC solicits contributions from candidates to fund the ADC's get-out-the-vote efforts, shares its get-out-the-vote procedures with candidates, and is willing to listen to candidates' suggestions with respect to get-out-the-vote procedures, then the get-out-the-vote expenditures are necessarily coordinated with the candidates. (*Id.*) As such, because limits on coordinated expenditures are constitutionally sound, so to are the limits on the ADC's ability to receive contributions from other PACs.

When a PAC coordinates an expenditure with a candidate, it is the functional equivalent of making a contribution to that candidate. *See Colorado Republican Fed. Campaign Comm.*, 533 U.S. at 447. This is

---

members of the 292 member Alabama Democratic Executive Committee, that the Chair of the Alabama Democratic Party once gave remarks at an ADC meetings, and that over a five year period, the Alabama Democratic Party contributed over eighty-seven thousand dollars to the ADC. However, there is no evidence that the Alabama Democratic Party was directing how those funds were used or how ADC implemented its programs, including the get-out-the-vote program. Absent more, the undersigned cannot say that the Alabama Democratic Party directly or indirectly controlled the actions of the ADC.

supported by the FCPA's definition of contribution, which reads:

(2) CONTRIBUTION

a. Any of the following shall be considered a contribution:

1. A gift, subscription, loan, advance, deposit of money or anything of value, a payment, a forgiveness of a loan, or payment of a third party, made for the purpose of influencing the result of an election.
2. A contract or agreement to make a gift, subscription, loan, advance, or deposit of money or anything of value for the purpose of influencing the result of an election.
3. Any transfer of anything of value received by a political committee from another political committee, political party, or other source.
4. The payment of compensation by any person for the personal services or expenses of any other person if the services are rendered or expenses incurred on behalf of a candidate, political committee, or political party without payment of full and adequate compensation by the candidate, political committee, or political party * * * .

ALA. CODE § 17-5-2(a)(2). As the court understands this definition, if the ADC spends money getting out the vote on behalf of a candidate, then the value of the get-out-the-vote effort could be considered a contribution *if the candidate does not provide payment of full and adequate compensation*. ALA. CODE § 17-5-2 (a)(2)a.4. Important to this is the assumption that the

candidate prearranged this expense on his or her behalf. In the absence of prearrangement and coordination the expenditure would not be a contribution, but would be an independent expenditure. *See Citizen's United*, 558 U.S. at 360.

The State argues that the fact ADC solicits and receives contributions from candidates for getting out the vote demonstrates coordination, such that the value of the get-out-the-vote efforts should be considered a contribution to a candidate. However, this point overlooks the fact that under the FCPA's definition of "contribution," an expenditure is not a contribution if the candidate provides full and adequate compensation for the services rendered. Here, assuming for purposes of this discussion that there is sufficient evidence that a candidate was prearranging with the ADC such that the ADC's get-out-the-vote efforts could be considered to be on behalf of that particular candidate, there is not enough evidence in the record that the undersigned can say that the candidates' contributions did not fully and adequately compensate ADC for those efforts. In other words, there is not enough evidence to suggest that ADC was making a contribution to these candidates because the undersigned cannot determine whether the ADC was fully compensated for its get-out-the-vote efforts. Because the undersigned cannot find that the ADC was using its independent-expenditure-only account to make candidate contributions by providing a prearranged service to the candidate without being compensated, the State has not proven it has an anti-corruption interest because the ADC's so-called independent expenditures are actually coordinated candidate contributions.

B. Is the PAC-to-PAC Transfer Ban Closely Drawn

Having established that the State's interest in preventing *quid pro quo* corruption and its appearance permits it to insist, at the very least, that there is some organizational separation or other safeguard in place with regard to the ADC to guard against the risk that contributions, even if formally earmarked for independent expenditures, could be funneled to a candidate, the question turns to whether the PAC-to-PAC transfer ban is a closely drawn means of furthering that interest.

Under the closely drawn standard, "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444. Clearing this hurdle "require[s] a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served[;] * * * that employs not necessarily the least restrictive means but * * * a means narrowly tailored to achieve the desired objective." *Id.* at 1456-57 (internal citation and quotation marks omitted).

In this case, the court finds that the ban on contributions, expenditures, and transfers of funds to the ADC from other PACs is closely drawn to further the State's anti-corruption interest. In light of lack of evidence of organizational separation or other safeguards

to prevent contributions that are nominally for independent expenditures ending up in the Candidate Account, the court cannot say that a more narrowly tailored solution, such a limit on the amount another PAC could contribute to ADC, would adequately protect the State's interest. Given the lack of safeguards, even a small donation could end up in the wrong account. Further, the impact of the PAC-to-PAC transfer ban on the ADC's associational rights is minimal. The ADC is still able to receive unlimited contributions from individuals; it can still make unlimited contributions to candidates; and it can make unlimited independent expenditures. Because ALA. CODE § 17-5-15(b) is closely drawn to serve a sufficiently important state interest, the ADC's as applied constitutional challenge must fail. *See Catholic Leadership Coal. of Texas*, 764 F.3d at 445 ("Likewise, Texas's complete ban on Plaintiffs' proposed contribution is closely drawn to its anticircumvention interest insofar as Plaintiffs have failed to provide any clear safeguard that sufficiently assures that no part of the corporate contribution will end up being transferred to a candidate.").

IV. CONCLUSION

As noted above, Plaintiffs' "Second Motion for Preliminary Injunction" (doc. 43) and Defendants' "Motion for Summary Judgment and Evidentiary Submission" (doc. 44) are due to be denied. The court further finds on the merits that ALA. CODE § 17-5-15(b) is constitutional as applied to the ADC. As such, a final judgment in favor of the State will be entered.

DONE, this 31st day of July, 2015.

JOHN E. OTT
Chief United States Magistrate Judge 35

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-16040

D.C. Docket No. 5:11-cv-02449-JEO

THE ALABAMA DEMOCRATIC CONFERENCE,
an Alabama political action committee,
DR. EDDIE GREENE,
JAMES GRIFFIN,
BOB HARRISON,
EMMITT E. JIMMAR, et al.

Plaintiffs - Appellees,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
ROBERT L. BROUSSARD,
in his official capacity as District Attorney for the 23rd Judicial Circuit,
BRYCE U. GRAHAM, JR., in his official capacity as District Attorney for the 31st Judicial Circuit,

Defendants - Appellants.

Appeal from the United States District Court for the Northern District of Alabama

---

(September 19, 2013)

Before BARKETT and JORDAN, Circuit Judges, and SCHLESINGER, District Judge.*

PER CURIAM:

The Alabama Democratic Conference, a political action committee ("PAC") under Alabama law, and five of its members (collectively "ADC") sued the Alabama Attorney General and two District Attorneys (collectively "the State") to enjoin the enforcement of ALA. CODE § 17-5-15(b), an amendment to Alabama's Fair Campaign Practices Act that prohibits all transfers of funds from one PAC to another.[1] ADC argued that, because under *Citizens United* v. *FEC*, 558 U.S. 310 (2010), the State cannot regulate the "independent expenditures" of PACs, expenditures which are defined as those made without any prearrangement or coordination with a candidate, *see Colo. Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 610 (1996), it also cannot regulate contributions to PACs that are used only for independent expenditures. Thus, ADC asserted, the transfer ban is unconstitutional as applied to funds that it receives from other

* Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

[1] The challenged provision reads as follows: "It shall be unlawful for any political action committee, 527 organization, or private foundation, including a principal campaign committee, to make a contribution, expenditure, or any other transfer of funds to any other political action committee, 527 organization, or private foundation." ALA. CODE § 17-5-15(b). This provision has been amended several times since ADC filed its complaint, but the amendments do not affect our analysis.

PACs and deposits into a separate bank account that is used only for independent expenditures.[2]

The district court agreed, finding § 17-5-15(b) unconstitutional as applied because it infringed on ADC's First Amendment rights to freedom of speech and freedom of association, and entered an injunction preventing the State from enforcing the law against funds that ADC uses for independent expenditures. The State appeals, arguing that § 17-5-15(b) does not violate the First Amendment or, in the alternative, that disputed issues of material fact preclude summary judgment.

I

We review the district court's grant of summary judgment *de novo*. *See, e.g.*, *Hendrix ex rel. G.P.* v. *Evenflo Co., Inc.*, 609 F.3d 1183, 1191 (11th Cir. 2010). Summary judgment is appropriate when "there is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986).

II

It is well-established that political contributions are considered to be political speech, and protected by the First Amendment. *See Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 440. Laws restricting campaign contributions are permissible, however, if

[2] ADC does not argue that § 17-5-15(b) is unconstitutional on its face.

the State can establish that they are "closely drawn" to serve a "sufficiently important interest." *Buckley* v. *Valeo*, 424 U.S. 1, 23-25 (1976). *See also McConnell* v. *FEC*, 540 U.S. 93, 134-36 (2003), overruled in part by *Citizens United*, 558 U.S. at 365-66. The parties agree that Alabama's ban on PAC-to-PAC transfers is subject to this standard of review. *See* Appellants' Br. at 28-30; Appellees' Br. at 16-17.

A

The State argues that it has "sufficiently important" interests in ensuring transparency and in preventing corruption and the appearance of corruption, and that permitting PAC-to-PAC transfers would facilitate the bribery of public officials, hide the source of funds being used for political purposes, and conceal the identity of political contributors. According to the State, its interests in ensuring transparency and preventing corruption or the appearance of corruption justify the transfer ban.

The State notes that the Supreme Court has recognized that states have a substantial interest in ensuring transparency in the political process. *See, e.g.*, *Citizens United*, 558 U.S. at 366-70 (upholding disclosure requirements based on the government's interest in "provid[ing] the electorate with information" and "insur[ing] that the voters are fully informed about the person or group who is speaking" (internal quotation omitted)). But the Supreme Court has relied on the transparency interest only to uphold disclosure requirements, which are "a less restrictive alternative to more comprehensive regulations of speech." *Id.* at

369. It has never held that a government interest in transparency is sufficient to justify limits on contributions or expenditures. *See id.* (upholding disclosure requirement, but invalidating restrictions on independent expenditures); *McConnell*, 540 U.S. at 196 (upholding disclosure requirements based on government's interest in "providing the electorate with information"); *Buckley*, 424 U.S. at 76 (upholding disclosure requirements for independent expenditures while invalidating limits on expenditures).

The Supreme Court has specifically held that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC* v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). *See also Davis* v. *FEC*, 554 U.S. 724, 737 (2008) ("[T]he Court has recognized that [contribution] limits implicate First Amendment interests and that they cannot stand unless they are 'closely drawn' to serve a 'sufficiently important interest,' such as preventing corruption and the appearance of corruption."); *SpeechNow.org* v. *FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010) ("The Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption."). We turn, therefore, to whether the PAC-to-PAC transfer ban sufficiently implicates the State's anti-corruption interest so as to outweigh the imposition on the First Amendment rights of PACs.

According to ADC, because the Supreme Court held in *Citizens United* that "independent expendi-

tures * * * do not give rise to corruption or the appearance of corruption," 558 U.S. at 357, the transfer of funds used for independent expenditures also does not implicate the State's interest in preventing corruption or the appearance of corruption. Not surprisingly, the State disagrees.

The State responds that political operatives have historically used PAC-to-PAC transfers to make campaign contributions while avoiding Alabama's disclosure requirements, thus permitting corruption and the appearance thereof to flourish. The State argues that, if the PAC-to-PAC transfer ban contained an exception for funds used for independent expenditures, such operatives would continue to funnel money to candidates by setting up multiple PACs and making untraceable PAC-to-PAC contributions to a PAC's independent expenditure bank account in return for the recipient PAC's promise to make contributions to a candidate from its separate campaign contributions bank account. *Cf. Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 457 (recognizing that "candidates, donors, and parties test the limits of the current law"). Thus, even though ADC intends to establish two separate bank accounts—one for independent expenditures and one for campaign contributions—and says it will deposit all contributions from other PACs into the independent expenditure account, the State contends that corruption—and the appearance thereof—remain a concern because it is impossible for the State to en-

sure that funds contributed by other PACs are not in actuality used for campaign contributions.[3]

---

[3] Several courts in other circuits have addressed whether the establishment of separate bank accounts for independent expenditures and campaign contributions by a hybrid organization, such as ADC, sufficiently eliminates the possibility of corruption or the appearance of corruption to render contribution limits unconstitutional. These courts have reached conflicting conclusions. *Compare Stop This Insanity, Inc.* v. *FEC*, 902 F. Supp. 2d 23, 43 (D.D.C. 2012) ("When a single entity is allowed to make both limited direct contributions and unlimited independent expenditures, keeping the bank accounts for those two purposes separate is simply insufficient to overcome the appearance that the entity is in cahoots with the candidates and parties that it coordinates with and supports."), and *Vt. Right to Life Comm., Inc.* v. *Sorrell*, 875 F. Supp. 2d 376, 406-11 (D. Vt. 2012) (holding that Vermont's anti-corruption interest allowed it to regulate contributions to an independent-expenditure PAC because that PAC was closely intertwined with a group that made contributions to candidates), *with Emily's List* v. *FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009) ("A nonprofit that makes expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates. Rather, it simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a [separate] hard-money account."), *Thalheimer* v. *San Diego*, No. 09-CV-2862-IEG BGS, 2012 WL 177414, at *13 (S.D. Cal. Jan. 20, 2012) (enjoining enforcement of San Diego's contribution limit on PACs to the extent that they engage in independent expenditures, "regardless of whether independent expenditures are the *only* expenditures that those committees make"), *and Carey* v. *FEC*, 791 F. Supp. 2d 121, 136 (D.D.C. 2011) (granting preliminary injunction preventing the FEC from enforcing contribution limits on PACs that engage in both independent expenditures and campaign contributions so long as the PACs maintain separate bank accounts for the two types of spending). As we explain in the text, a definitive answer

The State concludes that *Citizens United* does not apply here because ADC makes both independent expenditures and campaign contributions, permitting the State to regulate all funds that ADC receives regardless of how ADC says it intends to use the transferred funds. *Cf. McConnell*, 540 U.S. at 143-54 (recognizing that campaign contributions implicate the government's anti-corruption interest); *Buckley*, 424 U.S. at 23-29 (same).[4]

---

to that question must wait because there are material issues of fact that must first be resolved.

[4] In addition to the threat of corruption and the appearance of corruption posed by multiple, untraceable PAC-to-PAC transfers, the State argues that it has two independent, corruption-based justifications for imposing the transfer ban on all funds that ADC receives from other PACs.

First, the State argues that ADC is so intertwined with the Alabama Democratic Party and Democratic candidates that it is effectively a wing of that political organization. The Supreme Court in *McConnell* held that the government's anti-corruption interest was sufficient to justify restrictions on contributions to political parties for any purpose, including for independent expenditures, because political parties and their affiliates "enjoy a special relationship and unity of interest" with candidates and officeholders such that even "*soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption." 540 U.S. at 144-45. The State argues that the same rationale applies to contributions to ADC, including those for independent expenditures only.

Second, the State asserts that, given ADC's close relationship with the Alabama Democratic Party and Democratic candidates, there is a strong likelihood that ADC coordinates many of its allegedly "independent" expenditures with candidates, making the expenditures the functional equivalent of direct campaign contributions, which implicate the State's anti-corruption interest. *See Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 446 (find-

We agree with the State that, at least at this stage of the proceedings, *Citizens United* does not render § 17-5-15(b) unconstitutional as applied. In prohibiting limits on independent expenditures, *Citizens United* heavily emphasized the independent, uncoordinated nature of those expenditures, which alleviates concerns about corruption. *See Citizens United*, 558 U.S. at 357 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent * * * alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.") (internal quotation marks omitted); *id.* at 360 ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."). *See also SpeechNow.org*, 599 F.3d at 693 ("The independence of independent expenditures was a central consideration in the Court's decision [in *Citizens United*].."). When an organization engages in independent expenditures as well as campaign contributions, as ADC does, its independence may be called into question and concerns of corruption may reappear. At the very least, the public may believe that corruption con-

---

ing coordinated expenditures to be "disguised contributions") (quoting *Buckley*, 424 U.S. at 47).

ADC contends that the State has waived both of these arguments by failing to present them in the district court, while the State claims that it raised both arguments at the hearing on the motion for summary judgment. Because we find, based on other grounds, that the district court erred in holding that the State's anti-corruption interest was insufficient as a matter of law to justify the transfer ban, we need not resolve this factual dispute.

tinues to exist, despite the use of separate bank accounts, because both accounts are controlled and can be coordinated by the same entity. Consequently, we cannot hold as a matter of law that the State's interest in preventing corruption or the appearance of corruption is insufficient to justify contribution limits on funds used for independent expenditures when the receiving organization also makes campaign contributions. *Cf. Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 465 ("We hold that a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of constitutional limits.").

In this as-applied challenge, whether the establishment of separate bank accounts by ADC, a hybrid independent expenditure and campaign contribution organization, eliminates all corruption concerns is a question of fact. Indeed, the Supreme Court in *Citizens United* invalidated limits on independent expenditures only after noting a lack of evidence in the record connecting independent expenditures to corruption. *See Citizens United*, 558 U.S. at 360 (noting a lack of evidence of quid pro quo corruption in independent expenditures and "only scant evidence that independent expenditures even ingratiate"). *See also Long Beach Area Chamber of Commerce* v. *City of Long Beach*, 603 F.3d 684, 698 (9th Cir. 2010) (finding the anti-corruption interest to be insufficient because of "[t]he City's inability to identify a single instance of corruption, quid pro quo or otherwise, involving contributions to [organizations] for use as independent expenditures").

Here, the State presented ample evidence of possible corruption through PAC-to-PAC transfers to withstand summary judgment. First, ADC and the Alabama Democratic Party make contributions to each other in order to support and advance their common political ideals. Second, many members of the Alabama Democratic Executive Committee are ADC members. Third, in 2010 several candidates or elected officials (e.g., Demetrius Newton, Phil Poole, and Richard Lindsey) made contributions to ADC on or around the dates when commensurate amounts were paid by ADC for "get out the vote" drives in counties contested by these respective candidates. Fourth, ADC itself lists "get out the vote" drives as legitimate expenses drawn from both the restricted candidate fund and the unrestricted "get out the vote" fund. Because we must view the evidence in the light most favorable to the non-moving party on a motion for summary judgment, *see Mann* v. *Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009), we hold that ADC has not met its burden to establish that there is no disputed issue of material fact such that it is entitled to summary judgment.

B

ADC alternatively contends that, even if the State's anti-corruption interest were sufficiently important to justify a contribution limit, the absolute ban on PAC-to-PAC transfers is not a "closely drawn" means of addressing the State's interest and the entry of partial summary judgment should be affirmed on that ground. The district court did not reach this question, however, and so the factual record concerning the

burdens imposed on PACs by the transfer ban as well as the feasibility and effectiveness of ADC's proposed alternatives is not sufficiently developed for review.

III

In sum, we conclude that the district court—given the material issues of fact that exist—erred in holding that the State's interest in preventing corruption or the appearance of corruption was insufficient as a matter of law to justify the ban on PAC-to-PAC transfers. Whether the anti-corruption interest is sufficient in light of the evidence in the record in this case, and whether the transfer ban is a closely drawn means of furthering that interest, given ADC's dual account proposal, are mixed questions of law and fact that should be explored in the first instance by the district court.

We vacate the district court's entry of partial summary judgment in favor of ADC and remand for further proceedings consistent with this opinion.

VACATED and REMANDED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

THE ALABAMA DEMOCRATIC CONFERENCE, et al.,	)	
Plaintiffs,	)	
v.	)	Case No.: 5:11-cv-02449-JEO
LUTHER STRANGE, in his official capacity as Attorney General of Alabama, et al.,	)	
Defendants.	)	

(December 14, 2011)

MEMORANDUM OPINION

This case is before the court on Defendants Luther Strange, in his official capacity as the Attorney General of Alabama, Robert L. Broussard, in his official capacity as District Attorney for the 23rd Judicial Circuit, and Bryce U. Graham's, in his official capacity as District Attorney for the 31st Judicial Circuit, Motion

to Dismiss (doc. 7) and Plaintiffs the Alabama Democratic Conference ("ADC"), Eddie Greene, James Griffin, Bob Harrison, Emmitt E. Jimmar, and Jimmie Payne's Motion for Partial Summary Judgment (doc. 9). Both motions have been fully briefed. *See* Doc. 14 (Defendants' Reply in Support of Defendants' Motion to Dismiss (Doc. 7) and Opposition to Plaintiffs' Motion for Partial Summary Judgment); Doc. 16 (Plaintiffs' Reply Brief in Support of Motion for Partial Summary Judgment); Doc. 17 (Plaintiffs' Notice of Additional Authority and Motion for Expedited Relief); Doc. 19 (ADC's Memorandum on Its Proposed Remedy); Doc. 20 (Supplemental Brief in Support of Defendants' Motion to Dismiss); and Doc. 21 (Plaintiffs' Post-Argument Memorandum).

I. INTRODUCTION

This case concerns the legality of an amendment to Alabama's Fair Campaign Practices Act ("Act") that was approved by the Alabama Legislature in December 2010. Part of the amendment prohibits one political action committee ("PAC") from making a contribution, expenditure, or any other transfer of funds to any other PAC.[1] Plaintiffs attack the legality of the PAC-to-PAC transfer ban on two grounds: (1) that it vio-

[1] As noted below, the amendment actually makes it unlawful for any PAC, 527 organization, or private foundation to make a contribution, expenditure, or any other transfer of funds to any other PAC, 527 organization, or private foundation. ALA. CODE § 17-5-15. However, for simplicity's sake, the court will refer to this prohibition as a ban on PAC-to-PAC transfers with the understanding that the prohibition applies more broadly.

lates Plaintiffs' First Amendment Rights and (2) that it violates Section 2 of the Voting Rights Act. (Doc. 1). Defendants moved to dismiss the Complaint while Plaintiffs moved for summary judgment on the First Amendment claim and contend that the Voting Rights Act claim is not due to be dismissed.

Before delving into the merits of the pending motions, it is important to note that Plaintiffs are only challenging the amendment as it applies to the ADC's proposed fund to be used for independent expenditures. (Doc. 10 at 9) ("Of course, Plaintiffs do not challenge the statute insofar as it prohibits PAC-to-PAC transfers of funds to candidates."); (*Id.* at 11) ("[I]n this action the ADC does not challenge the state's regulation of PAC-to-PAC transfers as they involve contributions eventually going to candidates."); and (*Id.* at 13) ("This suit seeks only relief against the application of the Act to funds received by the ADC for communication, GOTV [get out the vote] and independent expenditures."). Rather, Plaintiffs' action is premised on the belief that the government lacks an interest in regulating the transfer of money from one PAC to a different PAC when the PAC that receives the money does not then funnel the money to a candidate.

The undersigned will first address Plaintiffs' motion summary judgment on the First Amendment claims before discussing Defendants' motion to dismiss both the First Amendment and Voting Rights claims. For the reasons that follow, Plaintiffs' Motion for Partial Summary Judgment (doc. 9) is due to be granted and Defendants' Motion to Dismiss (doc. 7) is due to be granted in part and denied in part.

II PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (DOC. 9)

A. INTRODUCTION AND STANDARD OF REVEIW

As noted above, Plaintiffs moved for partial summary judgment on their First Amendment Claim. In support, they offer the affidavit and supporting documentation of Dr. Joe L. Reed, Chairman of the ADC. (Doc. 9-1, 9-2, and 9-3). Defendants do not dispute the facts offered by Plaintiffs for purposes of summary judgment. (*See* Doc. 14 at 3 n.1). Accordingly, the court accepts those facts as true only for purposes of the instant motion.

There being no genuine dispute as to any material fact, the question thus becomes whether Plaintiffs are entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(a).

B. FACTS

1. The Alabama Fair Campaign Practices Act

Alabama's political campaigns are governed by Alabama's Fair Campaign Practices Act. *See* ALA. CODE §§ 17-5-1, *et seq*. In December 2010, the Alabama Legislature amended the Act to prohibit PAC-to-PAC[2]

[2] Under the Act, a PAC is defined broadly to include "[a]ny * * * group of one or more persons which receives or anticipates

transfers. *See* ALA. CODE § 17-5-15. The Act now provides:

> (b) It shall be unlawful for any political action committee, 527 organization, or private foundation, including a principal campaign committee, to make a contribution, expenditure, or any other transfer of funds to any other political action committee, 527 organization, or private foundation. It shall be unlawful for any principal campaign committee to make a contribution, expenditure, or any other transfer of funds to any other principal campaign committee, except where the contribution, expenditure, or any other transfer of funds is made from a principal campaign committee to another principal campaign committee on behalf of the same person. Notwithstanding the foregoing, a political action committee that is not a principal campaign committee may make contributions, expenditures, or other transfers of funds to a principal campaign committee and a separate segregated fund established by a corporation under federal law if the fund does not receive any contributions from within this state other than contributions from its employees and directors is not restricted by this subsection in the amount it may transfer to a political action committee established under the provisions of Section 10A-21-1.01 by the same or an affiliated corporation.

---

receiving contributions or makes or anticipates making expenditures to or on behalf of any elected official, proposition, candidate, principal campaign committee or other political action committee." ALA. CODE § 17-4-2(a)(11).

Id.

In other words, the 2010 amendment, which became effective December 20, 2010, prohibits the transfer of money between two PACs, except in certain circumstances. *Id.* Those exceptions are as follows: First, a PAC that is not a candidate's principal campaign committee may give money to candidates' principal campaign committee. *Id.* Second, if a corporation maintains a "segregated fund established * * * under federal law" (for participation in federal elections), that fund may freely transfer funds to the corporation's affiliated PAC established under ALA. CODE § 10A-21-1.01 (for participation in state elections). *Id.* Third, there is a limited exception (for one class of candidates' principal campaign committees) for party qualifying fees, party dues, and tickets to political party dinners or functions. ALA. CODE § 17-5- 7(a).

Defendants contend that the ban on PAC-to-PAC transfers was enacted because the ability to transfer money freely between PACs led to the circumvention of Alabama's disclosure rules and provided effective anonymity for high-dollar political donors. (Doc. 7 at 4).Defendants argue that circumventing disclosure rules led to at least the appearance of corruption because donors were free to extract promises of official action as a condition for their contributions – and candidates were free to oblige them. (*Id.* at 5). Because of this, the legislature enacted the PAC transfer ban to prevent corruption and the appearance thereof and to further the State's interest in promoting transparency in campaigns. (*Id.* at 5-7).

2. The Alabama Democratic Conference

The Alabama Democratic Conference ("ADC") is an association of citizens that was established during the 1960 Kennedy-Johnson campaign to encourage political participation among black citizens and to support the Democratic candidates. (Doc. 9-1 at 1-2). The ADC has continued to exist as a grass roots voter-advocacy group since that time and, in accordance with Alabama law, has a PAC. (Doc. 10 at 4). The ADC's primary functions over the past decade have been to educate and protect voters and to run get-out-the-vote ("GOTV") drives. (Doc. 9-1 at 2-3). In the past 50 years, the ADC has used its resources to communicate with black citizens, though its GOTV activities and otherwise, on a wide range of matters related to their access to the political process, including, but not limited to the following:

(1) communications on the right to register to vote;
(2) the varying standards and procedures for voter registration;
(3) the varying methods of casting a ballot;
(4) the implications of election practices and procedures in their communities and how to obtain more fair procedures;
(5) the opportunity to serve as poll workers;
(6) the right of voters to be free from discriminatory treatment at the polls; and
(7) the right of voters who need help in voting to receive assistance and to choose for themselves the person whom they wish to provide that assistance.

(*Id.*; Doc. 10 at 4-5).

In the past, the ADC received contributions from other PACs, including the Alabama Education Association ("AEA"), A-VOTE (a PAC associated with AEA), the Alabama Trial Lawyers Association ("ATLA"), TRIAL (a PAC associated with ATLA), and the Alabama State Democratic Executive Committee. (Doc. 9-1 at 3-4). PACs, other than the principal campaign committees of candidates, have together contributed more than half of all the ADC's funds during the period between 2005 and 2010. (Doc. 9-2 at 5). In the past, the ADC has spent the bulk of its resources maintaining its communication infrastructure and supporting the efforts of its county units, especially in conjunction with GOTV activities. (Doc. 9-3). It has also made some expenditures to candidates. (*Id.*)

However, since the passage of the amendment to the Act at issue here, the ADC is no longer allowed to accept contributions from other PACs. As noted multiple times in their briefing, Plaintiffs are only challenging the PAC transfer ban as it applies to the ADC's use of funds for operations excluding donations to candidates. To ensure that funds received from PACs do not eventually go to candidates, the ADC has established two funds – funds that may be constitutionally restricted by the Act and those that may not. (Doc. 9-1 at 4-6). The two funds are called the Candidate Fund and the GOTV Fund. (*Id.* at 5-6). Currently, the money for both funds is maintained in the same bank account, but separate books are kept on each fund. (*Id.* at 5 n.1). The Candidate Fund will receive contributions from individuals and businesses, and the ADC will disburse those funds to candidates' principal campaign committees. (*Id.* at 5). All money going to

candidates – regardless of whether it is as a campaign contribution or for the candidate's GOTV efforts – will come from the Candidate Fund. (*Id.*) If the court grants the injunction sought by the ADC, it will also establish a GOTV Fund. (*Id.*) The GOTV Fund will seek and receive contributions from any entity – businesses, individuals, 527 organizations, PACs, and political parties. (*Id.*) The ADC asserts that it will use the GOTV Fund for maintaining the ADC infrastructure and for GOTV-related communication efforts and other independent expenditures (including transfers to other PACs for use in their GOTV campaign or for other independent expenditures). (*Id.*) Key to this GOTV Fund is that none of the money it contains will be transferred to candidates or their committees. (*Id.* at 6).

With these facts in mind, the court turns to the merits of Plaintiffs' First Amendment claim.

C. DISCUSSION

Plaintiffs argue that the absolute ban on PAC-to-PAC transfers violates the First Amendment because it infringes upon the political speech and associational rights of the ADC. First, it is clear that "contributing to political candidates [falls] within the First Amendment's protection for speech and political association." *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) (*Colorado II*). The Supreme Court has stated that these rights (the right of association and the right of expression) are not analyzed in a vacuum. *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U.S. 290, 300

(1981) ("A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression."). The Supreme Court has further found that "the right of association is a basic constitutional freedom * * * that is closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976) (internal citations and quotation marks omitted). With this in mind, this court will follow the lead of the Supreme Court and address these two rights together.

The first step in deciding whether a particular statute is constitutional is to determine the appropriate level of scrutiny to apply. That decision is complicated by the fact that this court is unaware of any Supreme Court decision analyzing the constitutionality of a similar regulation. Thus, the court must first analyze the levels of scrutiny applied in the campaign finance realm in the past and then determine the appropriate level of scrutiny to apply to the PAC transfer ban at issue in this case. Once an appropriate level of scrutiny is determined, the court must apply that standard to the facts of this case to determine the constitutionality of the amendment.

1. What is the appropriate level of scrutiny?

Determining the appropriate level of scrutiny is a two-step process. First, this court will discuss the different levels of scrutiny that the Supreme Court has

applied in challenges to campaign finance laws. Second, it will discuss which level of scrutiny should apply when analyzing the PAC-to-PAC transfer ban in question.

a. Levels of Scrutiny

The Supreme Court has applied differing levels of scrutiny when analyzing whether regulations that affect political speech and freedom of association violate the First Amendment. Recently, in Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, the Court summarized the state of the law as follows:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government. *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) (per curiam). As a result, the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971)). "Laws that burden political speech are" accordingly "subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United* v. *Federal Election Comm'n*, 558 U.S. ____, ____, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted); *see Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986).

Applying these principles, we have invalidated government-imposed restrictions on campaign expenditures, *Buckley*, *supra*, at 52-54, restraints on independent expenditures applied to express advocacy groups, *Massachusetts Citizens for Life*, *supra*, at 256-265, limits on uncoordinated political party expenditures, *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U.S. 604, 608 (1996) (opinion of BREYER, J.) (*Colorado I*), and regulations barring unions, nonprofit and other associations, and corporations from making independent expenditures for electioneering communication, *Citizens United*, *supra*, at ----, 130 S. Ct., at 917.

At the same time, we have subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny and upheld those restrictions. For example, after finding that the restriction at issue was "closely drawn" to serve a "sufficiently important interest," *see*, *e.g.*, *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 136 (2003) (internal quotation marks omitted); *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 387-388 (2000) (internal quotation marks omitted), we have upheld government-imposed limits on contributions to candidates, *Buckley*, *supra*, at 23-35, caps on coordinated party expenditures, *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 437 (2001) (*Colorado II*), and requirements that political funding sources disclose their identities, *Citizens United*, *supra*, at ____ ____, 130 S. Ct., at 916-917.

___ U.S. ___, 131 S. Ct. 2806, 2816-17 (2011).

As noted above, the Supreme Court has applied strict scrutiny to those laws that "burden speech." Examples of laws that burden speech are those that limit the expenditures of candidates and political groups. *Id.* On the other hand, the Court has applied a lower level of scrutiny when the "strictures on campaign related speech" are less onerous – for example, regulations limiting contributions or requiring disclosure of the names of people who have contributed to a campaign. *Id.* While not discussed in *Arizona Free Enterprise Club's Freedom Club PAC*, the Supreme Court has applied this lower level scrutiny in two different ways depending on the type of regulation it is addressing.[3] *See Buckley*, 424 U.S. at 20-30 and 64-68.

When determining the constitutionality of contribution limits, the Court has found that even a "significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms," hereinafter referred to as "closely drawn" scrutiny. *Id.* at 25 (internal citations and quotation marks omitted). Since this standard was announced in *Buckley*, the Court has consistently applied it when determining whether laws limiting contributions are valid. *See Nixon* v. *Shrink Missouri Gov't*, 528 U.S. 377, 387-88 (2000); *McConnell* v. *FEC*,

[3] Application of these lower levels of scrutiny did not come into play in *Arizona Free Enterprise Club's Freedom Club PAC*, 131 S. Ct. 2806. In that case, the Court only discussed the application of strict scrutiny as it applied to the restriction in question. *Id.*

540 U.S. 93, 231-32 (2003) (overruled on other grounds).

However, the Court has applied a slightly different lower level of scrutiny when addressing challenges to disclosures limits – exacting scrutiny, "which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 130 S. Ct. at 914 (2010) (internal quotations omitted) (citing *Buckley*, 424 U.S. at 64; *McConnell*, 540 U.S. at 201). Like with the standard the Court has applied to contribution limits, the Court has consistently applied exacting scrutiny when analyzing disclosure requirements. *See Buckley*, 424 U.S. 64-68; *Citizens United*, 130 S. Ct. at 914.

Thus, it is clear that the Supreme Court applies three levels of scrutiny in cases addressing political speech and associational rights – strict scrutiny and two lower level scrutinies, closely drawn scrutiny and exacting scrutiny.[4]

---

[4] Defendants "reject[] the notion that there are distinct 'mid-level' standards of scrutiny for campaign finance regulations." (Doc. 20 at 1). In doing so they rely solely on the language from *Arizona Free Enterprise Club's Freedom Club PAC* cited above. They argue that "although the Court has articulated the lower-level scrutiny in various ways, it should now be clear that the Court was in substance applying only one standard." (Id. at 2). While Defendants are right that the Court in *Arizona Free Enterprise Club's Freedom Club PAC* did only mention strict scrutiny and a lower level scrutiny, even a cursory review of the cases cited to support that proposition shows that there are in fact two lower levels of scrutiny used by the Court in those cases. *Compare McConnell*, 540 U.S. at 137 ("[W]hen reviewing Congress' decision to enact contribution limits * * * [t]he less rigorous standard of review we have applied to contribution limits

b. Which Level of Scrutiny Applies on the PAC-to-PAC Transfer Ban?

Having identified the standards of review the Supreme Court has applied in the past, the court must next determine which level of scrutiny is applicable

---

(*Buckley's* 'closely drawn' scrutiny) shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."); *Nixon*, 528 U.S. 387 ("Thus, under *Buckley's* standard of scrutiny, a contribution limit involving 'significant interference' with associational rights * * * could survive if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'") (internal citations omitted); *Buckley*, 424 U.S. at 25 ("Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.") (internal quotation marks and citations omitted); *Colorado II*, 533 U.S. at 456 ("We accordingly apply to a party's coordinated spending limitation the same scrutiny we have applied to the other political actors, that is, scrutiny appropriate for a contribution limit, enquiring whether the restriction is 'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combating political corruption."); *with Citizens United*, 130 S. Ct. at 914 ("The Court has subjected [disclaimer and disclosure] requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.") (internal citations omitted). And, a reading of those cases shows that the standards employed by the Court differed both in substance and language. Further, even if the Supreme Court were pronouncing a change in the law, which this court seriously doubts, such pronouncement would be dictum because a lower level of scrutiny was not at issue in *Arizona Free Enterprise Club's Freedom Club PAC*, 131 S. Ct. 2806 (unquestionably discussing and applying only strict scrutiny to the facts of the case).

when analyzing the ban on PAC-to-PAC transfers. Defendants argue that the ban on PAC transfers is constitutionally sound under any level of scrutiny, but state that because the ban on PAC transfers is most similar to a disclosure requirement, the undersigned should apply a lower level scrutiny. (Doc. 7 at 12-13). Conversely, Plaintiffs argue that the ban is unconstitutional under all potentially applicable levels of scrutiny. Nevertheless, they argue that the strict scrutiny, or alternatively, closely drawn scrutiny should apply. (Doc. 16 at 6-9).

The first question the court must answer is whether the PAC-to-PAC transfer ban burdens speech, thus warranting application of strict scrutiny. If the answer is no, the court must decide which of the lower standards apply to the restriction in question. In order to answer the first question, the court must determine the extent to which the PAC-to-PAC transfer ban interferes with Plaintiffs' First Amendment rights.

The Supreme Court's analysis in *Buckley* is particularly illuminating here. In *Buckley*, the Court compared the impact of contribution limits and expenditure limits on political speech and the right of association. 424 U.S. at 19-23. The Court found that expenditure limitations "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. On the other hand, the Court found that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20. In reaching that conclusion, the Court reasoned that the contribu-

tion itself serves as the general expression of support and that the size of that contribution does not increase the quantity of communication by the contributor. *Id.* at 21. The Court further held:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id.

In this case, the law in question, like the contribution limit discussed in *Buckley*, only marginally affects political expression because it does not limit the amount or way in which the ADC can spend its money during a campaign. The ADC is only marginally affected because, while it cannot receive contributions from other PACs, it is still able to receive money from individuals and corporations.[5] Because the PAC trans-

[5] When addressing the impact of a contribution limit, the Supreme Court has also stated that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. In other words, the Supreme Court asked "whether the contribution limitation was so radical in effect as to render political

fer ban does not limit the amount or way in which the ADC can spend its money during a campaign, the ban cannot "burden speech" as is required for application of strict scrutiny.

The analysis of a regulation's impact on speech is not mutually exclusive from the analysis of a regulation's impact on association. Thus, the court must also look at the PAC transfer ban's effect on the ADC's associational rights before excluding strict scrutiny as the appropriate standard. "[M]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22. However, when addressing the effect of a contribution limit, the court found that while the limitation in question limited "one important means of associating with a candidate or committee, [it left] the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* Because of this, the Court found

---

association ineffective, drive the sound of the candidate's voice below the level of notice, and render contributions pointless." *Nixon*, 528 U.S. at 397. To the extent Plaintiffs argue that not being able to receive contributions from PACs and other political organizations would prevent them from amassing the resources necessary for effective advocacy, that argument is unpersuasive. Plaintiffs do not offer any evidence in support of the assertion that they would be unable to amass sufficient funds from individual and corporate donations. While, Plaintiffs have submitted evidence showing that in the past a great deal of their contributions had come from other PACs, this is insufficient to show that they will not be able to get sufficient funding from individuals and corporations in the future.

that, like with political speech, limitations on expenditures affected a person's associational rights more significantly than a limitation on contributions. *Id.*

However, in this case, unlike *Buckley*, PACs are not able to contribute to another PAC at all, thus limiting their associational rights. Nonetheless, this limitation is not as severe as the limitation on independent expenditures discussed in *Buckley*. Under the amendment, PACs are still able to contribute to a political candidate without limitation and are able to receive contributions from individuals and corporations. The limitation on the ADC's associational rights is more akin to the limitation created by the contribution limit in *Buckley*. Thus, the impact on ADC's associational rights is not severe enough to warrant application of strict scrutiny. Because strict scrutiny is not the appropriate standard to apply to determine whether the PAC-to-PAC transfer ban survives the ADC's constitutional challenge, the court must now determine which lower level of scrutiny to apply.

In *Buckley*, the Supreme Court's seminal case on the First Amendment and campaign finance law, the Court addressed the constitutionality of both contribution limits and disclosure laws. In doing so, the Court announced different standards for each. *Compare Buckley*, 424 U.S. at 20-30 *with Buckley*, 424 U.S. at 64-68. In determining that closely drawn scrutiny was the most appropriate standard to apply to contribution limits, the Court drew from several cases that addressed the right of association. *Id.* at 25 (citing *Cousins* v. *Wigoda*, 419 U.S. 477, 488 (1975); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960)). On the other hand, when de-

termining that exacting scrutiny was the appropriate level of scrutiny to apply in cases concerning disclosure requirements, the *Buckley* Court looked to cases challenging the disclosure of membership lists from various organizations. *Id.* at 64-65 (citing *NAACP* v. *Alabama*, 357 U.S. 449, 461 (1958)). A comparison between the analysis of the Court with respect to contribution limits and disclosure requirements, illustrates the distinction between the effects a contribution limit has on the rights of speech and association and the effects a disclosure requirement has on those same rights. In discussing contribution limits, the Court recognized that contribution limits have a direct, albeit marginal, impact on a person's rights of speech and association. *Id.* at 20-22 ("By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute * * * entails only a marginal restriction upon the contributor's ability to engage in free communication."). However, when discussing disclosure requirements, the Court acknowledged that "[t]his type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65. Thus, contribution limits directly, but insignificantly, impact a person's First Amendment rights, while disclosure requirements do not directly infringe upon a person's rights, but might have indirect effects on those same rights. *See NAACP* v. *Alabama*, 357, U.S. at 462-63.

In urging the court to apply a lower level scrutiny, Defendants analogize the ban on PAC-to-PAC transfers to disclosure requirements. They argue:

> [G]iven its purpose and operation, the PAC transfer ban looks most like a disclosure requirement under which candidates or groups must identify their contributors. Because disclosure requirements do not prevent anyone from speaking, and impose no ceiling on campaign-related activities, they have long been upheld under a less demanding standard of review * * * . The Supreme Court's descriptions of disclosure rules apply with equal force to the PAC transfer ban and thus require application of the corresponding, lower-level scrutiny.

(Doc. 7 at 12-13) (citations and internal quotations omitted). On the other hand, Plaintiffs argue that exacting scrutiny should not apply because the Supreme Court has only applied this lowest level of scrutiny to disclosure/disclaimer requirements and the amendment to the Act being challenged here involves neither disclosure nor disclaimer limits. (Doc. 16 at 6-7).

First, it is clear that the ban in question here is not a disclosure requirement. Nothing in the language of ALA. CODE § 17-5-15 requires a PAC to disclose the identity of those people or groups making contributions nor does the amendment in question require the PAC to disclose what groups or candidates to which it contributes. In fact, other provisions of the Act govern those very disclosure requirements. *See* ALA. CODE § 17-5-8. Further, the PAC-to-PAC transfer ban is not analogous to a disclosure requirement. Prohibiting an

organization from doing something is unlike requiring an organization to report that they did that very thing.

The direct effect the PAC transfer ban has on the ADC's rights further shows that it should not be classified as a disclosure requirement. As addressed above, prohibiting the ADC from making or receiving contributions from other PACs directly limits, albeit marginally, the ADC's ability to engage in its rights of political speech and association. This is distinct from disclosure requirements, where the possible effect on First Amendment rights is indirect. *See Buckley*, 424 U.S. at 65.

This court's conclusion that the PAC transfer ban is unlike a disclose/disclaimer requirement is further supported by the similarity between the PAC transfer ban and a law setting a limit on the amount of money a person can contribute to a candidate or PAC. *See Minnesota Citizens Concerned for Life, Inc.* v. *Kelley*, 427 F.3d 1106, 1113 (8th Cir. 2005) (applying closely drawn scrutiny in a challenge to a provision prohibiting the transfer of funds between candidates' political committees). Without question, if the amendment stated that "it shall be unlawful for any political action committee * * * to make a contribution, expenditure, or any other transfer of funds *in an amount greater than $500* to any other political action committee," there would be no discussion about whether to apply the standard of review applicable to contribution limits. However, the hypothetical provision limiting contributions, expenditures, and transfers to $500, is not at all different from the actual ban – except rather than having a limit of $500, the limit is zero. In other words, by banning PAC-to-PAC transfers, the Ala-

bama legislature has essentially limited the amount one PAC can contribute to another PAC to zero.

In addition to the logical similarities between the PAC transfer ban and a contribution limit, there are also similarities in the way both restrictions affect the ADC's speech and associational rights. As previously noted, in both cases the regulation has a direct, but marginal, effect on those rights. Because Alabama's ban on PAC-to-PAC transfers is essentially imposing a contribution limit, the court must apply closely drawn scrutiny to determine whether the ban is closely drawn to match a sufficiently important interest. *Buckley*, 424 U.S. at 25.

2. Alabama's Interest in Banning PAC-to-PAC Transfers, Where, as is the Case Here, the Money does not Ultimately go to a Candidate

Having determined that the PAC transfer ban is a contribution limit at its core, the next step is to analyze the State's interests and determine whether they are closely drawn to match a sufficient government interest. The first step in this analysis is whether the State has a sufficient interest in regulating the speech in question. Defendants argue that the ban furthers its interests in promoting transparency, preventing circumvention of disclosure rules, and eliminating actual and perceived corruption. (Doc. 7 at 10).

The court will first address whether the State's interest in transparency is sufficient under closely drawn scrutiny. While it is clear transparency is a valid state interest to support a disclosure requirement,

Buckley, 424 U.S. at 66-67, this court is not aware of any cases where the Supreme Court found that transparency, on its own, was a sufficient enough interest to justify a contribution limit analyzed under closely drawn scrutiny.[6] In fact, a recent D.C. Circuit Court of Appeals opinion stated that "[t]he Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption." *Speechnow.org* v. *FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010) (citing *Davis* v. *FEC*, 554 U.S. 724, 740-41 (2008)); *See also*, *Colorado II*, 533 U.S. at 456 ("We accordingly apply to a party's coordinated spending limitation the same scrutiny we have applied to the other political actors, that is, scrutiny appropriate for a contribution limit, enquiring whether the restriction is 'closely drawn' to match what we have recognized as the '*sufficiently important' government interest* in combating political corruption.") (emphasis added); *Nixon*, 528 U.S. at 428 (Thomas, J., dissenting) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.") (internal quotation marks omitted); *Wisconsin Right to Life State Political Action Comm.* v. *Barland*, No. 11-2623 Slip Op. at 25 (7th Cir. December 12, 2011) ("It's worth pausing here to reiterate that preventing actual or apparent *quid pro quo* corruption is the *only*

---

[6] Further, neither party has brought such a case to the court's attention.

interest the Supreme Court has recognized as sufficient to justify campaign-finance restrictions. Over time, various other justifications restricting political speech have been offered – equalization of viewpoints, combating distortion, leveling electoral opportunity, encouraging the use of public financing, and reducing the appearance of favoritism and undue political access or influence – but the Court has repudiated them all.") (emphasis in original) (internal citations omitted). Accordingly, it is clear that the State's interest in transparency, while perhaps sufficient to justify a disclosure requirement, is insufficient to justify the PAC-to-PAC transfer ban.[7]

The State additionally argues that it has a valid interest in preventing the circumvention of disclosure requirements. (Doc. 7 at 13). Unquestionably, on its face, this is a valid state interest. However, the question is whether it is a sufficient interest to justify the ban under closely drawn scrutiny. As discussed above, the only valid interest justifying limits on contributions is preventing corruption or the appearance thereof. Like with the State's transparency interest, it is likely that the State's interest in preventing the circumvention of disclosure requirements would survive a challenge under exacting scrutiny. However, it is

[7] Defendants argue that "there is no reason the State's transparency interest cannot justify the PAC transfer ban under either standard." (Doc. 20 at 2). However, the only support offered for that contention is cites to sections of opinions addressing the constitutionality of disclosure requirements, not contribution limits. (*Id.*)

simply not a sufficient interest under closely drawn scrutiny.

Thus, the question becomes whether the State's interest in preventing corruption or the appearance of corruption is sufficient under the closely drawn level of scrutiny. There is no question that the State has a legitimate interest in preventing corruption or the appearance of corruption in the political process. *See Buckley*, 424 U.S. at 26-27. It is this interest in preventing corruption or the appearance of corruption that the State cites as one of the evils the PAC-to-PAC transfer prohibition seeks to remedy. Recently, the Supreme Court addressed the contours of a government's interests in preventing corruption or the appearance of corruption in *Citizens United*. There, the Supreme Court held that "[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. *Citizens United*, 130 S. Ct. at 909-10. Further, the Court found that "independent expenditures * * * do not give rise to corruption or the appearance of corruption."[8] *Id.* The D.C. Circuit summarized this nicely as follows:

> In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the ap-

[8] By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Citizens United*, 130 S. Ct. at 910.

> pearance of corruption. The Court has effectively held that there is no corrupting "quid" for which a candidate might in exchange offer a corrupt "quo."

Speechnow.org, 599 F.3d at 432-33.

In the situation before the court, Plaintiffs challenge the ban on PAC-to-PAC transfers as it applies to their proposed segregated fund scheme. To review, the ADC has established two funds on its books – the Candidate Fund and the GOTV Fund. The Candidate Fund will receive contributions from individuals and businesses and the ADC will disburse those funds to candidates' principal campaign committees. All money going to candidates – regardless of whether it is as a campaign contribution or for the candidate's GOTV efforts will come from the Candidate Fund. The GOTV Fund will seek and receive contributions from any entity – businesses, individuals, 527 organizations, PACs, and political parties. The ADC will use the GOTV Fund for maintaining the ADC infrastructure and for GOTV-related communication efforts and other independent expenditures (including transfers to other PACs for use in their GOTV campaign or for other independent expenditures). Key to this GOTV Fund is that none of the money it contains will be transferred to candidates or their committees.

Plaintiffs argue that because contributions they receive from any PAC-to-PAC transfers will be used for independent expenditures only, there can be no corruption. It follows then, if there can be no possibility for corruption, then preventing corruption or the appearance thereof cannot be a valid state interest. *Citizens United*, 130 S. Ct. at 909. The court agrees. *See*

Wisconsin Right for Life State Political Action Comm., No. 11-2623 Slip Op. at 26 ("It follows, then, as a matter of law and logic, that Wisconsin's $10,000 aggregate annual contribution limit is unconstitutional as applied to organizations, like the Right to Life PAC, that engage in independent expenditures for political speech. This is true even though the statute limits *contributions*, not *expenditures*. Whether strict scrutiny or the intermediate 'closely drawn' standard applies, the anticorruption rationale cannot serve as a justification for limiting fundraising by groups that engage in independent spending on political speech. No other justification for limits on political speech has been recognized, and none is offered here.") (emphasis in original); *Speechnow.org*, 599 F.3d at 432-33.

Given that preventing corruption or the appearance of corruption cannot be a valid interest if contributions are being made for purposes of independent expenditures,[9] it is clear that the State's interest in stopping corruption, or the appearance thereof, cannot support a ban on PAC-to-PAC transfers if the money

[9] It is also worth pointing out that the Supreme Court has noted a distinction between independent expenditures and coordinated expenditures. *See Colorado II*, 533 U.S. 431. While it is clear under current Supreme Court precedent that an independent expenditure cannot lead to corruption or the appearance thereof, it is equally clear that coordinated expenditures between a PAC and a candidate can lead to corruption. *Id.* at 442-43. However, it is not the role of this court to divine whether Plaintiffs will limit the funds from the GOTV account to only independent expenditures. At this juncture, it is simply the job of the court to address whether the PAC transfer ban is constitutional as applied to a PAC that with a segregated account to be used only for independent expenditures. (*See* doc. 9-1 at 5-6)).

does not ultimately get funneled to a candidate. Because the State cannot establish that it has a sufficient interest in infringing upon the ADC's First Amendment rights, this court must find that, as a matter of law, the PAC-to-PAC transfer ban is unconstitutional as applied to Plaintiffs. Accordingly, Plaintiffs' Motion for Partial Summary Judgment is due to be granted.

III. DEFENDANTS' MOTION TO DISMISS

A. INTRODUCTION AND STANDARD OF REVIEW

In addition to Plaintiffs' Motion for Partial Summary Judgment, the court also has before it Defendants' Motion to Dismiss. (Doc. 7). In their motion, Defendants seek dismissal of both the First Amendment and Voting Rights Act claims as a matter of law. Under Rule 12(b)(6), a count must be dismissed if Plaintiffs fail to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). However, unlike with a motion for summary judgment, whether a complaint properly states a claim upon which relief can be granted is determined based on the language contained within the four corners of the complaint.[10] *See* FED. R. CIV. P 12(d). Thus, the question before the court is whether, based on the allegations in the com-

[10] In addition to the briefing submitted in support of the motion to dismiss, Defendants also submitted materials to "establish facts of which the Court may take judicial notice." (Doc. 7at 1 n.1). However, this additional evidence was not needed by the undersigned when making its determination.

plaint, Plaintiffs have stated a claim upon which relief can be granted. The court finds that they have with respect to the First Amendment Claim, but that they did not with respect to the Voting Rights Act Claim.

B. FIRST AMENDMENT CLAIMS

For the same reasons, discussed in detail in Section II.C, that Plaintiffs are entitled to summary judgment as to their First Amendment claims, Defendants' motion to dismiss the First Amendment claims is due to be denied.

C. VOTING RIGHTS ACT CLAIMS[11]

In addition to the First Amendment claim, Defendants have also moved to dismiss Plaintiffs' claim that the PAC-to-PAC transfer ban violates Section 2 of the Voting Rights Act. (Doc. 7).

Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

---

[11] Please see section II.B for an overview of the facts related to the PAC transfer ban.

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

Defendants' Motion to Dismiss challenges whether the ban is covered by Section 2 of the Voting Rights Act and, if so, whether Plaintiffs' Complaint contains allegations sufficient to show that it caused minority voters to be denied meaningful access to the political process.

The pertinent question here is whether the PAC-to-PAC transfer ban qualifies as a "voting qualification or prerequisite to voting or standard, practice, or procedure * * * which results in a denial or abridgement of the right of any citizen * * * to vote on account of race or color." *Id.* To answer this question, the court must first consider whether the PAC-to-PAC transfer

ban is a "standard, practice, or procedure" that is covered within the scope of the Voting Rights Act.[12]

Plaintiffs argue that the scope of the Voting Rights Act is designed to be broad, reaching "any state enactment which alter[s] the election law of a covered State in even a minor way." *Allen* v. *State Bd. Of Elections*, 393 U.S. 544, 566 (1969). Because of the breadth of the scope of the Voting Rights Act, Plaintiffs' contend that the "PAC-to-PAC ban constitutes a voting standard, practice or procedure that discriminatorily affects the rights of black citizens to participate in the political process." (Doc. 10 at 29)[13] On the other hand, Defendants argue that the State's prohibition on one PAC transferring money to another PAC is not a voting standard, practice, or procedure.

This court was unable to find, nor did either of the parties produce, a case specifically defining the contours of what a "standard, practice or procedure" is under Section 2 of the Voting Rights Act.[14] Thus, it is

---

[12] Neither party argues that the PAC-to-PAC transfer ban is a voting qualification or prerequisite to voting.

[13] Plaintiffs provide little more than conclusory statements to support this assertion. In their response to Defendants' Motion to Dismiss, Plaintiffs argue that access to funds is directly related to the ability to participate in the political process and that the PAC-to-PAC transfer ban, which Plaintiffs claim burdens voter protection and GOTV efforts is directly related to voting. (Doc. 10 at 28-31). However, Plaintiffs provide little support for these statements and fail to show how the PAC transfer ban *directly* effects voting.

[14] In *Chisom* v. *Roemer*, the United States Supreme Court addressed whether, as amended, Section 2 applied to judicial elections, but it did not specifically address what a "standard, practice or procedure" was. In it's discussion, the Court provided "a

appropriate for the court to look to how that same language has been defined under Section 5 of the Voting Rights Act.[15] *See FCC* v. *AT&T*, ___ U.S. ___, 131 S. Ct. 1177, 1185 (2011) ("[I]dentical words and phrases within the same statute should normally be given the same meaning."); *Nijhawan* v. *Holder*, 557 U.S. 29, 129 S. Ct. 2294, 2301 (2009) ("Where * * * Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations.").

In *Presley* v. *Etowah Country Commission*, 502 U.S. 491 (1992), the Supreme Court addressed whether a particular law was a "standard, practice or procedure with respect to voting" such that preclearance was required under Section 5 of the Voting Rights Act. *Id.* In its discussion, the Court noted that the scope of Section 5 "is expansive within its sphere of operation * * * [and] comprehends all changes to rules governing voting." *Id.* at 501-02. The Court went on to say that "our cases * * * reveal a consistent requirement that changes subject to § 5 pertain only to voting" and then listed the four categories of changes that

---

limit on the times that polls are open" as an example of a standard, practice, or procedure. 501 U.S. 380, 396 (1991).

[15] Section 5 of the Voting Rights Act provides in relevant part:

> Whenever a State * * * shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting * * * such State * * * may institute an action * * * for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973c(a).

the Court found were covered by Section 5's preclearance requirements: (1) changes in the manner of voting; (2) changes in candidacy requirements and qualifications; (3) changes in the composition of the electorate that may vote for candidates for a given office; and (4) changes affecting the creation of abolition of an elective office. *Id.* at 502-03. The Court summarized the categories as follows:

> The first three categories involve changes in election procedures, while all the examples within the fourth category might be termed substantive changes as to which offices are elective. But whether the changes are of procedure or substance, each has a direct relation to voting and the election process.

Id. at 503.

"The Voting Rights Act is not an all-purpose antidiscrimination statute." *Id.* at 509. In fact, it only covers those laws that bear a "direct relation to voting itself." *Id.* at 510. While Plaintiffs correctly assert that, as applied to the ADC, the PAC transfer ban might have an indirect affect on voting, that does not mean that the challenged provision comes within the scope of the Voting Rights Act. It is clear that the PAC-to-PAC ban here does not fit into any of the categories described by the Court in *Presley*. Further, the challenged law does not have any arguable direct

relation to voting.[16] For this court to find otherwise would greatly expand the scope of the Voting Rights Act to include almost any regulation passed by the state. Such expansion, as the Supreme Court found with respect to Section 5 in Presley, was not Congress's intent. *Id.* at 505. Accordingly, the court finds that as a matter of law, Plaintiffs cannot state a claim upon which relief may be granted under Section 2 of the Voting Rights Act. Thus, Defendants' motion to dismiss is due to be granted as to this claim.

IV. CONCLUSION

With respect to Plaintiffs' Motion for Partial Summary Judgment, this ruling seeks only to answer the question posed by Plaintiffs – whether the PAC-to-PAC transfer ban is unconstitutional *as applied* to Plaintiff. As explained above, the court finds that it is. Thus, Plaintiffs' Motion for Partial Summary Judgment (doc. 9) is due to be granted. Additionally, the court finds that Defendants' Motion to Dismiss (doc. 7) is due to be denied with respect to the First Amendment claim and granted with respect to the Voting Rights Act claim. An order consistent with this opinion will be entered.

---

[16] As noted in Footnote 13, Plaintiffs provide little support for the bold assertion that the PAC-to-PAC ban directly affects voting. It is clear to the court, that any effect the ban may have on voting is indirect. To get from a law banning the transfer of funds between PACs to the abridgment of the right to vote on account of color requires so many steps that the court cannot fathom how the regulation could be seen to have a direct effect on voting.

DONE, this 14th day of December, 2011.

_____

JOHN E. OTT
United States Magistrate Judge