No. 16-832

In the Supreme Court of the United States

Alabama Democratic Conference, et al.,
Petitioners,

v.

Attorney General, State 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 THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Can a state ban monetary transfers that lead to independent expenditures, on the basis of a public misapprehension that such transfers may end up as candidate contributions?

2. Can a state ban such transfers on the basis of a concern that its own campaign-finance-disclosure website is not user-friendly enough?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a non-partisan public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Cato is committed to preserving the core First Amendment rights of speech and association. This case concerns Cato because, without searching judicial scrutiny, states will continue to place severe burdens on the ability of individuals to cooperatively produce speech, while ignoring alternative solutions that entirely avoid imposing such burdens.

SUMMARY OF ARGUMENT

And money is like muck, not good except it be spread.

–Francis Bacon, *Of Seditions and Troubles* (1625).

Though this analogy between money and manure may be a little coarse, its essential truth is as valid today as it was 400 years ago: money is only worth something because we can pass it on to someone else. Whenever people cooperate, money is on the move.[2]

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[1] Rule 37 statement: Both parties received timely notice and consented to the filing of this brief. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

[2] The cash in your wallet may have had 55 other owners in the last year alone. Gottfried Leibbrandt, The Statistics of Payments 20 (2009), *available at* http://bit.ly/2kCmQk0.

That economic fact is no less true when people cooperate to advocate on political issues. The right to speak on matters of public concern becomes "diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) (quoting *Buckley v. Valeo*, 424 U.S. 1, 65–66 (1976)). For example, to create a single television advertisement on an issue of public policy, a dollar might move from a concerned citizen to a political action committee (PAC), to an advertising agency, to a production studio to a camera operator's paycheck.

Despite the ubiquity of such transfers, Alabama has decided that one type of transfer in particular can only imply a nefarious purpose. The state bans *all* transfers of money between *all* PACs, no matter the type of committee or purpose of the transfer.

Alabama's ban represents a severe burden on effectively producing speech because different PACs—like different participants in an economy—have their own areas of expertise. Given this reality, a dollar in the hands of one may, depending on the circumstances, achieve much more than a dollar in the hands of another. Cooperation between PACs is thus a natural element of finding ways to most efficiently further their shared speech goals.

Given the harm that such a complete transfer ban imposes, none of Alabama's stated interests come close to passing constitutional muster. Both transparency concerns and the appearance of corruption—to the extent that they may be legitimate problems—could be solved in ways that avoid restricting speech. The fact that the state legislature did not even con-

sider any of these alternative methods demonstrates that it did not engage in the rigorous narrow tailoring that this Court requires. Review is warranted so that Alabama and other states do not continue to casually enact serious restrictions on the freedom to associate.

ARGUMENT

I. TRANSFER BANS ARE A SEVERE BURDEN ON COOPERATIVE ASSOCIATION

The court below suggested that Alabama's transfer ban "only marginally impact[s] political dialogue" because individual donors may still give their money directly to particular PACs. Pet. App. 25a. An analogy shows why this is simply not the case.

Suppose you are a proud alumnus who wishes to support your alma mater. You donate $1,000, trusting that the university will allocate the money to best further its goals. The university, responding to needs as they arise, eventually gives some of this money to a contractor to construct a new classroom building, some to an advertising agency to make a new recruitment brochure, some to a nearby high school as part of its community outreach, some to another university as part of a joint scholarship program, and some to its own faculty and other employees.

This multi-step process—from donor to alma mater to other recipients—makes sense, because the university is in the best position to learn and respond to its own needs. But suppose that such multi-step transfers were banned, so that each individual *donor* must, at the moment of donation, determine the best allocation of his money. Under such a regime, that donor would be required to give some of his money directly to the contractor, some to the advertising

agency, etc. This system would be a massive burden on both the donor's ability to help his university and the university's ability to help itself. Yet this is precisely the regime Alabama has imposed on those who wish to support political advocacy.

Just like in the business realm, different PACs possess different specializations. Some may focus on producing television advertisements, for example, while others have expertise in get-out-the-vote efforts. A dollar in the hands of one PAC does not create the same effect as that same dollar in the hands of another. This means that in order to cooperate and best achieve shared speech goals, reaching the optimal allocation of money across PACs is critical.

The transfer of money among PACs, as certain needs are discovered to be more acute, is how this cooperation happens. In this way, the participants in a shared project of political advocacy resemble the participants in a market, where "[t]he continuous flow of goods and services is maintained by constant deliberate adjustments, by new dispositions made every day in the light of circumstances not known the day before, by *B* stepping in at once when *A* fails to deliver." F. A. Hayek, *The Use of Knowledge in Society*, 34 Am. Econ. Rev. 519, 524 (1945).

The history behind the Alabama Democratic Conference (ADC) shows how this specialization and reallocation happens in the world of political expression. The ADC has spent decades building credibility and familiarity with the black community in Alabama. This is why it has been called "the most important black political interest group in the modern era of Alabama politics"—William H. Stewart, Alabama Politics in the Twenty-First Century 64 (2016)—and "the

most influential black group in the state." Jack Bass & Walter de Vries, The Transformation of Southern Politics 77 (1995). The ADC possesses a competitive advantage in outreach to black Alabama voters that no other PAC can recreate.

Accordingly, when other issue-oriented PACs believe that their policy aims would be furthered by targeted outreach to black voters, it makes sense that they would associate with and help facilitate the ADC's efforts, rather than take on that task themselves. In such a situation, the transfer of money from one PAC to another is the best means of furthering the expressive goals of both.

And this is in fact what happened in Alabama before the present ban was imposed. Groups like the Alabama Education Association (AEA) and the Alabama Trial Lawyers Association (ATLA) were frequent donors to the ADC because they consider their political interests to align. Pet. App. 83a. The ability to make PAC-to-PAC transfers allowed these groups to survey the political landscape and respond when get-out-the-vote needs were found to be most critical. This process cannot be recreated by relying solely on non-transferable, one-time donations from individual donors. As new events arise and new information on the political landscape is gathered, "the ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to meet them." Hayek, *supra*, at 524. In most cases, those with the most knowledge of the political circumstances will be the PACs themselves.

In sum, the PAC-to-PAC ban represents a severe burden on *every* participant in the process of political

speech. Groups like the ADC do not receive contributions that would help them speak at the times when those contributions are most needed. Groups that wish to donate, like AEA and ATLA, are unable to cooperate with organizations like the ADC to effectively facilitate speech they cannot achieve on their own. And individual donors like AEA and ATLA—who the circuit court blithely assumes can donate to the ADC instead—are forced to guess where their money is most needed, rather than being able to enlist the help of PACs whose job it is to know.

II. THIS COURT'S REVIEW IS NECESSARY TO HALT THE SPREAD OF TRANSFER BANS THAT ARE NOT NARROWLY TAILORED

Alabama's transfer ban limits the ability of PACs to cooperate in making independent expenditures. Though litigants and courts may dispute the appropriate tier of scrutiny that should be applied to such a ban, the outcome is clear whatever the tier applied. At the very least, the ban on PAC-to-PAC transfers is a "contribution limit involving significant interference with associational rights," which "must be closely drawn to serve a sufficiently important interest." *Davis v. FEC*, 554 U.S. 724, 740 n.7 (2008). Under this test, states must avoid any "unnecessary abridgement of associational freedoms." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (plurality). Alabama's indiscriminate ban on all transfers between two PACs does not come close to meeting that standard in serving either of the state's proffered interests.

First, Alabama argues that its transfer ban is necessary to prevent the appearance of corruption. The circuit court accepted this argument, holding that the

ban is justified because "the appearance in Alabama was that donors were attempting to conceal donations to candidates and other groups." Pet. App. 15a n.1 (quoting the district court). Yet the ban applies not just to transfers that end up being donated to candidates, but also to transfers that end up funding independent expenditures. And "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate"—*Citizens United v. FEC*, 558 U.S. 310, 360 (2010)—a distinction that is strictly enforced by anti-coordination laws. If a donation from one PAC to another to facilitate an independent expenditure does in fact "give rise to concerns about shadowy campaign contribution activity,"—Pet. App. 26a—this is a fault of public understanding, not of the PACs themselves.

Courts must not allow the "appearance of corruption" standard to be satisfied by an unjustified public misapprehension. If such a public misapprehension is actually a problem, a far less restrictive means of fixing it would be a program of public education regarding anti-coordination laws.[3] Alabama cannot allow a misunderstanding of the law to go uncorrected and then use that very same misunderstanding to justify its own restriction of associational rights.

Second, Alabama argues that its transfer ban is needed to further the interests of transparency and disclosure. But as the petitioners have shown, the

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[3] As another matter, *amicus* is skeptical that public perception should even be used as a factor to restrict a constitutional right in the first place. *See generally* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119 (2004).

disclosure concerns that prompted the passage of the PAC-to-PAC ban have *already* been rendered moot, since Alabama transitioned from paper to electronic records soon after the law's enactment. Pet. Br. 9.

Further, even if Alabama remains concerned that "chains" of donations are hard to follow on its own website, a redesign can easily be imagined that would eliminate that difficulty. For example, Alabama could design a transparency website that gives users the option of "translating" all PAC-to-PAC transfers into individual donations. If, for example, *PAC A* donates $1,000 to *PAC B*, and half of *PAC A*'s total donations came from John Smith, such a website could tell the user that that this transfer amounts to an indirect donation of $500 from John Smith to *PAC B*, via *PAC A*. The ability to create such a website negates Alabama's contention that PAC-to-PAC transfers represent an insurmountable transparency problem.

The availability of these much easier fixes for both of Alabama's alleged state interests shows that the legislature did not take seriously this Court's admonishment that a campaign finance restriction must be the "least restrictive means" to further those interests. Instead, every indication is that the legislature enacted a blanket ban on all PAC-to-PAC transfers without considering more targeted alternatives.

Other pieces of evidence confirm this hypothesis. The transfer ban was written with such sweeping scope that the Alabama attorney general himself recently found himself in a potential Catch-22, uncertain whether Alabama law *required* donors to pass funds from a federal 527 organization through an in-state-PAC or *forbade* them from doing the same. *See* Kyle Whitmire, *Return to Sender: Strange Campaign*

Gives Back $50,000 After Questions About PAC Transfer, Al.com, May 20, 2014, http://bit.ly/2jFFxyY. The uneasy fit of the categorical ban on transfers with other campaign finance regulations demonstrates the lack of concern for proportionality with which the law was enacted.

Further evidence of this attitude comes from opinion pieces written before the law's enactment, which consistently expressed concern only with *campaign contributions*, not independent expenditures. *See, e.g.*, Bob Johnson, *Legislators Say 2007 May Be Year to Pass PAC-to-PAC Ban*, Decatur Daily, Jan. 21, 2007, http://bit.ly/2jmWo94 ("The practice of transferring campaign contributions from one political action committee, or PAC, to another has made it impossible for voters to tell where a candidate is getting the money to run his or her campaign."); Bob Blalock, *PAC Donations Drain Public Confidence in Alabama's Campaign Finance System*, Al.com, Feb. 14, 2009, http://bit.ly/2kBX2AH ("[A] complex web of PACs . . . allows donors to hide from the public their campaign contributions to candidates.").

When compared with these much more specific concerns, an outright ban on all PAC-to-PAC transfers is vastly overbroad. Indeed, this overbreadth has led commentators to suggest that the law was not actually passed to fight corruption, but rather "devised to interfere with the work of the Alabama Democratic Conference." Noah Feldman, *A Loss for Citizens United. And for Democrats.*, Bloomberg View, Sept. 29, 2016, http://bloom.bg/2kC167U.

Finally, this Court should grant review because this blunderbuss approach has not been limited to Alabama's transfer law. Just this past November,

Missouri also enacted a complete ban on PAC-to-PAC transfers. *See* Celeste Bott, *Court Challenges Likely for Photo ID, Campaign Contribution Amendments Approved by Missouri Voters*, St. Louis Post-Dispatch, Nov. 9, 2016, http://bit.ly/2jWJgfe.

Notably, the Missouri law was passed by ballot referendum rather than by legislative vote. The single up-or-down referendum proffered to Missouri voters included several other provisions besides the complete PAC-to-PAC ban. Under the take-it-or-leave-it voting method of referendums—by which voters must simply approve or reject a ballot in its entirety as presented by its sponsor—it is implausible that voters will even be cognizant of distinctions such as that between candidate contributions and independent expenditures, let alone reject a referendum for failure to respect that distinction. *See, e.g.*, Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L. J. 107, 127 (1995) ("There is no basis in the literature about initiative campaigns—or in intuitions about elections and voters more generally—to believe that voters have any detailed knowledge about the legal context surrounding the proposed initiative."). Thus, the initiative process makes it all the more likely that laws failing to respect the distinction will continue to be enacted. Only this Court's review can ultimately prevent the spread of transfer bans that infringe on core First Amendment speech.

CONCLUSION

Concerns that PAC-to-PAC transfers could irretrievably obscure the sources of a PAC's funding might have had some salience in the era of paper rec-

ords and mimeograph machines, but today they hold no weight. Banning PAC-to-PAC transfers to avoid modernizing a website is like banning home sales to avoid printing a new phonebook.

For the foregoing reasons, and those stated by the petitioner, the Court should grant a writ of certiorari and ultimately reverse the Eleventh Circuit.

Respectfully submitted,

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