No. 16-832

In The Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,

Petitioners,

v.

STEVEN T. MARSHALL,
ATTORNEY GENERAL OF ALABAMA, ET AL.,

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Faced with a circuit split that seven federal judges in this case expressly acknowledge – a split that numerous other courts of appeals judges also explicitly recognize – Alabama's main strategy is to try to distract this Court by offering up "factual" assertions to suggest this case is "unusual." When the State briefly turns to the law, it presents the novel argument that the First Amendment permits the State to ban any political group from contributing to any other political group because any more tailored approach to running an effective disclosure system would simply be "too fussy."

On the facts, Alabama's transparent attempt to avoid the reality of the circuit split can be safely ignored. The district court factually found against Alabama on the very "facts" with which Alabama now seeks to distract this Court – though Alabama, remarkably, does not inform the Court of that. Moreover, Alabama's fanciful "factual" assertions do not matter in any event because the legal issues on which the federal courts are divided remain squarely presented. Indeed, none of Alabama's asserted "facts" played any role in the decision below or in the reasons the Eleventh Circuit resolved the conflict as it did. That is why the State's brief bears so little resemblance to what the courts below actually decided.

On the law, Alabama "aspires" to have this Court endorse "a less fussy approach" to regulating political association and speech. Br. in Opp. 4. Contrary to this

Court's holdings in a long line of cases, most recently *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), the State prefers to dispense with *any* of the well-established, less intrusive means of achieving its effective-disclosure interest and to simply ban, on pain of criminal penalty, any political group from making contributions to any other political group for any purpose. The First Amendment, under either strict or "closely drawn" scrutiny, does not permit the State to impose gratuitously such a severe burden on core rights of political association and participation.

I. ALABAMA'S EFFORTS TO SOW CONFUSION CAN SAFELY BE IGNORED.

The district court has already rejected, as findings of fact, Alabama's assertions about "coordination" and the Democratic Party. Similarly, Alabama's odd and irrelevant emphasis on the purported difference between a ban on financial contributions and a ban on all contributions played no role in Alabama's defense of the law throughout two rounds of litigation below or in the Eleventh Circuit's resolution of the issue over which the circuits are divided.

1. ADC Has Structured Itself As A Hybrid PAC.

In one of its attempts to distract this Court, the State asserts that ADC is not a hybrid PAC. But the district court made findings of fact to the contrary, which Alabama does not acknowledge. Moreover, the

State's assertions about "coordination" are irrelevant in any event.

Alabama boldly tells this Court that ADC purportedly "is exclusively engaged in *coordinated* spending." Br. in Opp. 9. Unfortunately for the State, the district court already rejected that assertion as a finding of fact. Indeed, the district court devoted an *entire section* of its opinion to Alabama's effort to convince it of this fact: "3. Are the ADC's Purported Independent Expenditures Actually Coordinated Expenditures?" Pet. App. 58a. After analyzing the record, the district court concluded that "the State has not proven it has an anti-corruption interest because the ADC's so-called independent expenditures are actually coordinated candidate contributions." *Id.* at 60a.

The State was more forthright on this point with the Eleventh Circuit than with this Court. There, the State made the same assertions about coordination, but at least it correctly told the Eleventh Circuit that "[t]he District Court thought otherwise [on the State's coordination claim]. . . ."[1] The State then tried (unsuccessfully) to persuade the Eleventh Circuit to overturn the district court on this point.

Here, the State does not inform this Court of the District Court's findings, then argue for overturning these findings as clearly erroneous. Instead, the State entirely omits mention of the district court's findings and just baldly asserts that ADC engages in

[1] Appellees' Br. at 48, No. 15-13920 (11th Cir. Dec. 9, 2015).

coordinated spending – and (to compound the State's brazenness) that it does so "exclusively." Br. in Opp. 9.

But this "fact" offered to distract the Court is irrelevant, in any event. This case does not concern the past spending practices of ADC, before the State enacted the PAC-transfer ban. In the wake of that ban, ADC legally restructured its activities, as the district court noted, "in a manner consistent with those upheld by the court in *Emily's List*." Pet. App. 41a; *see infra*, pages 10-12. Directly following this legal authority and the FEC's guidance, ADC established a separate Candidate Account to hold funds for candidate contributions and an Independent Expenditure Only Account for funds received for that purpose. The question is whether, going forward, the First Amendment permits the State to disregard this new structure and enforce its PAC contribution ban on ADC's receipt of contributions for independent spending.

That any purported issue about coordination makes no difference to the questions presented here is confirmed by the undisputed fact that the State would *still* ban PAC contributions to ADC even if ADC were a pure independent-spending group. Section 17-5-15(b) criminalizes any PAC transfer to any PAC for any purpose, period. The State's position is that any PAC contribution to any other PAC *inherently* destroys effective disclosure and cannot be dealt with in any way other than a ban. As the State argues: "[t]he potential of corruption inherent in PAC-to-PAC transfers stems from the *delivery* of money – not what the ultimate recipient does with it." Br. in Opp. 23.

In the State's view, the PAC contribution ban is constitutionally valid across the board, "regardless of a PAC's publicly stated spending plans." *Id.* at 8. The State's law and the State's legal position thus establish the legal irrelevance of the State's already-rejected allegations about ADC's past spending practices.

At one point, the State tries to scare this Court off by suggesting the case requires the Court to probe the distinction between independent and coordinated spending. Br. in Opp. 20. But that is not so: the simple and clean legal question decided below and presented here is whether Alabama may enforce an absolute PAC-to-PAC contribution ban against a hybrid PAC that segregates those funds for use only for independent spending.

2. The District Court Rejected Alabama's Claims About ADC And The Democratic Party.

Just as remarkably, the State's bald assertion that the ADC acts as "a wing of the Alabama Democratic Party," Br. in Opp. 6, was also directly rejected in the district court's factual findings. *See*, *e.g.*, Pet. App. 58a n.15 ("[T]here 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."). Moreover – not surprisingly – this issue played no role in the Eleventh Circuit's decision, which instead announced general principles concerning the State's right to ban a

Carey-style hybrid PAC, *see infra*, pages 10-12, from receiving PAC contributions.

And once again, this "claim" does not even matter. Even political parties are legally capable of making independent expenditures and have a First Amendment right to do so. *See Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604 (1996). As is often the case with political groups, the ADC and the party "have a close relationship and pursue similar goals," Pet. App. 53a, but that hardly means ADC can be treated *more restrictively* than an actual political party and be deemed legally incapable of engaging in independent spending.

3. In-Kind Contributions.

Finally, at the midnight hour before this Court, Alabama suddenly tries to make much out of an (implausible) assertion that its law purportedly bans only "money transfers, not in-kind contributions" between political groups. Br. in Opp. 1. Until it got to this Court, Alabama never thought this "point" made a meaningful difference to the legal issues; it played no role in Alabama's defense below, nor in the Eleventh Circuit's decision. Once again, Alabama is reaching for ways to distract the Court from the clear conflict. The claim that the law exempts "in-kind contributions" is extremely implausible, but irrelevant in any event.

a. Nothing in any of the court decisions below turned on this issue. The Eleventh Circuit upheld Alabama's law even though the court understood the law

to ban all PAC contributions to other PACs. Federal judges are capable of drawing relevant distinctions, but the court did not distinguish the conflicting precedents from other circuits on the ground that Alabama exempted in-kind contributions. It recognized that it faced a head-on conflict and resolved it. The court concluded that Alabama's law could be applied to ADC even though the court acknowledged that the exact same law could not be applied, constitutionally, to ADC in certain other circuits. *See* Pet. App. 17a-18a.

Alabama itself never suggested this purported "exemption" was significant to the constitutional issues. In its first appeal, the State appears not to have even mentioned the issue. In its second appeal, the State included a single footnote making passing reference to this assertion, but it played no role in the State's arguments, including why the Eleventh Circuit should reject the conflicting precedents from other circuits.

It is clear what is going on here: faced with a square conflict recognized by the judges below and numerous other courts of appeals judges, Alabama is trying to conjure up any kind of purported distinction. But if ever there were a distinction without a difference, it is this one – which is no doubt why Alabama made nothing of the distinction below.

Indeed, the State never explains here *why* it should matter to the First Amendment analysis or the relevance of these conflicting precedents whether Alabama bans "only" PAC financial contributions. Without

adequate justification and proper tailoring, States cannot shut down a major mode of political association and expression by leaving a tiny window open for a less significant mode. States cannot ban an organization from paying petition circulators simply because the organization could provide other forms of support, such as coffee and doughnuts. *See Meyer v. Grant*, 486 U.S. 414 (1988). A State surely could not ban individual financial contributions to an independent-spending group if the State left open the narrow path of in-kind contributions.

b. Alabama's assertion is not only legally irrelevant, but extremely implausible. Alabama Code Section 17-5-15(b) prohibits one PAC from making "a contribution" to another PAC. The State's election code specifically defines "contribution" to include a "deposit of money or *anything of value*," not just financial contributions (as do nearly all campaign-finance laws). Ala. Code § 17-5-2(a)(3)(a)(1) (emphasis added). Indeed, the Campaign Finance Reports that PACs must regularly file confirm that Alabama law treats in-kind contributions as contributions. *See*, *e.g.*, Reply App. 1a. Those reports include sections for "Cash Contributions," "In-Kind Contributions," and "Receipts from Other Sources." *Id.* Separate forms must be filed for "In-Kind Contributions." *Id.*[2]

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[2] *See also* Fair Campaign Practices Act, State of Alabama, Political Action Committee Campaign Finance Report Summary Form 1A, https://www.alabamavotes.gov/downloads/election/fcpa/pacarpak.pdf.

The State's lawyers do not cite any state administrative rulings or case law to support their assertion that in-kind contributions are exempt. Indeed, the State seemingly took a different position before the district court.[3] Campaign-finance laws characteristically define contribution as "anything of value" and therefore treat in-kind contributions as contributions. *See*, *e.g.*, 11 C.F.R § 100.52(d)(1) ("the term anything of value includes all in-kind contributions"). These laws recognize that many valuable resources to campaigns could be transferred by the simple expedient of transforming the donation from cash to an in-kind contribution – for example, research, media scripts, speeches, or strategic analyses. Alabama offers no policy reason it would make sense for the State, given its purported concerns, to ban financial but not in-kind PAC contributions.

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[3] In response to ADC's Statement of Facts, the State quoted the deposition of the Secretary of State's designee, who testified it is routine for PACs to file reports on in-kind contributions:

> To the extent Secretary of State [designated representative] Ed Packard's testimony is relevant on this point, it *confirms* that "[the Secretary's] interpretation of the definition of a contribution would make [coordinated campaign activities] an in-kind contribution." Doc. 43-1 (Packard Depo.) at 33:15-17. As such, "it's reflected as part of the reporting that's been in place since the FCPA first was implemented." *Id.* at 34:11-13; *see also id.* at 32:4-35:21.

Defs.' Resp. to Pls.' Statement of Facts at 2-3, No. 5:11-cv-02449-JEO (N.D. Ala. May 27, 2014), ECF No. 49 (alterations in original).

But leaving aside the implausibility of Alabama's assertion, the issue is no more than a final attempt to throw sand in this Court's eyes. Even accepting this assertion would change nothing about the central First Amendment issue at stake, the conflict in the circuits, or the cert-worthiness of this case.

II. THE CONFLICT IS REAL AND THE DECISION BELOW UNJUSTIFIABLY INFRINGES FUNDAMENTAL RIGHTS OF ASSOCIATION AND SPEECH.

Alabama's diversionary maneuvers seek to displace this Court's focus from the actual posture of the case. Had any of these already-litigated "factual" issues been of any relevance below, the Eleventh Circuit would not have found a need to devote the bulk of its legal analysis, six pages, to grappling with the way in which the courts of appeals have "split" in deciding whether hybrid PACs with segregated bank accounts can be restricted in the contributions they may receive for independent spending. Pet. App. 17a. That is the question squarely presented here, despite Alabama's none-too-subtle effort to obscure it.

As the petition noted, the conflict is even deeper than the Eleventh Circuit appreciated. Alabama tries to avoid an entire edifice of First Amendment law and federal election practice built upon the decisions 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 former concluded that hybrid PACs "are entitled to make their expenditures – such as . . . get-out-the-vote

efforts . . . – out of a soft-money or general treasury account that is *not subject to source and amount limits*." 581 F.3d at 12 (emphasis added). Later D.C. Circuit cases have acknowledged this holding of *Emily's List*. *See Stop This Insanity, Inc. Employee 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).

Carey then applied *Emily's List* to hold that First Amendment narrow-tailoring analysis means that a hybrid PAC has the constitutional right to receive unlimited contributions to a segregated independent expenditure account, to be used for independent spending, as long as it keeps those funds separate from funds received for candidate contributions. Any more burdensome regulatory structure, *Carey* held, was unconstitutional. *See* 791 F. Supp. 2d at 131-32. More than one hundred "*Carey* Committees" with this structure now exist in the federal system. Pet. 19-20. As the district court found, ADC followed this guidance and structured itself as a *Carey* committee at the state level – yet the Eleventh Circuit held that structure still did not give ADC a First Amendment right to receive PAC contributions for independent spending. For Alabama to suggest the holding below is not also in conflict with these D.C. Circuit decisions and the administration of the federal election laws is disingenuous.

On the merits, many good reasons lead groups to contribute funds for independent spending to other

groups, rather than spending that money themselves. As the Cato Institute's *amicus* brief describes, specialization and the division of labor apply in politics, as in economics. Any contribution limit must be proven to be, at the least, "closely drawn" and capable of surviving "exacting scrutiny," but the burden here of cutting off all PAC contributions to a grassroots political organization for independent spending is particularly severe.

The State's disclosure interest that justifies this severe burden is minimal, at best. The problems the State identifies with PAC transfers all arose when Alabama relied on an antiquated system of infrequent paper filings lodged in the Secretary of State's Office. But once the State moved in 2013 to a modern system of frequent, searchable electronic filing of campaign finance reports, anyone became able to quickly track PAC contributions through any transfers. Indeed, the State admitted as much in response to ADC's Statement of Facts below:

> 11. The changes in the Code and the introduction of the searchable database have revolutionized the ease of tracking contributions. The tedious review of hard copies no longer is necessary. With the new searchable database now in place, an interested person now can track contributions by individuals and PACs through any transfers with a few strokes on a computer keyboard. . . .

Response: Undisputed. . . .[4]

Before this Court, the State now simply declares that "the new reporting measures will not change the ultimate futility of [this] task" – without giving any explanation as to why. *See* Br. in Opp. 26.

To the extent the State's electronic filing system leaves the State with any remaining legitimate disclosure interest in regulating PAC contributions to other PACs, the First Amendment requires Alabama to achieve that interest with more closely drawn means than the "unfussy" blunderbuss of a total and complete ban on one political group contributing financial support to another. The State's "indiscriminate ban" is certainly "disproportionate" to its interest in ensuring effective disclosure. *McCutcheon*, 134 S. Ct. at 1458. Indeed, Alabama admits that the problems it once had with PAC transfers "do not crop up in many jurisdictions" because other states achieve the same purposes through less restrictive means. Br. in Opp. 3.

[4] Defs.' Resp. to Pls.' Statement of Facts at 6, No. 5:11-cv-02449-JEO (N.D. Ala. May 27, 2014), ECF No. 49.

CONCLUSION

This Court should grant certiorari to resolve a significant conflict concerning the essential rights of political groups to associate together in get-out-the-vote drives and other forms of independent political activity.

Respectfully submitted.

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MARCH 2017

ANNUAL

[SEAL] FAIR CAMPAIGN PRACTICES ACT
STATE OF ALABAMA

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Political Action Committee
Campaign Finance Report
SUMMARY FORM 1A

Please Print in Ink or Type.

Name of Political Committee (as appears on Statement of Organization)	Acronym for PAC
Address (as appears on Statement of Organization) ☐ Check box if reporting new address	
City State ZIP Code	Telephone Number

Calendar Year covered by this report. [ ] 1a

☐ Amended Annual Report

☐ Termination Report

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SECTION I – Summary of activity from last filed report through December 31 of reporting year					
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Cash Contributions					
2a	Itemized cash contributions (total from Form 2)	2a			
2b	Non-itemized cash contributions	2b			
2c	Non-itemized employee payroll contributions	2c			
2d	Total cash contributions (add lines 2a, 2b and 2c)			2d	
In-Kind Contributions					
3a	Itemized in-kind contributions (total from Form 3)	3a			
3b	Non-itemized in-kind contributions	3b			
3c	Total in-kind contributions (add lines 3a and 3b)	3c			
Receipts from Other Sources					
4a	Total itemized receipts from other sources (total from Form 4)	4a			
4b	Total non-itemized receipts from other sources	4b			
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Expenditures					
5a	Itemized expenditures (total from Form 5)	5a			
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8	Total cash contributions for year			8	
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12	Ending balance (add lines 7, 8, & 10, then subtract line 11)			12	
13	Total campaign debt (total debt owed as of December 31)	13			

As required by the Alabama Fair Campaign Practices Act, I hereby swear or affirm to the best of my knowledge and belief that the attached report(s) and the information contained herein are true and correct and that this information is a full and complete statement of all contributions, expenditures, and other required information during the applicable period of time.

Sworn to and subscribed before me this _____ day of _____ of the year _____. My commission expires the _____ day of _____ of the year _____.

Signature of Notary Public

Signature of Chairperson or Treasurer of Political Committee

Date

Print Notary's Name

FORM REVISED 4.5.2013