No. 16-832

In The Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, et al.,

Petitioners,

v.

LUTHER STRANGE,
ATTORNEY GENERAL OF ALABAMA, et al.,

Respondents.

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

BRIEF OF FREE AND FAIR ELECTION FUND, FREEDOM PAC, AND AMERICAN DEMOCRACY ALLIANCE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

EDWARD D. GREIM
Counsel of Record
TODD P. GRAVES
J. BENTON HURST
ALAN T. SIMPSON
GRAVES GARRETT, LLC
1100 Main St., Suite 2700
Kansas City, MO 64105
(816) 256-3181
edgreim@gravesgarrett.com

Counsel for Amici Curiae

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

TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of the Amici Curiae 1

Introduction and Summary of Argument 5

Argument 8

I. CONTRIBUTIONS TO A POLITICAL FUND THAT MAKES ONLY INDEPENDENT EXPENDITURES DO NOT GIVE RISE TO *QUID PRO QUO* CORRUPTION OR ITS APPEARANCE 8

A. *Buckley* Defines When an Expenditure is Independent 9

B. The Eleventh Circuit Established a New Standard for Determining Whether an Expenditure is "Independent" 10

1. "Appearing to relate to campaign contributions" is not a relevant inquiry in determining whether coordination has occurred 12

2. Other circuits utilize unlawful standards to determine the independence of expenditures from a political fund 13

C. Decisions of the Second, Fifth, and Eleventh Circuits Improperly Presume Hybrid PACs Threaten to Circumvent Valid Contribution Limits 14

TABLE OF CONTENTS – Continued

Page

1. The *Vermont Right to Life Committee* factors are not closely drawn to the state's interest in preventing circumvention of valid contribution limits 15
2. Alabama's PAC-to-PAC transfer ban does not further any interest in preventing the circumvention of valid limits 18

D. The Eleventh Circuit's Decision Justifies Burden-Shifting and Significant Interference with Independent Expenditures that "Appear to Relate to" Campaign Contributions 19

E. The "Appearance of Corruption" Cannot Provide a Basis to Ban Contributions for Independent Expenditures 21

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Ala. Democratic Conference v. Attorney General ("ADC I"), 541 Fed. Appx. 931 (11th Cir. 2013) .....*passim*

Ala. Democratic Conference v. Attorney General ("ADC II"), 838 F.3d 1057 (11th Cir. 2016).....*passim*

Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612 (1976).....*passim*

Cal. Med. Ass'n v. FEC, 453 U.S. 182, 101 S. Ct. 2712 (1981).....12, 16

Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409 (5th Cir. 2014).....13, 14, 17

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 102 S. Ct. 434 (1981).....22

Citizens United v. FEC, 558 U.S. 310, 130 S. Ct. 876 (2010).....*passim*

Colorado Republican Federal Campaign Comm. v. FEC ("Colorado I"), 518 U.S. 604, 116 S. Ct. 2309 (1996).....11, 20

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 127 S. Ct. 2652 (2007) 7

McCutcheon v. FEC, 134 S. Ct. 1434 (2014).....16, 21

Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) 22

TABLE OF AUTHORITIES – Continued

Page

SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) 6, 21, 22

Vermont Right to Life Committee, Inc. v. Sorrell, 758 F.3d 118 (2d Cir. 2014) ..... *passim*

CONSTITUTION

U.S. Const. amend. I ..... *passim*

STATUTES

Ala. Code § 17-5-2 ..... 6, 9

Ala. Code § 17-5-15 ..... 6, 11

Mo. Const. art. VIII, § 23 ..... 1, 2, 3

52 U.S.C. § 30101 9

52 U.S.C. § 30116 ..... 9, 14

INTEREST OF THE AMICI CURIAE[1]

Amici are Missouri state political action committees ("PACs") and a nonprofit corporation. In November 2016, Missouri voters passed a constitutional amendment regulating campaign finance and political committees. *See* Mo. Const. art. VIII, § 23. As a result, the Missouri Constitution now subjects amici to a blanket ban on PAC-to-PAC transfers, similar to the ban at issue in this case. *See* Mo. Const. art. VIII, § 23.3(12). Amici have challenged that amendment as contrary to the First Amendment in the United States District Court for the Western District of Missouri, *Free and Fair Election Fund, et al. v. Missouri Ethics Commission, et al.*, No. 2:16-cv-4332. The present case raises an issue of vital concern to amici: whether the First Amendment permits a ban on transfers to a political fund that will only make independent expenditures.

Free and Fair Election Fund ("Fair Elections") is a Missouri PAC commonly referred to as an "independent expenditure-only PAC" or "Super PAC"; Fair Elections intends to only make independent expenditures in Missouri state elections. Fair Elections has a bank account, but it does not make candidate or party contributions, nor does it engage in any coordination with

[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part, and that no person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of this brief have been submitted to the Clerk. The parties were notified 7 days prior of the intention to file; however, both parties have given consent.

candidates or political parties. Nevertheless, the Missouri Constitution now bars Fair Elections from accepting contributions from political parties, candidate committees, and other PACs. Mo. Const. art. VIII, § 23.3(12). Fair Elections has a substantial interest in a determination that independent expenditure-only PACs cannot be prohibited from accepting contributions from other political committees.

Freedom PAC is also a Missouri PAC. Freedom PAC intends to make independent expenditures, candidate contributions in Missouri state elections, and contributions to Fair Elections, but such contributions are currently prohibited. Freedom PAC has previously made coordinated expenditures in support of Missouri candidates for local office. At present, Freedom PAC maintains only one bank account. It has not adopted a "hybrid PAC" structure. The rules for hybrid PACs are unclear under federal and Missouri law. *See* Mo. Const. art. VIII, § 23.7(20) (defining PAC to include candidate contribution funds as well as independent expenditure funds). The Missouri Constitution imposes civil and criminal penalties for violating contribution limits or source prohibitions. *See* Mo. Const. art. VIII, §§ 23.5, 23.6. Freedom PAC has a substantial interest in a determination that PACs may not be prohibited from contributing to independent expenditure-only PACs.

American Democracy Alliance ("ADA") is a Missouri nonprofit corporation. ADA wishes to make contributions to Fair Elections and Freedom PAC, but Missouri's Constitution limits the size of such contributions, even if ADA's contributions are made to

a segregated fund for the sole purpose of making independent expenditures. *See* Mo. Const. art. VIII, §§ 23.3(1) (limiting the amount of contributions made in any election), 23.7(8) (defining contributions to include donations of money to PACs). ADA has a substantial interest in a determination that contributions to independent expenditure-only PACs may not be limited.

Banning contributions to independent expenditure-only funds does not further any state interest in preventing *quid pro quo* corruption or its appearance. The Eleventh Circuit blessed such a ban merely because the organization maintaining the independent expenditure-only fund also maintains a second fund that it uses to make contributions. The decision rejects this Court's delineation of what makes an independent expenditure "independent" from a candidate or political party. *See Buckley v. Valeo*, 424 U.S. 1, 47, 96 S. Ct. 612 (1976) ("The absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."). Relying on decisions from the Second and Fifth Circuits, the Eleventh Circuit held that making contributions from the second fund's bank account removes the independence of the first fund. This line of reasoning questions the independence of any independent expenditure by a person that makes (or could make) a candidate contribution. The Eighth Circuit has not yet adopted a position on this matter.

Amici encourage this Court to review the holding below because the Eleventh Circuit's decision is not an isolated error. Rather, it joins a gathering cohort of courts of appeals that—citing one another—have opened a significant breach in the protections this Court recognized in *Citizens United v. FEC*, 558 U.S. 310, 357, 130 S. Ct. 876 (2010). The erosion of *Citizens United*, and the doctrinal disarray this chorus is fostering, should be stopped now. Delay will not sharpen opposing viewpoints; it will only prolong and magnify the difficulty of reining in the lower courts, as error builds upon error. For example, the decision below rests in part on judicial speculation that corruption may "appear" to exist in certain circumstances, even where by law and logic it cannot. Used in this way, the "appearance of corruption" will be used by judges to create additional breaches in long-settled First Amendment doctrine. This case is an appropriate vehicle for rectifying this doctrinal error, because it deals with the already-salient concept of "coordination." This concept, clear from a distance, is difficult to apply in practice. It nonetheless demarcates an important constitutional line, between expenditures and contributions. A malleable "coordination" standard, based on subjective views of what "appears" corrupt, not only sets a poor precedent for other areas of doctrine, it creates a major loophole in protections for independent expenditures—the essence of protected campaign speech.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is important because, if the decision below is not corrected, the Eleventh Circuit will join the Second and Fifth Circuits in creating a roadmap for regulators bent on undermining this Court's longstanding protection of independent expenditures, most recently expressed in *Citizens United*. First, the decision targets the malleable concept of "coordination," which was already a weak point in First Amendment protection of campaign speech. Ordinarily, when contact between candidates and outside groups seems to exceed relatively murky and subjective standards, "coordination" is said to have occurred, allowing regulators to argue that protected expenditures are really contributions. The decision below now expands "coordination" to include strategic decision-making by outside groups, without any candidate influence. Second, having mounted the ramparts at this weak point, the decision below misapplies the state interest in combatting the "appearance of corruption." The court below would seemingly allow any number of prophylactic measures that lessen the "appearance" of coordination, even if coordination is not synonymous with corruption. These are serious (and infectious) doctrinal errors.

This errant approach allowed the Court below to sustain a ban on contributions to a political fund that makes only independent expenditures. The Alabama Democratic Conference ("ADC") maintains a fund for the purpose of making independent expenditures in

Alabama elections. Alabama law prevents ADC's independent expenditure fund from accepting contributions from any "group of one or more persons which receives or anticipates receiving contributions and makes or anticipates making expenditures to or on behalf of" Alabama elected officials, ballot measures, or other political committees. Ala. Code §§ 17-5-2(a)(13); 17-5-15(b). This "PAC-to-PAC" transfer ban cuts off ADC's traditional fundraising sources—other PACs—and burdens ADC's ability to raise funds for its activities.

This record presents a proper vehicle for this Court to restore order, and in doing so, this Court will have the aid of prior precedent that applies well-established doctrine. The decision can rest on the question of Alabama's permissible state interest. Here, the court below was wrong to hold that the state has an interest in prohibiting PACs from making contributions to an independent expenditure fund. First, any state interest in preventing *quid pro quo* corruption is inapplicable to such contributions. "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." *SpeechNow.org v. FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010) (en banc). "[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC*, 558 U.S. 310, 357, 130 S. Ct. 876 (2010).

Absent evidence suggesting that an independent expenditure fund makes candidate contributions or coordinated expenditures, the state's interest in preventing *quid pro quo* corruption and its appearance does not support a contribution ban. *Id.*

In conclusion, this Court should grant certiorari to make clear that regulators' and courts' subjective conclusions about what may "appear" to violate campaign finance law—even if it does not—may be prohibited, as a sort of prophylaxis-upon-prophylaxis. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474-76, 127 S. Ct. 2652 (2007). The interest in combatting the "appearance of corruption" is not license to regulate where there is only an "appearance" of coordination, or only the "appearance" of a contribution that, on the record, was clearly an expenditure. This case should be the vehicle for closing this widening breach in First Amendment protections for independent campaign speech. Waiting will only cause the error to spread among lower courts and justify new assaults from regulators eager to probe chinks in the armor of *Citizens United*.

ARGUMENT

I. CONTRIBUTIONS TO A POLITICAL FUND THAT MAKES ONLY INDEPENDENT EXPENDITURES DO NOT GIVE RISE TO *QUID PRO QUO* CORRUPTION OR ITS APPEARANCE

In *Buckley*, this Court recognized that *sine quo non* of an independent expenditure: the lack of prearrangement or coordination with a candidate. *Buckley v. Valeo*, 424 U.S. 1, 47, 96 S. Ct. 612 (1976). Later, in *Citizens United*, the Court explained why this definition matters when courts apply constitutional scrutiny to laws: "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United*, 558 U.S. at 357. Yet, the Eleventh Circuit has added important qualifiers. First, the Eleventh Circuit found an "appearance of corruption" arises for otherwise independent expenditures made by a person that also makes candidate contributions. This "appearance" does not require any showing of prearrangement or coordination with a candidate; the "coordination" of contributions and expenditures suffices. Second, the Eleventh Circuit held that a fund that makes only independent expenditures may be presumed to contribute to candidates when the fund is closely connected to a candidate contribution fund. These results justify significant restrictions on all contributions for independent expenditures.

A. *Buckley* Defines When an Expenditure is Independent

The question of whether an expenditure is "independent" or "coordinated" is fundamental. "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Citizens United*, 558 U.S. at 360 (citing *Buckley v. Valeo*, 424 U.S. 1, 46, 96 S. Ct. 612 (1976)). Independent expenditures present no threat of *quid pro quo* corruption or its appearance. "The absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S. at 47.

On the other hand, candidate-coordinated expenditures by political committees are typically treated as contributions under state law, *see* Ala. Code § 17-5-2(a)(3) (defining contribution), and under federal law, 52 U.S.C. § 30116(a)(7)(B)(i).[2]

[2] Federal law also defines the term "independent expenditure" to reflect the *Buckley* standard. *See* 52 U.S.C. § 30101(17) ("The term 'independent expenditure' means an expenditure by a person—(A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.").

B. The Eleventh Circuit Established a New Standard for Determining Whether an Expenditure is "Independent"

Despite this well-settled standard, the Eleventh Circuit now applies a new test for determining whether an expenditure is independent. This new standard does not depend on evidence that a fund's expenditures are coordinated or prearranged with a candidate. A political fund that makes only independent expenditures may be rendered "coordinated" or "apparently corrupt" based on facts and transactions having nothing to do with a candidate.

In its decisions below, the Eleventh Circuit found it significant that ADC was a "hybrid PAC" rather than an independent expenditure-only PAC. *Ala. Democratic Conference v. Attorney General* ("*ADC II*"), 838 F.3d 1057, 1061 (11th Cir. 2016) (citing *Ala. Democratic Conference v. Attorney General* ("*ADC I*"), 541 Fed. Appx. 931, 935 (11th Cir. 2013) (per curiam) (unpublished)). The court held that ADC's maintenance of a separate bank account for candidate contributions created an appearance of corruption:

> [T]he 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.* 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.*

ADC II, 838 F.3d at 1061 (emphasis in original) (citing *ADC I*, 541 Fed. Appx. at 935).[3]

The Eleventh Circuit's analysis confuses fundamental protections for political speech in multiple ways. First, to refer to an individual or entity (here a corporation) as "coordinating" two political funds is a misnomer. *See Citizens United*, 558 U.S. at 360. Coordination refers to *candidate* influence, cooperation, or prearrangement. *Id.*[4] For a corporation like ADC to render a fund's expenditures coordinated, ADC must be shown to have acquired and shared nonpublic campaign information from a candidate (or her agent). *See id.*

Second, when expenditures are, in fact, independent of a candidate, the public's belief that such expenditures are "corrupt" does not justify a ban on contributions to the fund making the expenditures. *Id.* at 357; *see also Colorado Republican Federal Campaign Comm. v. FEC* ("*Colorado I*"), 518 U.S. 604, 617-18, 116

---

[3] The Eleventh Circuit, rather than the state of Alabama, made this distinction. Alabama law does not differentiate between candidate contribution PACs, independent expenditure-only PACs, and hybrid PACs. *See* Ala. Code § 17-5-15(b) (banning *all* PAC-to-PAC transfers).

[4] Though Alabama does not have campaign contribution limits, one can imagine a contribution fund and an independent expenditure-only fund making strategic expenditure decisions. This cooperation or information sharing between funds, without more, does not present any candidate coordination or prearrangement concerns.

S. Ct. 2309 (1996). As a matter of law, independent expenditures do not corrupt or create an appearance of corruption. *Citizens United*, 558 U.S. at 357. The government lacks any interest in enforcing the public's unsupported beliefs about corruption. *Id.*

1. "Appearing to relate to campaign contributions" is not a relevant inquiry in determining whether coordination has occurred

The Eleventh Circuit's decision conflates "an appearance of corruption" with an appearance of relating to candidate contributions. *ADC II*, 838 F.3d at 1061 (citing *ADC I*, 541 Fed. Appx. at 935). This drastically narrows the scope of the term "independent expenditure." To be sure, Alabama's anticorruption interest applies to contributions to political funds that make candidate contributions. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-99, 101 S. Ct. 2712 (1981) (government's interest in preventing corruption and its appearance supports contribution limits to federal multicandidate PACs). However, ADC's making of candidate contributions from one bank account fails to suggest that expenditures from a different bank account are coordinated or prearranged with a candidate.[5] Making strategic decisions about candidate contributions and independent expenditures does not

[5] Notably, under Alabama law, an individual, corporation, or political fund may make both unlimited campaign contributions and unlimited independent expenditures, even if the funds originate from the *same bank account*.

imply that the contributor is coordinating with a candidate. *See Buckley*, 424 U.S. at 47. Coordinating with a candidate on an expenditure causes that expenditure to be treated as a contribution. The Eleventh Circuit has the causal chain exactly backward.

2. Other circuits utilize unlawful standards to determine the independence of expenditures from a political fund

Three circuit courts of appeals call into question a political fund's independent expenditure-only status based on the fact that an independent expenditure fund is part of a "hybrid PAC." *See*, *e.g.*, *Vermont Right to Life Committee, Inc. v. Sorrell*, 758 F.3d 118, 141-42 (2d Cir. 2014); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 444-45 (5th Cir. 2014) (resting decision solely on the interest in preventing the circumvention of valid limits); *ADC II*, 838 F.3d at 1068. The Second and Eleventh Circuits hold that a hybrid PAC's status raises special coordination concerns. These Circuits permit a state to limit contributions to hybrid PAC independent expenditure funds, absent a showing of "functional distinctiveness." *Vt. Right to Life Comm., Inc.*, 758 F.3d at 142; *ADC II*, 838 F.3d at 1068.

The factors for "functional distinctiveness" of two funds, identified by the Second Circuit in *Vermont Right to Life Committee*, include:

- "the overlap of staff and resources";
- "the lack of financial independence";

- "the coordination of activities"; and
- "the flow of information between the entities."

758 F.3d at 142. None of the factors actually suggests that an independent expenditure fund is coordinated with a candidate. *See Buckley*, 424 U.S. at 47. If the same test were applied to an individual that makes both contributions and independent expenditures in a given race, the individual would fail the "functional distinctiveness" test under each factor. Still, *Buckley* recognizes that such individual's expenditures are independent. *Id.* The State's anticorruption interest cannot support limiting such expenditures. *Citizens United*, 558 U.S. at 357.[6]

C. Decisions of the Second, Fifth, and Eleventh Circuits Improperly Presume Hybrid PACs Threaten to Circumvent Valid Contribution Limits

The Second, Fifth, and now Eleventh Circuits have identified an additional concern regarding contributions to hybrid PACs: the State's interest in preventing circumvention of valid contribution limits. *See*, *e.g.*, *Vt. Right to Life Comm., Inc.*, 758 F.3d at 141-42; *Catholic Leadership Coal. of Tex.*, 764 F.3d at 444-45; *ADC II*,

[6] That coordinated expenditures may be treated as contributions, *see*, *e.g.*, 52 U.S.C. § 30116(a)(7)(B)(i), does not reveal any unique threat of coordination or prearrangement in a hybrid PAC. Even assuming that ADC makes coordinated expenditures from its candidate contribution fund, the Eleventh Circuit's test does not suggest that separate expenditures are coordinated.

838 F.3d at 1068. This interest exists, but hybrid PACs do not present unique concerns. The State's identified concern is that the hybrid PAC will act to illegally make campaign contributions in excess of limits or from prohibited sources. This concern about illegal action applies equally throughout the campaign finance system. The same concern applies to any PAC that states it will only make independent expenditures. If the bare possibility of illegal action justifies limiting independent expenditures or contributions for independent expenditures, the First Amendment provides significantly less room for political speech than this Court has previously indicated.

Moreover, this case presents a novel application of the states' interest in preventing circumvention of valid limits: in a state like Alabama that does not actually impose candidate contribution limits or prohibit contributions from corporations, does the state still have an interest in preventing circumvention of its (non)limits?

1. The *Vermont Right to Life Committee* factors are not closely drawn to the state's interest in preventing circumvention of valid contribution limits.

In *Vermont Right to Life Committee*, the Second Circuit addressed concerns about circumvention of valid contribution limits through its "functional distinctiveness" test. 758 F.3d at 142. None of these

factors actually suggests that an independent expenditure fund will circumvent contribution limits. As shown below, the "functional distinctiveness" test and the State's anticircumvention interest lack the requisite "fit." *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014). Despite this lack of fit, the Second Circuit and the Eleventh Circuit have allowed the "functional distinctiveness" test to stand in place of evidence that a contribution to an independent expenditure fund circumvents contribution limits. The test has been held to satisfy the state's burden to demonstrate circumvention was likely. *See Vt. Right to Life Comm., Inc.*, 758 F.3d at 142. But the State's mere suspicion that circumvention would be possible should not suffice in the face of unequivocal statements and facts to the contrary.

The Second and Eleventh Circuits' interpretation of the facts required to implicate the State's anticircumvention interest cannot be reconciled with this Court's previous application of the interest in cases like *California Medical Association.* 453 U.S. at 197-99. In a hybrid PAC, there are generally two funds: a candidate contribution fund and an independent expenditure fund. The State's anticircumvention interest only applies to prevent the transfer of value from the independent expenditure fund to the candidate contribution fund, not vice-versa. Transfers to the independent expenditure fund do not threaten to circumvent contribution limits.

Application of the "functional distinctiveness" test reveals that hybrid PACs raise no unique concerns

about circumvention of valid limits. An "overlap of staff and resources," without more, does not raise the prospect of circumvention. "Overlap" of people and resources often occurs when an individual, corporation, or political party makes both contributions and independent expenditures. Overlap also happens when a single individual is associated with several PACs. But these facts do not suggest contribution limits are being circumvented. Another factor, the "lack of financial independence," is only relevant to the extent the campaign contribution fund receives money (or other benefits) from the independent expenditure fund. *See id. Compare Vt. Right to Life Comm., Inc.*, 758 F.3d at 142 (finding significant the flow of money from a candidate contribution fund to an independent expenditure fund), *with Catholic Leadership Coal. of Tex.*, 764 F.3d at 444-45 (recognizing circumvention of limits only happens in one direction).

Similarly, "the coordination of activities" and "the flow of information between entities" are only relevant to the extent the independent expenditure fund provides benefits to the candidate contribution fund. When no evidence supports the conclusion that this has occurred or is likely, the State may not limit contributions to the independent expenditure fund. *Cf. ADC II*, 838 F.3d at 1068 (banning contributions despite any evidence of circumvention).

2. Alabama's PAC-to-PAC transfer ban does not further any interest in preventing the circumvention of valid limits

Alabama presents a prime example of the lack of fit between the State's chosen remedy, a wholesale ban on PAC-to-PAC transfer, and the State's interest in preventing circumvention of valid limits. The PAC-to-PAC transfer ban is not closely drawn to preventing circumvention of valid limits. Alabama does not impose contribution limits or prohibit corporate contributions.

It is also worth noting that Alabama law does reference any of the *Vermont Right to Life Committee* factors. Perhaps the Alabama Legislature recognized that the Eleventh Circuit's requirements for "internal controls" and "account management procedures" apply with equal force to individuals, corporations, and other political funds, each of which is permitted to make unlimited campaign contributions and independent expenditures under Alabama law. *See id.* Or perhaps the Alabama Legislature decided it was not clear what, if any, "internal controls" would lessen the possibility that an independent expenditure fund would stray from making independent expenditures. Regardless, the deference due to Alabama about the scope of its law must relate to a decision Alabama actually made, which is a blanket ban on every PAC-to-PAC transfer. *See ADC II*, 838 F.3d at 1069-70. As the Eleventh Circuit appeared to recognize, the PAC-to-PAC transfer

ban is not supported by the state's anticorruption interest. *Id.* at 1066 ("Other Circuits, applying the logic of *Citizens United*, have uniformly invalidated laws limiting contributions to PACs that made only independent expenditures." (collecting cases)).

D. The Eleventh Circuit's Decision Justifies Burden-Shifting and Significant Interference with Independent Expenditures that "Appear to Relate to" Campaign Contributions

The Eleventh Circuit's decisions in *ADC I* and *ADC II* suggest that Alabama may limit independent expenditures, or shift the burden of demonstrating independence, so long as the person making the expenditures also makes one or more campaign contributions:

> 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.

ADC II, 838 F.3d at 1064-65. The Eleventh Circuit's standard undermines this Court's holding in *Citizens United*, 558 U.S. at 357. The State's anticorruption interest fails to arise when an expenditure is actually independent, regardless of any alleged "appearance." *Id.* The Eleventh Circuit's decision nonetheless provides support for the idea that the State may treat an individual who makes contributions and independent

expenditures differently than an individual that only makes independent expenditures. *See ADC II*, 838 F.3d at 1064-65. *Cf. Colorado I*, 518 U.S. at 621-22 ("An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one.").

Individuals, corporations, political funds, and others in the Second and Eleventh Circuits should be concerned about whether their independent expenditures will be banned by state regulators, absent any evidence of coordination or circumvention of valid limits, based on an arbitrary checklist. At a minimum, they can expect to face regulatory burdens of demonstrating their own independence, absent any evidence of coordination. It is especially troubling that Second and Eleventh Circuits' tests equate political engagement and association with the appearance of corruption. The fewer candidates a person contributes to, the more easily they can demonstrate their expenditures are independent. *See id.* at 1068.

Under Alabama law, individuals may make contributions and expenditures out of a single bank account. Does Alabama have an anticorruption interest in preventing such an individual from making independent expenditures, unless the individual rebuts a presumption of coordination? The Eleventh Circuit finds that a presumption of corruption arises and suggests Alabama could presumptively ban such expenditures. *ADC II*, 838 F.3d at 1064-65, 1068. The danger is even clearer for membership corporations, who may be required to segregate decision-making for candidate

contributions and independent expenditures, even though such requirements further no substantial state interest.

According to the Eleventh Circuit's logic about the "appearance of corruption," political funds, including a PAC that only makes independent expenditures, may be banned from political activity with regularity. PACs apparently lose the right to contribute to a candidate or make independent expenditures if an individual involved in PAC decisions also has made contributions to a candidate. The Eleventh Circuit's decision does not even require that the candidates be the same person, or running in the same race. Perhaps this far-reaching definition of corruption was intentional, given that the Eleventh Circuit found an interest in preventing circumvention of contribution limits, in a state with no contribution limits. *ADC II*, 838 F.3d at 1068.

E. The "Appearance of Corruption" Cannot Provide a Basis to Ban Contributions for Independent Expenditures

"[T]he Government's interest in preventing the appearance of corruption is . . . confined to the appearance of *quid pro quo* corruption. . . ." *McCutcheon*, 134 S. Ct. at 1451. "[C]ontributions to groups that make only independent expenditures . . . 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 v. FEC*, 599 F.3d 686, 694-95

(D.C. Cir. 2010) (en banc). "This simplifies the task of weighing the First Amendment interests implicated by contributions . . . against the government's interest in limiting such contributions. As we have observed in other contexts, 'something . . . outweighs nothing every time.'" *Id.* at 695 (quoting *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)).[7]

ADC maintains two separate bank accounts for political spending: one for candidate contributions and another for independent expenditures. No evidence suggests that expenditures from ADC's independent expenditure-only fund are used to make either (1) coordinated or prearranged expenditures; or (2) direct or indirect candidate contributions. Absent such a showing, contributions to ADC's fund for independent expenditures "cannot corrupt or create the appearance of corruption." *Id.* This fundamental rule should not vary among the circuits.

[7] Additionally, "[a]n informational interest in 'identifying the sources of support for and opposition to' a political position or candidate is not enough to justify the First Amendment burden" of a ban on contributions or independent expenditures. *SpeechNow.org*, 599 F.3d at 692 (quoting *Citizens Against Rent Control/ Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298, 102 S. Ct. 434 (1981)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD D. GREIM
Counsel of Record
TODD P. GRAVES
J. BENTON HURST
ALAN T. SIMPSON
GRAVES GARRETT, LLC
1100 Main St., Suite 2700
Kansas City, MO 64105
(816) 256-3181
edgreim@gravesgarrett.com

Counsel for Amici Curiae