No.16-832

In The
Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,

Petitioner,

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

AMICUS CURIAE BRIEF OF THE CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Competitive Politics is a nonpartisan, nonprofit organization that works to protect and defend the First Amendment rights of speech, assembly, and petition. As part of that mission, the Center represents individuals and civil society organizations, *pro bono,* in cases raising First Amendment objections to burdensome regulation of core political activity. In addition, the Center has participated as *amicus curiae* in many of this Court's most important First Amendment cases, including *McCutcheon v. Federal Election Commission,* 134 S. Ct. 1434 (2014), *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

SUMMARY OF THE ARGUMENT

Despite regulating activity at the core of the First Amendment's protections, campaign finance restrictions are governed by a sprawling, complex system of state and federal statutory and administrative regulations, augmented by a series of decisions issued by this Court. For most organizations, that law is unnavigable without the assistance of a small, specialized bar of attorneys

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amicus or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37, and all parties have consented to its filing.

steeped in the arcane rules that have come to govern political participation.

This is a troubling enough development, and one that this Court has previously decried. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010). Nevertheless, as the decision below shows, things can always get worse. In grossly misapplying this Court's existing precedents, and creating new circuit splits that further destabilize this area of the law, the decision below ensures that even campaign finance experts will find it nearly impossible to provide reliable legal advice to political participants, litigants, and legislatures.

This case presents a clean, as-applied opportunity to clarify an important question of First Amendment law and, not incidentally, to resolve the confusion that now surrounds this area of legal practice. The writ of *certiorari* ought to issue.

ARGUMENT

Seven years ago, this Court declared that "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney…or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 558 U.S. at 324. Unfortunately, as this case and a number of others demonstrate, citizens and small civil society groups must still wade through "[p]rolix" statutes governing their rights to speak and organize. *Id.* [2] This has become, in many instances, nearly

[2] The late Justice Antonin Scalia once remarked, in open court, that "campaign finance law is so intricate that [he could]n't

impossible without the advice of attorneys drawn from a small and specialized bar, of which *Amicus* and its counsel are a part. *Citizens United*, 558 U.S. at 324; *see e.g. Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1179 n.2 (D. Colo. 2014), *aff'd sub. nom Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016), *cert. denied sub. nom Williams v. Coal. for Secular Gov't*, 137 S. Ct. 173 (2016) ("Reviewing the relevant [campaign finance] statutes and constitutional provisions, Dr. Hsieh found it 'impossible' to figure out what she was supposed to do").

Now, what has become nearly impossible for average citizens is becoming increasingly difficult even for experts. This Court's opinions in this area are lengthy, and the legal standards it has announced complex. But they lay out a structure understood by the practicing bar. The Eleventh Circuit's opinion undermines that structure, and threatens further confusion. Without this Court's intervention, the cost, in chilled political activity and foregone speech, is likely to be high.

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figure it out." Tr. of Oral Argument, *McCutcheon v. Fed. Election Comm'n*, No. 12-536 (Oct. 8, 2013) at 17; *available at*: https://www.supremecourt.gov/oral_arguments/argument_transcripts/12-536_21o2.pdf.

A. This Court has consistently distinguished between contribution bans and disclosure regulations, both in the governmental interests implicated and the standard of review applied.

This case concerns a contribution ban. Ala. Code § 17-5-15(b). Such limitations are only permitted where political contributions threaten the reality or appearance "of a direct exchange of an official act for money." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014). That anticorruption interest is the "one legitimate governmental interest for restricting campaign finances." *Id.* at 1450.[3] Furthermore, independent expenditures that are not coordinated with a candidate's campaign do not implicate this interest because there is no opportunity for a direct swap of *quid* for *quo*. *Citizens United*, 558 U.S. at 357 ("[I]ndependent expenditures…do not give rise to corruption or the appearance of corruption").

By contrast, certain restrictions that "do not prevent anyone from speaking," *Citizens United*, 558 U.S. at 366 (citation and internal quotation marks omitted), are held to a lower, though still stringent

[3] The Court has also suggested that governments may restrict some forms of political giving if doing so is necessary to prevent circumvention of other contribution limits adopted to prevent corruption. *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (*per curiam*). But this interest must be proven by the government. *McCutcheon*, 134 S. Ct. at 1453 ("But each is sufficiently implausible that the Government has not carried its burden of demonstrating that the aggregate limits further its anticircumvention interest…")

standard of review. *McCutcheon*, 134 S. Ct. at 1456-1457 ("Even when the Court is not applying strict scrutiny, we still require…[the government utilize] 'means narrowly tailored to achieve the desired objective.'" (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1982))). Disclosure provisions that "provide the electorate with information about the sources of election-related spending" belong to that category. *Citizens United*, 558 U.S. at 367 (citation and internal quotation marks omitted, punctuation altered).

In either case, regulation must be based upon a record, not the talismanic invocation of an appropriate governmental interest. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden"); *also Bates v. City of Little Rock*, 361 U.S. 517, 525 (1960) ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion"). The extent of that record will necessarily vary, but the government nevertheless bears the burden of persuasion. *Shrink Mo. Gov't PAC*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). This is especially true in an as-applied context. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) ("Facial challenges are disfavored…"); *see Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (noting, in heightened scrutiny analysis, "the court must ensure that" the governmental "interest

support[] *each application* of a statute restricting speech") (Roberts, C.J., controlling op.) (emphasis in original).

Finally, courts must be on guard against laws requiring an organization to adopt "a far more complex and formalized organization," lest "some groups decide[] that the contemplated political activity [i]s simply not worth it." *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254-255 (1986) (O'Connor, J., concurring); *Citizens United*, 558 U.S. at 337-338 (noting "the First Amendment problems" with "burdensome" organizational requirements).

B. The opinion below fundamentally misapplied this Court's foundational campaign finance precedents.

Alabama does "not limit the amount of money that a person, business, or PAC may contribute directly to a candidate's campaign." Pet. App. 4a.[4] However, it is illegal "for any political action committee [PAC]…to make a contribution…to any other political action committee." Ala. Code § 17-5-15(b).

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[4] In adopting this policy, Alabama is joined by nine other states which have declined to impose limits on PAC contributions to candidates. Ind. Code Ann. § 3-9-2-1 *et seq.*; Iowa Code § 68A.501 *et seq.*; Miss. Code § 23-15-801 *et seq.*; N.D. Century Code § 16.1-08.1-01 *et seq.*; Ore. Rev. Stat. § 260.005 *et seq.*; *generally* 25 Penn. Stat.; Tex. Elect. Code § 253.001 *et seq.*; Utah Code Ann. 20A-11-1 *et seq.*; Va. Code Ann. § 24.2-945 *et seq.*. Wyoming has no limit for PAC contributions to statewide candidates. Wy. Code Ann. § 22-25-102(m); *see also* Neb. Att'y Gen. Advisory Opinion #11003 (Aug. 17, 2011).

Petitioner, a politically active organization, would like to receive PAC donations, as it has in the past, for the purpose of making independent expenditures. To do this, it has adopted a structure that has already been blessed in the federal campaign finance system. Pet. App. 7a ("[T]he ADC operated two bank accounts to keep its candidate contributions separate from its independent expenditures…."); *Carey v. Fed. Election Comm'n*, 791 F. Supp. 2d 121 (D.D.C. 2011) (approving of similar system in federal law).

The Eleventh Circuit upheld the ban, holding that the lower court's ruling was "not clearly erroneous." Pet App. 15a.[5] In doing so, the court of appeals did not seriously inquire whether the government had demonstrated that its ban was "narrowly tailored" or otherwise subject the ban to a "rigorous review." *McCutcheon*, 134 S. Ct. at 1446, 1457 (citation and internal quotation marks omitted). It instead treated the "legislature's decision about the scope of [the] law, and whether it [wa]s precise enough to carry out [the] state's" interest "with deference." Pet. App. 25a. Pursuant to this loose standard of review, the court determined that PAC-to-PAC contributions were "viewed by Alabama citizens as a tool for concealing donor identity, thus creating the appearance that" such contributions "hide corrupt behavior." *Id*.

Relying in part on an inapposite Fifth Circuit case, the court concluded that Alabama "had an anti-corruption interest in ensuring…donations facilitate

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[5] The court of appeals' use of a "clearly erroneous" standard to review an alleged First Amendment violation alone counsels in favor of granting of the writ.

only independent expenditures." Pet. App. 21a (citing *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 443 (5th Cir. 2014). Accordingly, the ADC was forced to ensure that "[d]ifferent people…control the spending decisions for the different accounts," Pet. App. 23a, as well as comply with other, future and unstated, "adequate account-management procedures." Pet. App. 22a ("We will not undertake to make an exhaustive list of necessary safeguards here…").

Each of these steps departed from this Court's campaign finance jurisprudence.

First, the court of appeals should have forced the government to carry its burden of demonstrating that its PAC-to-PAC contribution ban actually advanced the anti-corruption interest. This Court has limited that interest, explaining that legislatures "may target only a specific type of corruption—'*quid pro quo*' corruption" or "the appearance of *quid pro quo* corruption." *McCutcheon*, 134 S. Ct. at 1450-1451. "That Latin phrases captures the notion of a direct exchange of an official act for money." *Id*. at 1441.

Nevertheless, the court did not require Alabama to demonstrate that the law, as-applied to these facts, deterred the exchange of "'dollars for political favors.'" *Id*. at 1441 (quoting *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)). If anything, it found the opposite. Pet. App. 5a (Petitioner's "decision about whether to endorse a candidate is not dependent on whether a candidate contributes to" the Alabama Democratic Conference). Instead, the circuit court spoke of the corruption interest as involving poorly-defined "shadowy campaign contribution activity." Pet. App. 26a. Strictly speaking, that broad concern

implicates the government's interest in "providing the electorate with information about the sources of election-related spending," rather than concerns over *quid pro quo* arrangements. *Citizens United*, 558 U.S. at 367 (citation and internal quotation marks omitted, punctuation altered). And legislatures may further *that* interest through disclosure, not contribution bans. *Id.*; Pet App. 4a (noting Alabama's "system of disclosure that requires regular reporting of campaign contributions and spending by candidates, corporations, and PACs").[6]

In addition to its failure to properly define the anticorruption interest, the court of appeals allowed Alabama to avoid its duty to demonstrate that its ban actually furthered that interest. This would have been a challenging task in any event. It is difficult to argue that Alabama's ban is properly tailored when a similar federal ban has been declared unconstitutional. In *Carey*, the United States District Court for the District of Columbia, applying strict scrutiny, blessed a similar bifurcated arrangement. *Carey*, 791 F. Supp. 2d at 128-29. Ultimately, that court determined that "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" of creating two separate organizations. *Carey*, 791 F. Supp. 2d at 131.

In reaching a different result, the Eleventh Circuit relied, in part, upon *Catholic Leadership*

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[6] The idea that a ban on contributions serves the State's interest in revealing the identities of donors making banned contributions is unintuitive, circular, and unsupported by any authority.

Coalition. 20a-22a. In that case, Texas banned corporate contributions to candidates, a tool this Court has upheld as a proper means of combating corruption or its appearance. *See Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003) (upholding federal ban on corporate contributions as a valid use of government power in service of the anti-corruption interest). "Accordingly...Texas ha[d] a valid anticorruption interest in ensuring that a corporation" did not "use a political committee to [make a contribution]…from the corporation to a candidate." *Catholic Leadership Coal.*, 764 F.3d at 443.

But Alabama does not ban corporate contributions to candidates, nor does it ban or limit any other form of contribution that its PAC-to-PAC transfer ban helps buttress. Consequently, "the state does [not] have an anticorruption interest in ensuring th[at the relevant] donations facilitate only independent expenditures." *Catholic Leadership Coal.*, 764 F.3d at 443.[7]

Even assuming that Alabama *had* demonstrated that a ban served its anti-corruption interest, the Eleventh Circuit did not show that the ban "represents…a means narrowly tailored to achieve the desired objective," *McCutcheon*, 134 S. Ct.

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[7] Likewise, Vermont, whose laws were at issue in the Second Circuit case relied upon below, also limited contributions to candidates. *Vt. Right to Life, Inc. v. Sorrell*, 758 F.3d 118, 141 (2d Cir. 2014). In fact, given that Alabama generally permits unlimited contributions, the state has failed to demonstrate that PACs should not be able to make both independent expenditures and campaign contributions *from a single account*, assuming a sufficient disclosure regime. Petitioner's system, then, should have easily passed muster.

at 1456-1457 (citation and internal quotation marks omitted). In such circumstances, and particularly given the court's finding that Petitioner does not engage in corrupt activities related to candidate contributions, maintaining separate bank accounts is the most narrowly tailored solution to advance the government's anti-corruption interest. *McCutcheon*, 134 S. Ct. at 1456 ("In the First Amendment context, fit matters").

C. The Eleventh Circuit is not alone in fundamentally misapplying this Court's precedents, tests, and standards.

The Eleventh Circuit's ruling deserves this Court's attention, contravening as it does longstanding and fundamental precedents. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the case that directly controls, leaving to this Court the prerogative of overruling its own decisions"). But the writ is also appropriate because the decision below does not stand alone. Pet. at 15-26 (describing division among the circuit courts of appeal).

In *Vermont Right to Life, Inc. v. Sorrell*, 758 F.3d 118, heavily relied upon by the Eleventh Circuit here, the Second Circuit imposed a number of burdens upon prospective independent speakers, without proper consideration of the burdens involved. In determining whether a segregated account for unlimited independent expenditures was sufficiently independent from an organization's direct candidate contributions, the Second Circuit imposed a five-factor test that asked whether groups "share financial

resources…share employees or members[] …coordinate together on projects…receive information and advice from the same sources…[or] meet at the same time and place." *Amicus Curiae* Br. of Ctr. for Competitive Politics and Cato Inst. at 11-12, *Vt. Right to Life, Inc. v. Sorrell*, No. 14-380, *cert. denied* 135 S. Ct. 929 (2015); "A Supreme Speech Opportunity", Wall Street Journal (Jan. 8, 2015) ("If that test holds, an awful lot of nonprofit operations are in trouble…The kind of 'coordination' going on between two branches of Vermont Right to Life is no different than the ordinary operation of countless groups like the Sierra Club…"). [8] That decision unquestionably burdened political activity in Vermont. But, more importantly, because Vermont imposed strict limits on contributions to political candidates, and Alabama does not, the decision is inapplicable even on its own terms.

And more disconcertingly, the Ninth Circuit has radically narrowed *Citizens United*'s holding that a prohibition on corporate speech "is a ban…notwithstanding the fact that a PAC created by a corporation can still speak." *Citizens United*, 558 U.S. at 337. In 2015, that court imposed PAC status upon a corporation spending 0.000225% of its annual revenues on political speech. *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 569 (2015); *cf. Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012) ("The question presented in this case is whether the holding of *Citizens United* applies to Montana state law. There can be no serious doubt that it does").

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[8] *Available at*: www.wsj.com/articles/a-supreme-speech-opportunity-1420763054

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Plainly, this area of the law has become disoriented. The governmental interests supporting contribution bans have expanded, governments are increasingly permitted to impose such bans without any relevant record of corruption, and the courts have taken to allowing nearly any regulation, without serious scrutiny, in the name of undefined "transparency." This confusion, coming in an area of sensitive and fundamental First Amendment liberty, is dangerous enough. But for those campaign finance attorneys whose advice is fast becoming indispensable for speakers wishing to discuss "the most salient political issues of our day," *Citizens United*, 558 U.S. at 324, this doctrinal uncertainty makes it nearly impossible to advise clients or undertake a reasoned, advance analysis of what is and is not unconstitutional. A course correction is necessary.

Additional legal unpredictability will inevitably chill speech, as speakers find that even acknowledged experts among the practicing bar can no longer provide sound advice. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (Uncertainty regarding "basic First Amendment freedoms…operates to inhibit the exercise of those freedoms…[and] inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked") (citation and internal quotation marks omitted, punctuation altered). Such a development would come with serious consequences for First Amendment liberties and the flourishing of civil society they support. This case

presents a timely as-applied opportunity to address a number of foundational questions of campaign finance law and provide concrete guidance to the courts of appeals and the practicing bar.

CONCLUSION

For the foregoing reasons, this Court ought to grant the writ.

Respectfully submitted,

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