No. 14-391

In the
Supreme Court of the United States

STOP THIS INSANITY, INC. EMPLOYEE LEADERSHIP FUND, *et al.*,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF OF COOLIDGE-REAGAN FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Coolidge-Reagan Foundation ("CRF") is a nonprofit public interest organization dedicated to advancing First Amendment freedoms, with a particular focus on political speech and associational rights, through education, advocacy and litigation. In furtherance of its mission, CRF has instituted and participated in numerous cases before this Court and others. *See e.g., McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

CRF has an interest in this case because it involves a restriction on protected political activity -- curtailing the ability of certain entities to establish "independent expenditure"-only accounts, thereby reducing participation in the political marketplace.

CRF writes separately to underscore the flawed methodological paradigm used by the D.C. Circuit to justify this restriction. Specifically, CRF protests the court below's premise that entities should be required to demonstrate a need to exercise First Amendment rights, rather than requiring the Government to demonstrate a need to limit them.

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[1] Pursuant to S. Ct. R. 37.6, *amicus curiae* certifies that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus* or his counsel make a monetary contribution to fund the preparation or submission of this brief. Pursuant to S. Ct. R. 37.3(a), letters of consent to the filing of this brief from all parties have been filed with the Clerk of the Court.

Such a perversion of this Court's constitutional jurisprudence represents a sea change and, if unchecked, portends further abridgement of fundamental First Amendment freedoms.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's ruling below establishes a dangerous new methodology for resolving campaign finance cases. The ruling creates a circuit split concerning the right of entities to create "independent expenditure"-only accounts. Moreover, the court's justification for upholding the restrictions on protected campaign finance activities directly conflicts with this Court's precedents. This Court should grant Petitioner Stop the Insanity Inc, Employee Leadership Fund's ("STI-ELF") Petition for *Certiorari* to give these issues the careful consideration they deserve.

I. CORPORATIONS' SEPARATE SEGREGATED FUNDS REMAIN CRITICAL VEHICLES FOR PARTICIPATION IN THE POLITICAL PROCESS

This Court should grant *certiorari* because the D.C. Circuit has denied corporations' separate segregated funds ("SSFs") their fundamental constitutional rights on the grounds that they are

obsolete. This ruling sets a dangerous factual precedent, because SSFs remain a critical component of the federal campaign finance system. *Cf.* Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 65 (2013) (analyzing the tendency of lower courts to afford *stare decisis* effect to higher courts' factual findings in unrelated cases). It sets a dangerous methodological precedent, by permitting the Government to abridge constitutional rights if the court determines it is not "necessary" for an entity to exercise them, rather than based on a showing that such limitation is necessary to further an appropriate governmental interest, namely in this context, to prevent *quid pro quo* corruption. Finally, the D.C. Circuit's ruling is a dangerous constitutional precedent, because it denies SSFs the ability to establish "independent expenditure"-only ("IE-only") accounts that may solicit contributions from members of the general public, calling into question the constitutionality of separate, segregated IE-only accounts more generally.

A. Separate Segregated Funds Remain an Important Feature of Federal Campaign Finance Law

The premise of the D.C. Circuit's ruling is that because corporations may "engage in unlimited political spending," their SSFs have become nothing more than "functionally obsolete" "statutory

artifacts" not entitled to exercise constitutional rights. Pet. App. 2a, 4a (op. at 2, 4); *see also id.* at 6a (op. at 6) (holding that SSFs have become "a vintage . . . relic").

This Court's ruling in *Citizens United v. FEC*, 558 U.S. 310, 320-21 (2010), recognizes the right of corporations to directly make independent expenditures concerning federal elections and candidates. However, federal law still prohibits corporations from directly contributing to federal candidates or political party committees. 52 U.S.C. § 30118(a).

To make contributions, corporations must create "separate segregated funds" ("SSFs"), whose finances are kept strictly separate from the corporation's, *id.* § 30118(b)(2), and are treated as PACs, *id.* § 30101(4)(B). SSFs may solicit only the connected corporation's shareholders, executives, and administrative personnel, as well as their families, not the general public. *Id.* § 30118(b)(4)(A)(i). Such solicitations must be in writing, and may occur only twice annually. *Id.* § 30118(b)(4)(B).

The D.C. Circuit expresses a degree of incredulity over the fact that Stop This Insanity Inc. ("STI") "decided to form" its SSF, Petitioner STI-ELF, Pet. App. 6a (op. at 6), emphasizing that "the statutory scheme did not compel [STI] to form the segregated fund, *id.* at 8a (op. at 8); *see also id.* at 10a (op. at 9) (critiquing the "idiosyncratic and outmoded congressional arrangement," as well as the "oddity of . . . segregated funds' existence in the wake" of *Citizens United*); *id.* at 14a (op. at 12) ("We may

never know why Appellants wish to do things the hard way."). Yet forming an SSF such as Petitioner STI-ELF is the only way a corporation may make contributions to a candidate. And, despite the D.C. Circuit's intimations to the contrary, there are numerous reasons why an entity may wish to engage in the political process through contributions rather than, or in addition to, independent expenditures. Whereas independent expenditures, by definition, may not be made in association with a candidate, *see* 52 U.S.C. § 30101(17)(B), one of the main functions of a political contribution is to associate the contributor with the candidate, *see Buckley v. Valeo*, 424 U.S. 1, 22 (1976). Contribution limits "impinge on protected associational freedoms" because "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Id.*

Moreover, corporations that directly engage in independent expenditures in support of candidates may jeopardize their tax-exempt status. *See* 26 U.S.C. § 501(c)(4) (allowing non-profit organizations to claim tax-exempt status if they are "operated exclusively for the promotion of social welfare" and their net earnings "are devoted exclusively to charitable, educational, or recreational purposes").

Empirical evidence confirms the inaccuracy of the D.C. Circuit's premise. The FEC's online database reveals that over 1,600 PACs associated with corporations and other such entities are active

during the 2014 campaign cycle. *See* FEC, 2014 Committee Summary, *available at* http://www.fec.gov/data/CommitteeSummary.do (last referenced Oct. 27, 2014).[2] Thus, the First Amendment rights of PACs that are SSFs cannot be categorically dismissed on the grounds that such entities have become antiquated.

B. The D.C. Circuit Impermissibly Requires Entities to Demonstrate a Need to Exercise First Amendment Rights, Rather Than Requiring the Government to Demonstrate a Need to Limit Them.

The D.C. Circuit's ruling below also establishes a dangerous methodological precedent that conflicts with this Court's well-established standards for adjudicating the constitutionality of limits on independent expenditures. It is undisputed that federal law prohibits SSFs from soliciting members of the general public for contributions, even if such contributions would be placed in a specially segregated account used solely for subsidizing independent expenditures. 52 U.S.C. § 30118(b)(4)(A)(i).

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[2] A search was run with "committee type" specified as "Political Action Committees (PACs)—All," and "organization type" specified as "corporation." The search returned 88 pages of results, with most pages listing 20 SSFs each.

This Court repeatedly has held that the First Amendment does not permit the Government to limit independent expenditures, because whatever risk of corruption they purportedly may pose is insufficient to warrant such a direct limitation on political expression. *See generally Buckley*, 424 U.S. at 39 (invalidating limits on independent expenditures by individuals).[3] Independent expenditures are not associated with actual or apparent *quid pro quo* corruption because the "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also 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.[4]

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[3] *See also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985) ("[T]he PACs' [independent] expenditures are entitled to full First Amendment protection.") (hereafter, "*NCPAC*"); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (same for certain non-profit corporations); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614 (1996) ("*Colorado I*") (same for political parties); *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (same for all domestic corporations).

[4] *Accord Colorado I*, 518 U.S. at 616 (holding that a political party committee's independent expenditures are constitutionally protected because "the absence

Based on these rulings, the consensus among the circuits is that, because the Government may not limit the amount of independent expenditures a person makes, restricting the amount that people may contribute to make independent expenditures collectively through a political committee would violate First Amendment associational rights. "To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views . . . while placing none on individuals acting alone, is clearly a restraint on the right of association." *Citizens Against Rent Cont./Coalition for Fair Hous. v. Berkeley*, 454 U.S. 290, 296 (1981).

One of the most notable rulings to this extent came from the D.C. Circuit itself, sitting *en banc*, which held:

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

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of prearrangement and coordination . . . help[s] to alleviate any danger that a candidate will understand the expenditure as an effort to obtain a quid pro quo") (quotation marks omitted); *NCPAC*, 470 U.S. at 498 ("[I]ndependent expenditures by political committees" have "no tendency . . . to corrupt or to give the appearance of corruption."); *see also Citizens United*, 558 U.S. at 357.

> 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.' . . . ***[T]he government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.***

SpeechNow.org v. FEC, 599 F.3d 686, 695-96 (D.C. Cir. 2010) (en banc) (emphasis added); *see also Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013) (holding that, because an IE-only committee has an unlimited right to "engag[e] in . . . advocacy" through independent expenditures, the Government may not indirectly restrict such communications by limiting the committee's ability to "seek[] funds to engage in that advocacy").[5]

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[5] *Republican Party v. King*, 741 F.3d 1089, 1096-97 (10th Cir. 2013) ("Because there is no corruption interest in limiting independent expenditures, there can also be no interest in limiting contributions to non-party entities that make independent expenditures."); *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011) ("[A]fter *Citizens United* there is no valid governmental interest sufficient to justify imposing limits on fundraising by independent-expenditure organizations."); *Long Beach Area Chamber of Comm. v. City of Long Beach*, 603 F.3d 684, 696, 698 (9th Cir. 2010); *N.C. Right to Life, Inc. v. Leake*, 525

And, as discussed in greater detail below, many courts have taken the next logical step, holding that when a committee makes both contributions and independent expenditures, it may establish a separate fund, free from many of the restrictions that apply to "hard money" accounts (*i.e.*, accounts from which contributions may be made), for the sole purpose of subsidizing such non-corrupting independent expenditures. *See Carey v. FEC*, 791 F. Supp. 2d 121, 126-27, 131 (D.D.C. 2011); *Republican Party v. King*, 741 F.3d 1089, 1096-97 (10th Cir. 2013); *Thalheimer v. City of San Diego*, No. 09-CV-2862-IEG (BGS), 2012 U.S. Dist. LEXIS 6563, at *38-40 (S.D. Cal. Jan. 20, 2012); *see also Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

The D.C. Circuit, however, declined to require the Government to justify its restrictions on STI-ELF's independent expenditures according to the rigorous standards that generally apply to such limitations. Rather, it held that an SSF may not invoke "the closest sort of scrutiny" under the First Amendment because it can simply have its connected corporation engage in speech on its behalf. Pet. App. 10a (op. at 9). The "critical flaw" in STI-ELF's argument, according to the D.C. Circuit, is that "[n]othing prevents [STI-ELF's connected] corporation from speaking on behalf of the PAC . . . . Moreover, independent expenditures are less burdensome

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F.3d 274, 293 (4th Cir. 2008); *see also N.Y. Prog. & Prot. PAC v. Walsh*, 733 F.3d 483, 487 n.1 (2d Cir. 2013).

through the corporate alternative." *Id.* at 8a (op. at 7). The court later reiterates that, if an SSF "is unable to speak on an issue or candidate of concern, the [connected] Corporation can [do so], making any burden 'merely theoretical,' rather than substantial." *Id.* at 11a (op. at 10) (quoting *Buckley*, 424 U.S. at 19).

The D.C. Circuit's reasoning presents a startling new methodology for adjudicating campaign finance cases that is directly at odds with this Court's well-established precedents. Rather than requiring the Government to establish a compelling need to limit an entity's independent expenditures, *see Buckley*, 424 U.S. at 44-45, the D.C. Circuit held that STI-ELF's right to engage in such expenditures is somehow diminished because its affiliated corporation may speak on its behalf. The simple fact that alternate avenues for expression or association may exist has never been held, in itself, to warrant applying a lower level of scrutiny to restrictions relating to independent expenditures. And an entity's right to engage in "core" First Amendment activities, *Colorado I*, 518 U.S. at 616, does not depend on whether other, albeit related, entities are willing and available to engage in such expression on its behalf. The D.C. Circuit deprived STI-ELF of the protection of strict scrutiny review for its First Amendment rights simply because it purportedly had alternate avenues for conveying its desired message. This not only led to an incorrect ruling in this case, but is a dangerous precedent for future cases and flatly at odds with this Court's

independent expenditure jurisprudence. This Court should grant *certiorari* to consider this issue on the merits.

C. Separate Segregated Funds Have As Much of a Constitutionally Protected Interest as Other PACs In Establishing "Independent Expenditure"-Only Accounts

After employing an incorrect methodology and choosing the wrong level of scrutiny, the D.C. Circuit ultimately reached an incorrect conclusion that not only violates the constitutional rights of SSFs but, as discussed in the Parts that follow, creates a circuit split and directly conflicts with this Court's precedents. The court held that an SSF may not solicit members of the general public to contribute to an IE-only account that is entirely quarantined from its general hard-money account (from which the SSF makes contributions). Pet. App. at 2a (op. at 10, 12). And such a prohibition is constitutionally permissible ***solely*** because it purportedly will result in greater public disclosure of information about contributions to the corporation and SSF. *Id*. at 13a (op. at 12).

Even assuming that restrictions on solicitations by SSFs, including solicitations for putative IE-only accounts, should be subject only to intermediate or heighted scrutiny, the D.C. Circuit's reasoning still fundamentally inverts this Court's First Amendment jurisprudence. A restriction on

First Amendment rights may pass heightened scrutiny only if it furthers "a sufficiently important interest" and is "closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25 (quotation marks omitted); *accord McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) and *California Medical Assn v. FEC*, 453 U.S. 180, 203 (1981) (Blackmun, J., concurring) ("contributions to political committees can be limited only if those contributions implicate the governmental interest in preventing actual or potential corruption, and if the limitation is no broader than necessary to achieve that interest."). And the only interests this Court has recognized as sufficiently weighty to warrant the imposition of contribution limits are preventing *quid pro quo corruption*, and circumvention of base limits. *Buckley*, 425 U.S. at 26-27; *Citizens United*, 558 U.S. at 359 (reiterating that the Government's ability to restrict First Amendment rights to combat corruption is "limited to *quid pro quo* corruption"); *McCutcheon*, 134 S. Ct. at 1450-51.

Neither court below made any factual findings or offered any explanation as to how permitting SSFs to solicit members of the public—either in general, or specifically to raise funds for separate IE-only accounts—would lead to *quid pro quo* corruption or circumvention of base limits. And neither court below made any factual findings or offered any explanation as to why solicitations by SSFs for IE-only accounts raise corruption or anti-circumvention concerns, but identical solicitations for identical IE-only accounts belonging to non-connected PACs do

not. Rather than basing its ruling on true anti-corruption or anti-circumvention concerns, the D.C. Circuit held that the solicitation restrictions on SSFs are a closely tailored means of furthering the Government's interest in obtaining and publicizing more information about an SSF's funding. Pet. App. at 13a (op. at 12). And again, the court below neither made any factual findings nor offered any explanation as to how the availability of such information is a closely tailored means of preventing corruption.

In short, the D.C. Circuit expressly sanctioned burdening SSFs' First Amendment rights to solicit the public and engage in independent expenditures solely to prevent their connected corporations from being able to help subsidize the SSFs' operating expenses without publicly disclosing those amounts. *See* Pet. App. at 13a (op. at 11-12) ("'[T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures.'") (quoting *SpeechNow*, 599 F.3d at 698); *see also id*. at 13a (op. at 9).

Nothing in this Court's jurisprudence allows restrictions on such flimsy, "attenuated" grounds. *Colorado I*, 518 U.S. 616. And to the extent the Government has a legitimate interest in encouraging the public release of such information, enacting a law requiring the disclosure of that information is a much more direct and tailored means of achieving that goal. *Cf. Citizens United*, 558 U.S. at 362

(holding that the Government may not prohibit independent expenditures from all corporations as a means of "preventing foreign individuals or associations from influencing our Nation's political process"); *NCPAC*, 470 U.S. at 498 (invalidating prohibition on independent expenditures by PACs because, "[e]ven were we to determine that the large pooling of financial resources [by PACs] did pose the potential for corruption or the appearance of corruption," the challenged statute was "not limited to multimillion dollar war chests," but rather "appl[ied] equally to informal discussion groups that solicit neighborhood contributions"). This Court's intervention is once again necessary to enforce basic First Amendment rights concerning campaign finance.

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT CONCERNING THE CONSTITUTIONAL RIGHT OF POLITICAL COMMITTEES TO ESTABLISH SEPARATE "INDEPENDENT EXPENDITURE" -ONLY ACCOUNTS

This case is especially ripe for adjudication because it implicates a deep split among the circuits

concerning whether PACs that contribute to candidates may establish special, separate "independent expenditure"-only accounts to accept contributions solely for the purpose of subsidizing independent expenditures. As discussed above, the vast majority of circuits throughout the nation—including the *en banc* D.C. Circuit, *see SpeechNow*, 559 F.3d at 694-95— have held that, because Congress may not limit an entity's ability to engage in independent expenditure, it likewise may not limit the ability of political committees which exclusively make such expenditures (*i.e.*, they do not make political contributions or coordinated expenditures) to raise funds in order to subsidize them. *See supra* note 5 and accompanying text. "There is no difference in principle . . . between banning an organization . . . from engaging in advocacy [through independent expenditures] and banning it from seeking funds to engage in that advocacy." *Texans for Free Enter.*, 732 F.3d at 538.

Building on this analysis, many courts, including the D.C. Circuit, have held that committees which choose to exercise their fundamental First Amendment right to contribute to the candidates and political parties they support should not be forced to surrender their ability to raise unlimited funds for the purpose of subsidizing their independent expenditures. *See Emily's List*, 581 F.3d at 12 ("A non-profit that makes [independent] expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties

or candidates."). Those courts have held that a non-candidate, non-party, non-connected committee may raise unlimited funds so long as they are deposited exclusively into an independent IE-only account, which is kept strictly segregated from the "hard money" fund the committee uses to pay for contributions and coordinated expenditures.

The D.C. District Court, for example, held that "maintaining two separate accounts is a perfectly legitimate and narrowly tailored means to ensure no cross-over" between the IE-only funds and the funds for campaign contributions. *Carey*, 791 F. Supp. 2d at 131. A political committee is "free to seek and expend unlimited . . . funds geared toward independent expenditures.," so long as it "strictly segregate[s] these funds and maintain[s] the statutory limits on soliciting and spending hard money." *Id.* at 134-35.

Other courts have reached the same conclusion. In *Republican Party v. King*, 741 F.3d at 1097, for example, the Tenth Circuit agreed that a political committee had the fundamental First Amendment right to both contribute to candidates from a "hard money" account subject to contribution limits, while making independent expenditures from a separate segregated account that could accept unlimited contributions. The court explained, "[N]o anti-corruption interest is furthered as long as [the political committee] maintains an [IE-only] account segregated from its candidate contributions" and "adheres to contribution limits for donations to its candidate account." *Id.*

The Tenth Circuit later reiterated that, because the committee's contributions to candidates from its "hard money" account "do[] not alter the uncoordinated nature of its independent expenditures." *Id.* at 1101. Such independent expenditures cannot give rise to actual or apparent corruption, and therefore may not be limited. *Id.*; *see also Emily's List*, 581 F.3d at 12 (holding that, "to avoid circumvention of individual contribution limits by its donors," a political committee with a non-contribution account "simply must ensure . . that its contributions to parties or candidates come from a hard-money account"); *Thalheimer*, 2012 U.S. Dist. LEXIS 6563, at *38-39 (enjoining limit on contributions to political committees that make independent expenditures, "regardless of whether independent expenditures are the only expenditures that those committees make").

Other courts have adopted a different approach. The Second Circuit, for example, held that a political committee is not entitled to receive the same treatment with regard to its separate, segregated IE-only account as a committee that engages solely in independent expenditures. *Vt. Right to Life Comm. v. Sorrell*, 758 F.3d 118, 141 (2014). The court concluded that the establishment of such a segregated account is not "enough to ensure that there is an absence of prearrangement and coordination" between the committee and a candidate or political party. It explained, "A separate bank account may be relevant, but it does not prevent coordinated expenditures." *Id.*

The Eleventh Circuit likewise held,

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

Ala. Democratic Conf. v. Att'y Gen., 541 F. App'x 931, 935 (11th Cir. 2013).

The D.C. Circuit's opinion below exacerbates this split, calling into question the extent to which the creation of a separate, segregated IE-only account, whose funds may not be transferred into an entity's main account or used for contributions, is sufficient to alleviate potential corruption concerns. The lower court denied STI's right to establish such an account to solicit members of the public to fund its independent expenditures, solely because of STI's "connection" to a corporation. This Court should grant *certiorari* to resolve the deep and widening split concerning the constitutional status of such separate, segregated IE-only accounts; the right of entities to solicit to raise funds to pay for independent expenditures from such accounts; and determine whether entities such as STI may be prohibited from creating them.

III. THE D.C. CIRCUIT IGNORED THIS COURT'S PRECEDENTS BY PERMITTING THE GOVERNMENT TO LIMIT FIRST AMENDMENT RIGHTS TO FURTHER ITS INTEREST IN PROMOTING "DISCLOSURE"

Another crucial aspect of the D.C. Circuit's opinion that warrants careful consideration by this Court is its conclusion that the FEC's asserted interest in obtaining additional "disclosure" of information relating to corporate and PAC activities is sufficiently "'important'" and "'tailored'" to warrant restrictions on First Amendment rights. Pet. App. at 11a (op. at 10) (quoting *Buckley*, 424 U.S. at 25). As mentioned earlier, the Court held that the Government may bar SSFs from soliciting for funds for a separate, quarantined IE-only account because "'the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures.'" Pet. App. at 13a (op. at 11-12) (quoting *SpeechNow*, 599 F.3d at 698).

As recently as *McCutcheon*, 134 S. Ct. at 1450, this Court reiterated that it has "consistently rejected attempts to suppress" First Amendment rights based on "legislative objectives" other than "preventing corruption or the appearance of corruption." This Court has never held that limiting an entity's ability to make contributions, or solicit

members of the public for the purchase of subsidizing independent expenditures, is a closely tailored way of furthering the Government's anti-corruption interest.

Indeed, limiting contributions or the ability to solicit for the purpose of subsidizing independent expenditures is an extremely indirect and peculiar way of furthering a purported anti-corruption interest in obtaining more information about an entity's funding. As a practical matter, the D.C. Circuit's holding is self-defeating, for if its exhortation to petitioner to resort to "an unrestrained vehicle, in the form of the parent corporation to engage in unlimited political spending" is abided by, the result will certainly be less disclosure, not more. *See* op. at 2. If the Government truly has a valid anti-corruption interest in learning more about an entity's funds, the reasonably tailored way of achieving that goal is to require the entity to disclose more information about its funding. Completely prohibiting a corporation from making contributions, or an SSF from soliciting members of the general public, are grossly overbroad and ineffectual ways of attempting to gather more information from them. *Cf. NCPAC*, 470 U.S. at 498 ("Even were we to determine that the large pooling of financial resources by [political committees] did pose a potential for corruption or the appearance of corruption, § 9012(f) is a fatally overbroad response to that evil."). Such heavy-handed measures sweep in vastly broader swaths of constitutionally

protected conduct than is necessary to achieve the Government's asserted goals.

The D.C. Circuit's ruling is also inconsistent with the *McCutcheon* Court's treatment of disclosure requirements. *McCutcheon* recognized that "disclosure of contributions minimizes the potential for abuse of the campaign finance system." 134 S. Ct. at 1459; *see also Citizens United*, 558 U.S. at 364-71. They "often represent[] a less restrictive alternative to flat bans on certain types or quantities of speech" because they "do not impose a ceiling on speech." *McCutcheon*, 134 S. Ct. at 1459-60. Thus, under *McCutcheon*, disclosure requirements are a less burdensome means of promoting the Government's interest in combatting actual and apparent *quid pro quo* corruption.

The ruling below transmutes disclosure from being an ***alternative*** to burdensome restrictions on political contributions, expenditures, and solicitation, to a ***rationale*** for them. Such a holding is a dangerous distortion of this Court's First Amendment jurisprudence. *McCutcheon* and *Citizens United* endorsed disclosure requirements as a means of avoiding greater impositions on First Amendment rights. Attempting to bootstrap from these holdings, the panel below presents disclosure as a valid justification for such restrictions, purportedly furthering a "more robust" "anticorruption interest" than this Court's precedents recognize. Pet. App. at 12a (op. at 11).

The Government's interest in learning how much corporations subsidize their associated SSFs does

not warrant a completely unrelated prohibition on SSFs' solicitations to the general public for the purpose of funding independent expenditures—which lie at the "core" of the First Amendment, *McCutcheon*, 134 S. Ct. at 1444; *accord Buckley*, 424 U.S. at 44-45. This Court must grant *certiorari* to prevent a vague and potentially unquenchable public interest in the "disclosure" of ever-growing amounts of information from serving as a new blanket rationale for campaign finance restrictions.

IV. THIS COURT SHOULD GRANT *CERTIORARI* TO FORMALLY OVERRULE *BEAUMONT*

Finally, this Court should grant *certiorari* to take this opportunity to overturn its ruling in *FEC v. Beaumont*, 539 U.S. 146, 155-156 (2003), either entirely, or to the extent it provides a basis for restricting solicitation by SSFs. *Beaumont* upheld the statutes that prohibit corporations from making political contributions in the first place, requiring them instead to establish SSFs for that purpose. *Id.* at 150. None of the rationales underlying *Beaumont* survive *Citizens United*. First, the *Beaumont* Court recognized that the ban on corporate contributions stemmed from a desire "'for elections free from the power of money.'" *Id.* at 152 (quoting *United States v. Auto. Workers*, 352 U.S. 567, 575 (1957)). A simple desire to limit the amount of money involved in politics, or "'the skyrocketing cost of political campaigns,'" however, is insufficient to warrant

burdens on First Amendment rights. *Citizens United*, 558 U.S. at 350 (quoting *Buckley*, 424 U.S. at 28).

Second, *Beaumont* justified the prohibition on corporate contributions and severe restrictions on corporate solicitation as ways of preventing corporations from "'obtaining an unfair advantage in the political marketplace.'" *Id.* at 154 (quoting *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652, 658-59 (1990)). The "'special advantages'" corporations enjoy, such as "'limited liability, perpetual life, and the favorable treatment of the accumulation and distribution of assets,'" allow them to "'attract capital'" and obtain "'an unfair advantage in the marketplace.'" *Id.* (quoting *Austin*, 494 U.S. at 658-59).

Citizens United, however, rejected the premise that corporations should be treated differently under the First Amendment "simply because [they] are not 'natural persons.'" 558 U.S. at 343 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). It is "'rudimentary'" that "'the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.'" *Citizens United*, 558 U.S. at 351 (quoting *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)). Moreover, *Citizens United* recognized that *Buckley* "rejected the premise that the Government has an interest in 'equalizing the relative ability of individuals and groups to influence the outcome of elections.'" 558 U.S. at 350 (quoting *Buckley*, 424 U.S. at 48-49).

Third, *Beaumont* contended that severe restrictions on corporations protect "'the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.'" *Beaumont*, 539 U.S. at 154 (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982)). Again, *Citizens United* dispatched with this rationale, pointing out the indisputable and obvious facts that "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas." *Citizens United*, 558 U.S. at 351. Moreover, there is "little evidence of abuse that cannot be corrected by shareholders 'through the processes of corporate democracy.'" *Id.* at 361-62 (quoting *Bellotti*, 435 U.S. at 794)).

Finally, *Beaumont* reaffirmed that "'restricting contributions by various organizations hedges against their use as conduits for 'circumvention of [valid] contribution limits.'" *Beaumont*, 539 U.S. at 155 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 & n.18 (2001) ("*Colorado II*")). Neither *Beaumont* nor any other case, however, explains why a contribution by a corporation or its SSF is more likely than a contribution by any other PAC to constitute

impermissible circumvention. As *McCutcheon* recognized:

> [T]here is not the same risk of quid pro quo corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly. When an individual contributes to a . . . PAC, the individual must by law cede control over the funds. . . . [I]f the funds are subsequently re-routed to a particular candidate, such action occurs at the initial recipient's discretion—not the donor's.

134 S. Ct. at 1452.

If connected SSFs were permitted to raise funds like non-connected PACs, it is unclear how they would be more likely than ordinary PACs to be used as tools for circumvention. And it is unclear why members of the general public would be more likely to attempt to use them as vehicles for circumvention than the class of people from whom SSFs presently may solicit contributions: stockholders, executives, administrative personnel, and their families. 52 U.S.C. § 30118(b)(4)(A)(i).

Like *Austin*, *Beaumont*'s doctrinal underpinnings have been severely eroded and are inconsistent with this Court's modern campaign finance jurisprudence. This Court therefore should grant *certiorari* to reassess *Beaumont*'s continued validity in the wake of *Citizens United* and *McCutcheon*, concerning the validity of both the overall ban on corporate

contributions, as well as the narrower issue of whether SSFs may validly solicit people outside of § 30118(b)(4)(A)(i)'s restricted class.

CONCLUSION

For the foregoing reasons, this Court should grant *certiorari* to afford this case full consideration on the merits.

Respectfully submitted,

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