UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STOP THIS INSANTITY INC. EMPLOYEE LEADERSHIP FUND, *et al.*,	
Plaintiffs,	Civ. No. 12-1140 (BAH)
v.	
FEDERAL ELECTION COMMISSION,	OPPOSITION TO PRELIMINARY INJUNCTION
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Contrary to plaintiffs' inflamed rhetoric, this case is *not* about a corporation's First Amendment right to finance independent campaign advocacy. That right is undisputed and is not at issue here. Rather, the question presented here is whether the Constitution entitles a corporation, such as plaintiff Stop This Insanity, Inc., to finance its electoral advocacy through an accounting device that serves to conceal the corporation's political spending from the public, and enables the corporation to pressure its employees and others into funding its candidate advocacy. Because the government has an important interest in enhancing disclosure of campaign spending and preventing potential coercion of contributors, the First Amendment does not require the government to permit the mechanism plaintiffs seek.

Put more directly, Stop this Insanity, Inc. ("STI"), a non-profit corporation, has a separate segregated fund — Stop This Insanity, Inc. Employee Leadership Fund ("STIELF") — which is registered with the Federal Election Commission as a political committee. At the present time, STIELF has a single bank account into which it receives contributions that are subject to the limitations, prohibitions, and reporting requirements of the Federal Election Campaign Act. STIELF uses this account to make direct contributions to candidates. Through this lawsuit, STIELF seeks to open a second federal account — a non-contribution account — into which it would solicit unlimited individual and corporate contributions, and it would use those funds to finance independent expenditures. The Act currently prohibits STIELF from opening such an account. However, STI itself can already, consistent with existing law, solicit and spend such funds — either directly or through the creation of a separate political committee (commonly called a "PAC"). As noted, jumping through the hoops of setting up a second account under the auspices of its separate segregated fund, rather than directly raising and spending the funds itself, permits STIELF to avoid FECA's disclosure obligations and to bypass some of its anti-coercion provisions. This utterly fails to provide a valid basis to enjoin the Commission from enforcing a statutory provision that has been in place for over 35 years. Plaintiffs therefore cannot demonstrate that they are likely to succeed on the merits of their claims, and their motion for a preliminary injunction should be denied.

LEGAL AND FACTUAL BACKGROUND

I. SEPARATE SEGREGATED FUNDS AND NON-CONNECTED PACs

The Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), prohibits a corporation such as STI from contributing its general treasury funds to any federal candidate, political party, or political committee. *See* 2 U.S.C. § 441b(a); *see generally FEC v. Beaumont*, 539 U.S. 146 (2003) (upholding constitutionality of provision). This prohibition encompasses not only direct monetary contributions, but also a corporation's giving of any "indirect payment . . . , any services, or anything of value." *See* 2 U.S.C. § 441b(b)(2). FECA does, however, permit a corporation to establish and administer its own PAC, defined as a "separate segregated fund" ("SSF"). 2 U.S.C. §§ 431(4)(B), 441b(b)(2)(C). A corporation can solicit contributions to its SSF, *see* 2 U.S.C. § 441b(b)(4); 11 C.F.R. § 114.5(g), and the corporation can make contributions to candidates and political parties with the funds the SSF receives in response to such solicitations. *See* 11 C.F.R. § 114.5(f).[1] Plaintiff Stop This Insanity Inc. Employee Leadership Fund is STI's separate segregated fund or SSF.

For the most part, FECA regulates SSFs in the same way it regulates PACs that are not established by a corporation (the latter known as "non-connected" PACs). For example, every

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[1] The FECA provisions and FEC regulations relating to corporate election activity also generally apply to labor unions. For example, like corporations, labor unions may not make direct contributions, 2 U.S.C. § 441b(a), but may establish SSFs, 2 U.S.C. § 441b(b)(2)(C). Because no labor union is a party to this case, the Commission's brief focuses almost exclusively on corporations and corporate SSFs. But each of the arguments herein would apply equally to union-sponsored SSFs. *See, e.g.*, *infra* p. 24 & n.17 (discussing how plaintiffs' desired relief would facilitate coercion of contributions by corporations or unions).

PAC, whether an SSF or a non-connected PAC, must register with the FEC and periodically file public disclosure reports. 2 U.S.C. § 434(a); 11 C.F.R. § 114.5(e)(3). These reports must provide certain information regarding each of the PAC's "contributions" and "expenditures," *i.e.*, the funds it receives and spends. 2 U.S.C. § 434(b). And FECA limits contributions to any PAC to $5,000 per contributor per year. 2 U.S.C. § 441a(a)(1)(C); 11 C.F.R. § 114.5(f).

There are, however, two significant differences between the statutory provisions governing SSFs and those governing non-connected PACs. First, as an exception to the ban on corporate contributions, an SSF may have the entire costs of its "establishment, administration, and solicitation" paid directly by the SSF's sponsoring corporation. 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.5(b). These corporate payments are statutorily excluded from FECA's definitions of "contribution" and "expenditure," so SSFs need not include such payments in their reports to the Commission or otherwise disclose them to the public. *See* 2 U.S.C. §§ 431(8)(B)(vi), (9)(B)(v), 434(b); 11 C.F.R. § 114.5(e)(1). Non-connected PACs, by contrast, have no sponsoring corporation, so they must pay their administrative and solicitation costs with the ordinary contributions they receive, which are reported under 2 U.S.C. § 434(b).

Second, FECA places greater restrictions on solicitations by SSFs than on solicitations by non-connected PACs. Non-connected PACs can solicit contributions from essentially anyone who is not a foreign national or a federal contractor. *See* 2 U.S.C. §§ 441c, 441e. But an SSF can solicit contributions only from its connected corporation's owners and salaried executives (and those owners' and executives' families). *See* 2 U.S.C. § 441b(b)(4)(A)(i); 11 C.F.R. § 114.5(g)(1). There is a limited exception allowing an SSF to solicit from its connected corporation's non-executive employees, but such solicitations may be conducted only twice per year, and only pursuant to detailed statutory and regulatory provisions that limit the coercive effect of a corporation asking its employees to give it money. *See* 2 U.S.C. § 441b(b)(4)(B) (providing that solicitation can be made "only by mail addressed to . . . employees at their residence and . . . so designed that the corporation . . . cannot determine who makes a contribution of $50 or less . . . and who does not make such a contribution"); 2 U.S.C. § 441b(b)(3)(B)-(C) (requiring solicitations of employees to inform each employee "of the political purposes of such fund at the time of such solicitation" and "of his right to refuse to so contribute without any reprisal"); 11 C.F.R. § 114.6. An SSF cannot solicit contributions from the general public, *i.e.*, anyone other than the sponsoring corporation's owners, executives, and employees. *See* 2 U.S.C. § 441b(b)(4)(A)(i); 11 C.F.R. § 114.5(g)(1). "The effect of [these provisions] is to limit solicitation by . . . corporations to those persons attached in some way to it by its corporate structure." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 202 (1982).

II. "SUPER PACs" AND "NON-CONTRIBUTION ACCOUNTS"

FECA's statutory text prohibits corporations from using their general treasury funds to finance any political expenditure. 2 U.S.C. § 441b(a). As codified, this prohibition encompasses "independent expenditures," which are communications that expressly advocate the election or defeat of a federal candidate and are not made in coordination with a candidate or political party. *See* 2 U.S.C. § 431(17). It also includes "electioneering communications," which are "broadcast, cable, or satellite communication[s]" that (a) refer to a clearly identified federal candidate, and (b) are broadcast in the area where the candidate is seeking election within sixty days before the general election or thirty days before a primary election or convention. 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A)(i).

In *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Supreme Court struck down FECA's prohibition on corporation-funded campaign advocacy as a violation of the First

Amendment. The Court noted that the government has an important interest in preventing corruption, and that limiting direct contributions to candidates reduces the opportunity for actually and apparently corrupt exchanges of governmental action for campaign funds. *See id*. at 901-02, 908. But the Court held that this governmental interest is inapplicable to independent advocacy about candidates, which does not pose the same risk of corruption. *Id*. at 908-11. Thus, the Court held that corporations have a constitutional right to spend their general treasury funds on independent expenditures for or against candidates. *Id*. at 913.

Although *Citizens United* struck down the prohibition on corporate *financing* of independent speech, the Court upheld FECA's requirement that all corporation-funded electioneering be *disclosed* to the Commission and the public. Specifically, the Court upheld the FECA provision mandating disclosure of funds used to finance any broadcast communication that mentions a federal candidate in the relevant jurisdiction in the period leading up to an election. *See Citizens United*, 130 S. Ct. at 914-16. Eight Justices agreed that disclosure is "less restrictive" than a limit on spending, *id*. at 915, and is a constitutionally permissible method of furthering the public's important interest in knowing who is responsible for pre-election communications about candidates, *see id*. at 915-16. As the Court explained, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id*. at 916.

Three months later, the D.C. Circuit applied *Citizens United* to hold that FECA's $5,000 limit on contributions to PACs was unconstitutional as applied to a non-connected PAC that spent its funds only on independent advocacy and was funded only by individual contributions. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). Such PACs, the court found, present no more risk of corrupting officeholders through independent expenditures than do corporations, and so the court held that FECA's $5,000 contribution limit was not supported by a sufficient governmental interest in that context. *See id*. at 693-95. But, as the Supreme Court had done in *Citizens United*, the D.C. Circuit affirmed the constitutionality of mandatory disclosure of political spending "based on a governmental interest in 'provid[ing] the electorate with information'" about the sources of election-related funds. *Id*. at 696 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). The circuit court therefore held that the government can constitutionally require all PACs — including those exempt from limits on the contributions they receive — to report *all* of their income and spending, "no matter whether the [funds] were [given] towards administrative expenses or independent expenditures." *Id*. at 698.

After *Citizens United* and *SpeechNow*, therefore, the state of the law was that corporations were permitted to spend unlimited funds to finance independent campaign advocacy, and individuals were permitted to make unlimited contributions to non-connected PACs that made only independent expenditures — with all such unlimited spending and giving subject to disclosure requirements. The FEC subsequently issued an advisory opinion determining that these cases, when read in tandem, necessarily meant that both corporations and individuals have a constitutional right to pool their money together to finance independent expenditures. *See* FEC Advisory Op. 2010-11, http://saos.nictusa.com/aodocs/AO%202010-11.pdf (July 22, 2010). The Commission therefore found that a non-connected PAC that makes only independent expenditures — not contributions to candidates — can accept unlimited contributions from both corporations and individuals. *Id*. These PACs have come to be known as "super PACs."

The Commission similarly found, in a separate advisory opinion issued on the same day, that corporations have the right to directly establish and administer super PACs. *See* FEC Advisory Op. 2010-09, http://saos.nictusa.com/aodocs/AO%202010-09.pdf (July 22, 2010) ("Club for Growth AO"). Such corporation-established super PACs are not SSFs, *id*. at 5, so they are not bound by FECA's prohibition on soliciting the general public for contributions to SSFs, *id*. at 4.

Three weeks after the Commission issued the foregoing advisory opinions, a non-connected PAC submitted an advisory opinion request seeking permission to establish two bank accounts: one to accept individual contributions within the $5,000 limit, and one to accept unlimited individual and corporate contributions. *See* Letter from Dan Backer, Esq., to Thomasenia Duncan, General Counsel, http://saos.nictusa.com/aodocs/1148154.pdf (Aug. 11, 2010). This PAC proposed to finance contributions to candidates from the first account and independent expenditures from the second. *Id*. at 1-2. After the Commission was unable to approve an advisory opinion, the PAC and certain affiliated individuals then filed suit in this district, seeking a preliminary injunction. *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). The Court awarded the plaintiffs a preliminary injunction, finding that they were likely to succeed on the merits of their claim. *See id*. at 132. The Court relied on the D.C. Circuit's opinion in *EMILY's List v. FEC*, 581 F.3d 1 (2009), which had held (prior to *Citizens United*) that a non-connected PAC had a constitutional right to establish two accounts: one for accepting limited individual contributions for making contributions to candidates, and one for accepting unlimited contributions to finance the PAC's independent expenditures and certain other independent election activity. *See Carey*, 791 F. Supp. 2d at 129-31 (discussing *EMILY's List*, 581 F.3d at 5-8, 12). The Court thus held that, pursuant to *EMILY's List*, *Citizens United*, and

SpeechNow, a non-connected PAC must be permitted to operate a bank account to accept unlimited contributions for making independent expenditures, even if the non-connected PAC also makes contributions to candidates from a different account. *Carey*, 791 F. Supp. 2d at 132.

After the Court in *Carey* granted an injunction, the Commission entered into a consent judgment permitting non-connected PACs that make contributions to candidates to maintain a separate bank account containing unlimited individual and corporate contributions for financing independent expenditures. *See* FEC, *Statement on* Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account*, http://www.fec.gov/press/Press2011/20111006postcarey.shtml (Oct. 5, 2011). Such unlimited accounts are known as "non-contribution accounts" because PACs cannot make contributions from them.[2] *See id*.

In sum, a non-connected PAC can now (1) make contributions to candidates using funds contributed by individuals within FECA's contribution limits, and (2) finance independent expenditures from a separate non-contribution account that is exempt from contribution restrictions.[3] Similarly, a corporation can (1) make contributions to candidates from its SSF, which can accept only individual contributions subject to FECA's contribution limits, and (2) finance independent expenditures directly or through its super PAC, which is not subject to contribution limits.

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2 Plaintiffs describe these accounts as "*Carey* accounts," but that is neither a term of art nor a widely used descriptor akin to "PAC" or "super PAC."

3 Foreign nationals, government contractors, national banks, and corporations organized by authority of any law of Congress cannot contribute to such separate accounts. 2 U.S.C. §§ 441b, 441c, 441e.

III. FACTUAL BACKGROUND AND ADMINISTRATIVE HISTORY

A. The Parties

The FEC is the agency of the United States government with statutory authority over the administration, interpretation, and civil enforcement of the FECA and other federal campaign finance statutes. Congress has empowered the Commission to "formulate policy" with respect to FECA, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," 2 U.S.C. §§ 437d(a)(8), 438(a)(8); to issue advisory opinions concerning the application of FECA or the Commission's regulations to proposed transactions or activities, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce FECA, 2 U.S.C. § 437g.

Plaintiff Stop This Insanity, Inc. is a non-profit corporation incorporated in Arizona that has filed for tax-exempt status as a "social welfare" organization. (*See* Compl. ¶ 18; 26 U.S.C. § 501(c)(4).) In March 2010, STI registered with the Commission as a non-connected PAC.[4] From March through September of that year, STI raised over $470,000 in contributions and spent approximately $215,000.[5] On October 20, 2010, STI rescinded its registration as a political committee and ceased filing financial disclosure reports with the Commission.[6] STI alleges that it "has no interest in financing independent expenditures." (Compl. ¶ 12.)

As previously noted, plaintiff Stop This Insanity Inc. Employee Leadership Fund is STI's separate segregated fund. (Compl. ¶ 17.) STIELF registered with the Commission as an SSF in

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4 STI, FEC Form 1, http://query.nictusa.com/pdf/131/10030264131/10030264131.pdf (March 9, 2010). All of STI's FEC filings can be viewed at http://query.nictusa.com/cgi-bin/fecimg/?C00478024.

5 STI, FEC Form 3X, http://query.nictusa.com/pdf/001/10931540001/10931540001.pdf (Oct. 16, 2010).

6 Letter from Dan Backer, Esq., to FEC Office of General Counsel, http://query.nictusa.com/pdf/390/10030482390/10030482390.pdf (Oct. 20, 2010).

January 2012,[7] but as of June 30, 2012, it had received no contributions and had an account balance of $0.[8] STIELF alleges a desire to make direct contributions to candidates (*id.* ¶ 23), and to establish a non-contribution account that would accept unlimited individual and corporate contributions to finance independent expenditures (*id.* ¶ 28). STIELF would like to solicit unlimited contributions from STI's executives and from individuals and corporations unaffiliated with STI. (*Id.*) STIELF would also like to solicit contributions from STI's non-executive employees "as provided under 2 U.S.C. § 441b(b)(4)(B)." (Compl. ¶ 77; *see also id.* ¶ 9, Prayer for Relief ¶ 3.) STIELF intends to have some or all of its administrative and solicitation expenses paid directly by STI. (*See* Compl. ¶¶ 12, 23.)

Plaintiff Todd Cefaratti is the president of STI (Compl. ¶ 19). He would like to contribute $10,000 to STIELF to finance STI's independent expenditures. (*Id.* ¶ 26.) Plaintiff Ladd Ehlinger is not formally affiliated with STI but would like to "support" STI's independent expenditures, and STI would like to solicit him for contributions to STIELF. (*Id.* ¶¶ 21, 27.) Plaintiff Glengary LLC is a corporation incorporated in Arizona that would like to contribute $10,000 to STIELF to finance STI's independent expenditures. (*Id.* ¶¶ 20, 25).

B. STIELF'S Advisory Opinion Request

On January 4, 2012, STIELF filed with the Commission a request for an advisory opinion. (Compl. Exh. A.) This request sought the Commission's approval for STIELF's plan to solicit and accept unlimited corporate and individual contributions into a non-contribution

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[7] STIELF, FEC Form 1, http://query.nictusa.com/pdf/650/12030701650/12030701650.pdf (Jan. 4, 2012). All of STIELF's FEC filings can be viewed at http://query.nictusa.com/cgi-bin/fecimg/?C00508697.

[8] STIELF, FEC Form 3X, http://query.nictusa.com/pdf/499/12952407499/12952407499.pdf (July 13, 2012).

account without being subject to the restrictions on SSF solicitations in 2 U.S.C. § 441b(b)(4)(A)(i) and (b)(4)(B). (*Id*. at 4.)

The Commission considered two draft responses to STIELF's request. Draft A would have approved STIELF's request and would have permitted STIELF to solicit contributions to its non-contribution account from the general public. (Compl. Exh. B. at 7, 12-14.) But the draft would also have maintained the statutory restrictions on SSF solicitations to STI's non-executive employees because those restrictions serve an important governmental interest — preventing employee coercion — that no judicial opinion has called into question. (*Id*. at 9-10.)

Draft B would have concluded that neither the holdings nor the rationales of *EMILY's LIST*, *SpeechNow*, or *Carey* — all of which addressed non-connected PACs — mandated allowing SSFs to operate non-contribution accounts. (*See* Compl. Exh. C at 5-6.) This draft noted that the statutory disclosure exemption for corporate payments covering the SSF's solicitation expenses, when combined with STIELF's intention to solicit funds from the general public, would mean that significant corporate political spending would go undisclosed if the SSF could operate a non-contribution account. (*See id*. at 6, 10.)

On March 1, 2012, three FEC Commissioners voted to adopt Draft A, and three voted to adopt Draft B. (Compl. Exh. D.) Because the affirmative vote of four Commissioners is required for the Commission to render an advisory opinion, 2 U.S.C. §§ 437c(c), 437d(a)(7), the Commission was unable to render an opinion on STIELF's request.

Plaintiffs filed this suit on July 10, 2012. The Commission defends here the position of the "controlling group" of three Commissioners who declined to approve Draft A — the draft that would have provided plaintiffs the relief they sought. *Cf. FEC v. Nat'l Republican Senatorial Comm*., 966 F.2d 1471, 1476 (D.C. Cir. 1992) (explaining that when suit challenges action on which Commission deadlocked, subject of judicial review is position of controlling group of Commissioners).

ARGUMENT

I. STANDARD OF REVIEW

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. . . . [It is] never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008); *see Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). To prevail on a motion for a preliminary injunction, a plaintiff "must establish": "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20; *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009).

Plaintiffs here shoulder a particularly heavy burden because their requested relief "would alter, not preserve, the *status quo*." *Veitch v. Danzig*, 135 F. Supp. 2d 32, 35 (D.D.C. 2001). The purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011), but plaintiffs here seek to upend the status quo by preventing the Commission from enforcing a statutory provision that has been in place for over 35 years.[9] *Cf. Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (refusing to enjoin enforcement of federal statute in First Amendment challenge and noting that "[b]y seeking an injunction, applicants request that I issue an order *altering* the legal status quo") (emphasis in original). This is particularly inappropriate

[9] The SSF-related provisions at issue here were enacted in the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475, 490-92 (1976).

in the pre-election context, where "considerations specific to election cases" weigh even further against the issuance of injunctions. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (vacating lower court's injunction against enforcement of election statute and noting potential for pre-election injunctions to cause confusion among voting public).

Contrary to plaintiffs' assertion (Pls.' Mem. of L. in Support of Mot. for Prelim. Inj. at 16 (Dkt. No. 4-1) ("Pls.' Mem.")), the decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), does not alter the settled principle that a plaintiff who seeks a preliminary injunction must satisfy each of the criteria for issuance of a preliminary injunction: That principle applies regardless of the nature and source of the plaintiff's substantive claims. *Cf. Winter*, 555 U.S. at 20-22 (rejecting lower courts' modifications to preliminary injunction standard and emphasizing that "[the] *plaintiff* seeking a preliminary injunction must establish" each factor) (emphasis added). Thus, plaintiffs can prevail on their motion only by meeting their heavy burden to make a clear showing in their favor on all four of the preliminary injunction factors, *see Sherley*, 644 F.3d at 392-93 — a showing sufficient to justify bringing to a halt the enforcement of a longstanding federal election statute just as the election season approaches its peak.

II. THE COMMISSION IS LIKELY TO PREVAIL ON THE MERITS OF THIS CASE BECAUSE THE CHALLENGED STATUTORY PROVISIONS FURTHER THE IMPORTANT GOVERNMENTAL INTERESTS OF DISCLOSING THE FUNDING OF CAMPAIGN SPEECH AND PREVENTING COERCION

Plaintiffs cast their lawsuit with much hyperbole as an effort to solicit and spend unlimited individual and corporate contributions in furtherance of their First Amendment rights. But STI can already, consistent with existing law, solicit and spend such funds *directly*. In the alternative, STI can legally direct unlimited contributions to a super PAC under STI's control. To be clear, FECA's contribution limits pose no obstacle to STI's plans, a fact they choose not to acknowledge. In other words, the issue here is not *whether* STI can obtain the funds to finance its activities, but only *how*. Plaintiffs claim that STI has a First Amendment right to finance its independent expenditures through a non-contribution account of STIELF. What plaintiffs largely fail to mention, however, is that using this indirect and evasive device — and rejecting the two direct and straightforward mechanisms already freely available — would permit STI to avoid FECA's disclosure requirements. But the Supreme Court and the D.C. Circuit have made clear that the Constitution permits the government to prevent such evasion. And plaintiffs seem not even to recognize that their plan would run afoul of the FECA provisions that protect corporate employees from the potentially coercive effect of receiving solicitations from their employers — provisions whose constitutionality is not in question. These important governmental interests in providing disclosure to the public regarding electoral financing and in preventing coercive solicitation of employees are more than sufficient to deny plaintiffs' desired relief.

A. Permitting SSFs to Operate Non-Contribution Accounts Would Contravene *Citizens United* and *SpeechNow* by Facilitating Evasion of FECA's Disclosure Requirements

After devoting significant attention to the undisputed principle that STI has a constitutional right to make independent expenditures, plaintiffs discuss the true heart of their lawsuit in a single paragraph near the end of their brief. There they note that FECA does not require public disclosure of STI's payments to cover STIELF's administrative and solicitation costs, 2 U.S.C. § 441b(b)(2)(C), and plaintiffs explain that they intend to apply this exception to STI's payments for the administration and solicitation costs of STIELF's non-contribution account. (*See* Pls.' Mem. at 30-31.) Left unstated, however, are the implications of this plan. Plaintiff's devised plan would conceal not only the sources — but also the very existence — of STI's payments to finance political communications to the general public. There is no constitutional basis for such concealment, which is directly contrary to the analyses of political disclosure in *Citizens United* and *SpeechNow* — cases that could not have spoken more clearly to the lawfulness of mandatory disclosure of political spending.

1. Plaintiffs' Proposed Relief Would Enable Corporations to Conceal Campaign-Related Spending

As plaintiffs correctly note (*see* Pls.' Mem. at 30-31), the disclosure exemption for corporate payments of an SSF's costs is statutorily quite narrow. An SSF need not report payments for its "establishment, administration and solicitation" paid directly by its sponsoring corporation, in this case STI. 11 C.F.R. § 114.5(b), (e)(1). Before *Citizens United*, a corporation could lawfully engage in electoral spending only through its SSF, and the SSF could solicit funds only from its sponsoring corporations' executives, stockholders, and employees. Thus, the permissible corporate spending covered by FECA's exemption for administration and solicitation expenses involved only internal matters, *i.e.*, the SSF's solicitations from already-affiliated individuals, plus its overhead. None of that undisclosed spending paid for communications sent to the public.

This lawsuit, however, seeks to have the statutory disclosure exception swallow the rule, which it would do in two distinct ways. First, under the mechanism STI proposes, it could communicate its fundraising message to — and seek unlimited political contributions from — nearly any individual or corporation in America on behalf of STIELF without disclosing that STI paid for those solicitations or how much money it spent doing so. The distribution of such undisclosed solicitations is manifestly irreconcilable with the narrow scope of the statutory SSF exemption, which applies only to internal communications, and with FECA's disclosure provisions, which require PACs to disclose every dollar they spend and the source of those dollars. 2 U.S.C. § 434(b)(4).

Perhaps recognizing the disparity between their plans and what FECA requires, plaintiffs try to cabin the implications of their argument by noting that STI would still have to disclose any money it spends to pay for STIELF's independent expenditures. (*See* Pls.' Mem. at 31.) But this in no way mitigates the damage that would result from STI's proposal to pay for undisclosed *solicitations* of the general public — communications that can themselves support or oppose federal candidates. For example, under STI's theory, the corporation could send a solicitation to hundreds of thousands of people, urging them to donate unlimited funds to STIELF as a way to (in the words of STI's website) "stand up to Obama" because "[u]nder Obama, a tax-cheat is running the IRS . . . and a perjuring felon 'allegedly' is leading the DOJ."[10] The financing mechanism that plaintiffs seek would render this solicitation entirely exempt from the disclosure rules applicable to every other PAC engaging in similar electioneering.

In contrast, if STI were to create and operate a super PAC — as it is currently permitted to do (*see* Club for Growth AO) — plaintiffs could conduct all of their desired activities, and there would be no disclosure evasion. STI could pay for the super PAC's administrative and solicitation expenses without limit, and the super PAC could solicit the general public for unlimited individual and corporate contributions to finance independent expenditures — *i.e.*, it could do everything STIELF wishes to do from its non-contribution account. The only

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[10] STI operates a website at www.theteaparty.net; the quotations above can be found at http://act.theteaparty.net/5507/stand-up-to-obama/ and http://act.theteaparty.net/5273/prosecute-eric-holder/ (last visited Aug. 7, 2012). There is, of course, no doubt that STI has the constitutional right to make statements such as these in the context of soliciting contributions; the only question is whether STI can do so in a way that avoids disclosing who paid for the solicitation.

difference would be that STI's payments in support of the super PAC would be disclosed to the public.[11]

Citizens United squarely contradicts the notion that the Constitution required the Commission to approve plaintiffs' disclosure-evading procedure. To the contrary, eight Justices agreed in that case that mandatory disclosure of election-related funding is a constitutionally permissible method of furthering the public's important interest in knowing who is financing campaign speech. *See id*. at 915-16. The Court therefore upheld FECA's disclosure requirements even as applied to political communications that contained no candidate advocacy but rather "only pertain[ed] to a commercial transaction," *i.e.*, soliciting the public to buy a DVD that criticized a candidate. *Id*. As the Court explained, the government's "informational interest alone is sufficient," to justify mandating disclosure regarding such campaign-related speech because "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id*.[12] This holding puts to rest any argument that STI has a constitutional right to avoid disclosing its

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[11] Alternatively, STI can solicit unlimited contributions directly and deposit them into its own treasury to finance campaign advocacy. This might result in STI meeting the criteria to become a PAC, in which case there would be even greater disclosure of its financing. *See infra* pp. 18-19.

[12] *Citizens United* reaffirmed that the proper constitutional standard for assessing disclosure requirements is intermediate scrutiny: Whether there is "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66). This is the same "lesser demand" that applies in constitutional challenges to contribution limits. *Beaumont*, 539 U.S. at 162 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000)); *see also Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010) (three-judge court), *aff'd mem.*, 130 S. Ct. 3544 (2010). Thus, intermediate scrutiny applies in this case regardless of whether it is viewed as a challenge to contribution limits or to disclosure requirements. Plaintiffs do not and cannot argue (*see* Pls.' Mem. at 16) that their challenge involves any expenditure limit that would implicate strict scrutiny. *See Citizens United*, 130 S. Ct. at 913 (striking down corporate expenditure limit).

payments for political solicitations: If the government can constitutionally mandate disclosure of who paid to advertise a DVD critiquing a candidate, the government can *a fortiori* mandate disclosure of payments to solicit funds for the purpose of expressly advocating the election or defeat of a candidate.

Second, plaintiffs' plan would help STI avoid triggering the broad disclosure requirements applicable to political committees. Under FECA, a group whose major purpose is electing or defeating federal candidates must register with the Commission as a political committee and report all of its income and expenses once it makes $1,000 in expenditures or receives $1,000 in contributions. *See* 2 U.S.C. § 431(4)(A); *Buckley*, 424 U.S. at 79. STI's plan would permit STI to evade these registration and disclosure requirements; by spending its political funds to solicit for STIELF's non-contribution account, STI's spending would not constitute a contribution or an expenditure that would trigger the $1,000 threshold for political committee status. But such avoidance is irreconcilable with *SpeechNow*'s upholding of FECA's disclosure requirements as applied to independent-expenditure-only PACs. In *SpeechNow*, the en banc D.C. Circuit relied upon *Citizens United* in unanimously affirming the constitutionality of requiring such PACs to disclose all of their income and expenses. *See SpeechNow*, 599 F.3d at 696-98. The court held that these requirements further "the public . . . interest in knowing who is speaking about a candidate and who is funding that speech," and that PAC disclosure "deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals." *Id*. at 698. Accordingly, these governmental interests "are sufficiently important . . . to justify requiring [an independent-expenditure-only committee] to organize and report to the FEC as a political committee." *Id*; *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 58-59 (1st Cir. 2011) (upholding PAC disclosure in light of government's "interest in the dissemination of information regarding the financing of political speech"), *cert. denied*, 132 S. Ct. 1635 (2012). In light of this conclusive and binding determination, there is no merit to plaintiffs' claim that the Constitution requires the government to recognize a financing mechanism that could relieve STI of the disclosure obligations applicable to all PACs.

2. There Is No Legal Basis for Permitting Corporations to Evade FECA's Disclosure Provisions

In addition to *Citizens United* and *SpeechNow*, plaintiffs rely on *EMILY's List* and *Carey* as support for allowing SSFs to open non-contribution accounts. But neither of these cases addressed disclosure at all. *EMILY's List*, 581 F.3d at 19 n.16 ("This case does not involve reporting and disclosure obligations."). And, in any event, these cases concerned *non-connected* PACs; they explicitly disclaimed addressing the constitutionality of FECA as applied to SSFs.[13] *Id*. at 8 n.7 (excluding "a committee established by a corporation" from category of entities addressed in opinion); *Carey*, 791 F. Supp. 2d at 126 n.1 (same, quoting *EMILY's List*). Plaintiffs appear to concede as much when they assert that the holdings of *EMILY's List* and *Carey* "should be *extended* to include SSFs." (Pls.' Mem. at 3 (emphasis added).) But these cases simply cannot be extended here to nullify disclosure requirements whose constitutionality has been separately affirmed by higher courts. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997)

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[13] Plaintiffs take out of context (Pls.' Mem. at 15) the Commission's statement in a Federal Register notice that "[t]he Commission agrees . . . that [*EMILY's List*] applies to SSFs as well as to nonconnected committees." FEC, *Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees*, 75 Fed. Reg. 13,223, 13,224 (Mar. 19, 2010). That statement concerned the mandate of *EMILY's List* to vacate two specific PAC regulations (not at issue here), 11 C.F.R. § 106.6(c), (f), that applied on their face to both SSFs and non-connected PACs. The Commission stated that because the court ordered the regulations to be vacated, they no longer applied to either kind of political committee. *See* 75 Fed. Reg. at 13,224 ("Although the court defined the [PACs at issue] as not including SSFs, the court explicitly ordered the District Court to 'vacate the challenged regulations' . . . in their entirety. . . . Accordingly, the Commission is removing paragraphs (c) and (f) in their entirety.").

("'[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U. S. 477, 484 (1989)); *see also United States v. Danielczyk*, 683 F.3d 611, 615-16 (4th Cir. 2012) (applying *Agostini* principle and reversing district court that had extended *Citizens United* to strike down FECA provisions Supreme Court had previously held constitutional). And plaintiffs' request to "extend" *EMILY's List* and *Carey* beyond their stated context of non-connected PACs fails to account for FECA's key provisions governing disclosure and coercion by SSFs — provisions that categorically differentiate SSFs from non-connected PACs. For all the reasons discussed above, *EMILY's List* and *Carey* cannot be extended without vitiating these provisions.

The recent decision from this district in *Van Hollen v. FEC*, --- F. Supp. 2d ----, Civ. No. 11-766, 2012 WL 1066717 (D.D.C. Mar. 30, 2012), addressed a highly analogous situation.[14] At issue there was a regulation the Commission had promulgated in response to *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*"). *WRTL* had struck down a portion of FECA's corporate electioneering prohibition, *id*. at 476-82; as a result, certain corporate activity that had not previously been permissible under FECA was rendered lawful. But Congress had not contemplated such corporate activity in enacting FECA's disclosure provisions, and the application of the literal text of those provisions to the newly permissible category of corporate electioneering seemed to lead to results that Congress would not have intended. *See Van Hollen*, 2012 WL 1066717, at *10-*11. So the Commission promulgated a disclosure regulation that, the court noted, "was specifically undertaken to address the changes wrought by *WRTL*" — to

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[14] An appeal of this decision is pending (D.C. Cir. Nos. 12-5117, 12-5118), but the Commission is not a party to the appeal.

bridge the gap between the statutory provision and the effects of *WRTL* by essentially attempting to determine how Congress would have wanted FECA's disclosure provisions to apply to corporate electioneering. *See id*. at *13. In *Van Hollen*, the Court held that the Commission did not have the authority to promulgate such a regulation. *Id*. at *15. The Court found that the disclosure provisions enacted by Congress were unambiguous on their face, and the Commission was bound to enforce the unambiguous text, even if intervening court decisions had caused such enforcement to lead to seemingly anomalous results. *Id*. at *11 (citing *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998)).

The holding of *Van Hollen* supports the decision not to grant STIELF's advisory opinion request[15] and supports a denial of the relief plaintiffs seek from this Court. Here as in *Van Hollen*, court decisions (*i.e.*, *Citizens United* and *SpeechNow*) have given rise to a category of corporate electioneering that was not contemplated by Congress when it enacted FECA's disclosure provisions. But this does not mean that the Commission or the Court can disregard or fail to give full effect to those provisions. FECA's statutory disclosure exemption for a corporation's spending in support of its SSF's solicitation costs is unambiguously limited to solicitations of the owners, executives, and employees of the corporation because those are the only kind of solicitations that SSFs can engage in. Although *Citizens United* and *SpeechNow* have changed the rules governing corporate independent spending and limits on contributions to super PACs, those decisions did not address the solicitation rules. Thus, even if plaintiffs believe that Congress might have enacted a broader disclosure exemption if it had contemplated the legal regime post-*Citizens United*, such speculation cannot trump the actual text of the existing statute,

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[15] As the Commissioners who voted to deny STIELF's advisory opinion request noted, an administrative agency generally does not have authority to find that a statute it administers is unconstitutional. (*See* Compl. Exh. C at 7 (citing, *inter alia*, *Johnson v. Robison*, 415 U.S. 361, 368 (1974), and *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995)).)

which Congress has chosen not to amend in light of recent developments. Accordingly, there is no statutory basis for concluding that spending for solicitations to the general public should be exempt from disclosure; but that would be the effect if plaintiffs were to prevail on their request to create a non-contribution account within their SSF without being bound by the solicitation restrictions applicable to SSFs. *Van Hollen* therefore refutes plaintiffs' claims that the Commission or the Court should reinterpret this unambiguous statute to facilitate STI's disclosure-avoidance scheme.

B. Preventing Corporations from Coercing Their Employees and Others into Making Unlimited Political Contributions Is a Compelling and Important Governmental Interest that Furthers First Amendment Values

FECA bans SSFs from soliciting contributions from the general public, and it places significant restrictions on solicitations directed towards the non-executive employees of the SSF's sponsoring corporation. *See supra* pp. 3-4. For example, an SSF can solicit employees only (1) by mail, (2) not at their workplace, and (3) in such a manner that the corporation "cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution." 2 U.S.C. § 441b(b)(4)(B). FECA also limits SSFs to accepting contributions of $5,000 per contributor per year. 2 U.S.C. § 441a(a)(1)(C); 11 C.F.R. § 114.5(f). The parties here agree that purpose of FECA's employee-solicitation restrictions is to prevent a corporation from levering its inherent power over such employees to coerce them into contributing to the SSF. (*See* Pls.' Mem. at 4 n.1 (citing legislative history).)[16] Yet plaintiffs' plan to solicit employees for STIELF's non-contribution account is a thinly-disguised end run around these restrictions — an evasion that must fail because the validity of FECA's anti-coercion provisions has never been called into question.

[16] The three FEC Commissioners who would have otherwise granted STIELF's advisor opinion request also agreed that these provisions serve an anti-coercion purpose. (Compl. Exh. B at 10.)

Admittedly, plaintiffs now claim that they will "abide by" the "parameters set forth at 2 U.S.C. § 441b(b)(4)(B)" (Pls.' Mem. at 3-4 & n.1), but this caveat was not presented to the Commission in STIELF's advisory opinion request. To the contrary, the request stated that STIELF wished to solicit funds "*not* subject to the restrictions of . . . 2 U.S.C. § 441b(b)(4)(B)." (Compl. Exh. A at 4 (emphasis added).) Nonetheless, even if plaintiffs' new pledge is taken at face value, there are still three ways in which their desired relief would effectively abrogate FECA's employee-protection provisions.

First, FECA limits an SSF to soliciting non-executive employees twice per year. 2 U.S.C. § 441b(b)(4)(B). It appears, however, that STIELF seeks the ability to solicit STI's employees twice per year for its non-contribution account (*see* Pls.' Mem. at 1), while also maintaining a contribution account able to solicit twice per year (*see* Compl. ¶ 23), for a total of four annual solicitations of each employee. Thus, the inherently coercive pressure of a corporation asking its employees to give money would, in plaintiffs' scenario, be literally double that which Congress has deemed maximally permissible. Second, and more significantly, FECA limits SSFs to accepting $5,000 per contributor per year, so $5,000 is currently the most a corporation can ask an employee to give. But if plaintiffs were granted their relief, STI would be able to solicit unlimited funds from each employee, as there are no limits on contributions to independent-expenditure-only committees. Whatever coercive effect might result from asking an employee to give a legally limited amount, asking her to give all she can afford places a greater quantitative burden — well beyond the level Congress has approved. Third, FECA contains two anti-coercion provisions in addition to section 441b(b)(4)(B): A corporation must inform each employee it solicits "of the political purposes of [the SSF]" and "of his right to refuse to so contribute without any reprisal." 2 U.S.C. § 441b(b)(3)(B)-(C). Plaintiffs have conspicuously *not* pledged to abide by these restrictions when soliciting from their non-contribution account (*see* Pls.' Mem. at 1, 3-4, 12 (noting intention to comply with section 441b(b)(4))), and so it is unclear whether they would consider themselves free to disregard these provisions when engaging in their otherwise unlimited and unrestricted employee solicitations.

FECA's employee-protection provisions are unambiguous, and there is no suggestion from plaintiffs (or in any case law of which the Commission is aware) that they bear any constitutional infirmity. Thus, for the reasons noted above regarding FECA's disclosure requirements, the Commission and the Court are bound to give the anti-coercion provisions full effect. *See supra* pp. 20-22 (discussing *Van Hollen*). Because plaintiffs' desired relief would inherently derogate these provisions, that relief must be denied.

Furthermore, plaintiffs' planned solicitations would run afoul of FECA's SSF provisions even outside the context of employees. For example, freeing SSFs to solicit from the general public would allow a corporation to solicit its suppliers to give to the corporation's SSF. Enormous numbers of companies and individuals in the United States owe their livelihoods to major corporate buyers. *See, e.g.*, Tom Van Riper, *The Wal-Mart Squeeze*, Forbes (Apr. 24, 2007), http://www.forbes.com/2007/04/23/walmart-suppliers-margins-lead-cx_tvr_0423walmart.html. If such a buyer were to solicit its suppliers for political contributions, the financial coercion inherent in such solicitations would be qualitatively and quantitatively equivalent to solicitations of employees (who are similarly financially dependent on the soliciting corporation).[17] The primary statutory provision that prevents such coercion is section 441b(b)(4)(A)(i) — the very provision that plaintiffs seek to have voided as applied to STIELF.

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[17] Similarly, plaintiffs' proposal to solicit from the general public might enable a labor union (*see supra* p. 2 n.1) to pressure the corporations that employ the union's members into contributing to the union's SSF.

(Pls.' Mem. at 38.) But the Supreme Court upheld the constitutionality of this statute in *National Right to Work*, 459 U.S. at 206-11, and, contrary to plaintiffs' assertion (Pls.' Mem. at 32-33), *Citizens United* did not call that holding into question. *See* 130 S. Ct. at 909 (noting that *National Right to Work* involved provisions different from those struck down in *Citizens United*). There is, therefore, no basis in law for plaintiffs' claims that STIELF has a First Amendment right to disregard FECA's solicitation provisions.

III. PLAINTIFFS FACE NO COGNIZABLE HARM DURING THE PENDENCY OF THIS CASE

In addition to showing probable success on the merits of their case, plaintiffs must also demonstrate a likelihood — not merely a possibility — that they will suffer irreparable harm without injunctive relief. *Winter*, 555 U.S. at 22. "[T]he injury must be . . . actual and not theoretical . . . [and] of such imminence that there is a 'clear and present' need for equitable relief . . . ." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). To meet this requirement, "[a] litigant must do more than merely *allege* the violation of First Amendment rights." *Wagner v. Taylor*, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (emphasis in original) (discussing *Elrod v. Burns*, 427 U.S. 347 (1976)); *NTEU v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991) ("A preliminary injunction is not appropriate . . . 'unless the party seeking it can demonstrate that First Amendment interests are either threatened or in fact being impaired at the time relief is sought.'") (quoting *Wagner*, alterations omitted). If plaintiffs make "no showing of irreparable injury, 'that alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." *Hicks v. Bush*, 397 F. Supp. 2d 36, 40 (D.D.C. 2005) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)).

STI and STIELF allege that they are being harmed because they would like to solicit and receive unlimited contributions to finance independent expenditures. (*See* Pls.' Mem. at 33-34.)

But STI can do these things *right now*: There is literally no FECA provision in effect that would prohibit STI from soliciting unlimited individual and corporate contributions and using those contributions to pay for express candidate advocacy. *See supra* pp. 6-7 (discussing Club for Growth AO). Or, if STI for whatever reason wishes to conduct its advocacy indirectly, it can establish and operate a super PAC to engage in exactly the same activity. Plaintiffs provide no explanation of how these options are in any way deficient in comparison to their preferred disclosure-evasion mechanism. And even if plaintiffs were to plead such a deficiency, it would not constitute *irreparable harm*, for nothing plaintiffs might conjure would change the fact that STI can solicit and pay for its 2012 election advertising without limit.

Furthermore, plaintiffs' purported need for urgent relief is belied by their delay in bringing this action. The Commission deadlocked on STIELF's advisory opinion request on March 1, 2012 — approximately 250 days before the general election. This suit was not filed until July 10, more than four months after it became ripe, and less than 120 days before the election. Plaintiffs' unexplained delay in filing suit casts serious doubt on the genuineness of their newfound (and self-created) urgency. *See Tenacre Foundation v. INS*, 78 F.3d 693, 695 n.2 (D.C. Cir. 1996) (finding that seven-month delay before filing suit "undermines any assertions that [plaintiff] will suffer irreparable harm if the Court does not grant preliminary injunctive relief"); *cf. Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) ("[Plaintiff's] cries of urgency are sharply undercut by its own rather leisurely approach to the question of preliminary injunctive relief.").

IV. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH AGAINST ENJOINING ENFORCEMENT OF FECA'S DISCLOSURE AND ANTI-COERCION PROVISIONS

The balance of equities and the public interest weigh heavily in favor of preserving the status quo and denying plaintiffs' request for extraordinary injunctive relief.

In evaluating any request to enjoin the enforcement of a federal statute, "[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of [the government] in balancing hardships." *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) (internal quotation marks omitted); *cf. United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) (holding that "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute" by enjoining its enforcement). That presumption is at its apex here, because the Supreme Court has already determined that the disclosure statutes that plaintiffs seek to evade are constitutional. *See Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 90 (D.D.C. 2006) (three-judge court) ("To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court . . . , the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.") (internal quotation marks omitted). And given plaintiffs' four-month delay in bringing this case, the balance of equities weighs even further against an injunction. *See Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) ("[Plaintiffs'] delay is . . . quite relevant to balancing the parties' potential harms. Since an application for preliminary injunction is based upon an urgent need for the protection of a Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required.") (internal quotation marks and brackets omitted). Finally, as discussed above, the disclosure and anti-coercion provisions are critical pieces of FECA's SSF-regulation regime; enabling their evasion would therefore substantially injure the public interest. *See Christian Civic League*, 433 F. Supp. 2d at 90; *see also Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 352 (4th Cir.

2009) (upholding denial of pre-election preliminary injunction), *vacated on other grounds*, 130 S. Ct. 2371 (2010).

CONCLUSION

STI can lawfully solicit unlimited corporate and individual contributions to finance campaign advertising; FECA merely requires that such activity be fully disclosed to the public and conducted without placing unduly coercive pressure on vulnerable donors. Nothing in *Citizens United*, *SpeechNow*, or any other case plaintiffs cite casts doubt on the validity of these requirements. Thus, and for all of the foregoing reasons, plaintiffs' motion for a preliminary injunction that would enable them to circumvent FECA's disclosure and anti-coercion protections should be denied.

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