No. 14-____

IN THE

Supreme Court of the United States

STOP THIS INSANITY, INC., *et al.*,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

PATRICIA E. ROBERTS
WILLIAM & MARY LAW SCHOOL APPELLATE AND SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

DAN BACKER
DB CAPITOL STRATEGIES PLLC
203 South Union Street
Suite 300
Alexandria, VA 22314
Telephone: 202-210-5431

TILLMAN J. BRECKENRIDGE*
TARA A. BRENNAN
REED SMITH LLP
1301 K Street, NW
Washington, DC 20005
Telephone: 202-414-9200
Facsimile: 202-414-9299
tbreckenridge@reedsmith.com

*Counsel of Record

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a political committee that makes highly restricted direct contributions has a First Amendment right to engage in unrestricted non-contribution activities through a separate and segregated non-contribution account.

2. Whether the First Amendment forbids a government from restricting political speech based on the disclosure interest—an interest in providing the electorate with information about the sources of election-related spending—including when a more narrowly tailored remedy is available.

PARTIES TO THE PROCEDINGS

The Petitioners are Stop This Insanity, Inc., Stop This Insanity, Inc. Employee Leadership Fund, and Glengary Inc. Petitioners were plaintiffs and appellants below.

The Respondent is the Federal Election Commission, which was defendant and appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

Statutes

Regulations

TABLE OF AUTHORITIES (CONTINUED)

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Stop This Insanity, Inc. ("STII") and Stop This Insanity, Inc. Employee Leadership Fund ("ELF") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 761 F.3d 10 and is reproduced at page 1a of the appendix to this petition ("App."). The opinion of the District Court is reported at 902 F.Supp.2d 23 and reproduced at App. 15a.

JURISDICTION

The judgment of the D.C. Circuit was entered on August 5, 2014. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes is set forth in the appendix to this petition. App. 71a.

INTRODUCTION

This case presents questions of exceptional importance on the political speech rights of the majority of all PACs. The Fifth Circuit recently opined that contributions designated solely for use in independent expenditures[1] by hybrid PACs "appears

[1] An "independent expenditure" means "an expenditure by a person—(A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(17).

destined to be a coming campaign-finance law battleground." *Catholic Leadership Coal. of Tex.* v. *Reisman* ("*Catholic Leadership Coalition*"), 2014 WL 3930139, at *25 (5th Cir. Aug. 12, 2014). In that case, the Fifth Circuit further deepened a circuit split already advanced by the D.C. Circuit's decision in this case.

ELF is a connected PAC—a political advocacy organization that is connected to another organization, such as a corporation or a labor union, and can make direct contributions to candidates. ELF, as a connected PAC, is not required to disclose the amount of funds for operating expenses received from the organization to which it is connected. And under the Federal Election Commission's (the "Commission") interpretation of campaign finance statutes, ELF's minor disclosure exemption allows the government to tell ELF that it cannot distribute a pamphlet or send an email to anyone outside of a "restricted class"—comprised mostly of its couple-dozen employees and their spouses—touting its political views and asking for funds to further spread its message.

ELF has sought to become a "hybrid PAC" by creating a separate bank account from that used to solicit, receive, and expend amount- and source-restricted funds from its restricted class. It would receive funds from outside its restricted class for that non-contribution account[2]—consistent with the

[2] Petitioners use the term "non-contribution account," rather than the "independent expenditure-only account" because the Commission uses the latter term in referencing Independent Expenditure-Only PACs (colloquially known as "Super PACs") and the former term in referring to the separate bank account hybrid PACs deposit contributions into "for the purposes of financing independent expenditures, other advertisements that refer to a Federal candidate, and generic voter drives." FEC STATEMENT ON *CAREY* V. *FEC*: REPORTING GUIDANCE FOR POLITICAL COMMITTEES THAT MAINTAIN A NON-CONTRIBUTION ACCOUNT (Oct. 5, 2011), http://www.fec.gov/press/press2011/20111006postcarey.shtml. Similarly, Petitioners use the terms "non-contribution expenditures," and "non-contribution activities," rather than "independent expenditures," and "independent expenditure activities," for continuity and definitional precision as these terms include independent expenditures as well as generic voter drives, etc.

existing regulatory framework created by the Commission since *Citizens United* for precisely this activity—and would engage in only non-contribution expenditures. Even if ELF was to eschew the narrow disclosure exemption it receives, and announce every penny its connected organization, STII, gives it—including contributions to its candidate-contribution activities—under the Commission's interpretation of relevant statutes, ELF still could not form this separate account to further its political speech.

Here, the D.C. Circuit agreed with the Commission—joining the Second Circuit in a conflict with the Tenth Circuit and the Fifth Circuit over whether laws capping contributions to hybrid PACs for non-contribution expenditures and other restrictions on non-contribution activities are constitutionally permissible.

Moreover, the D.C. Circuit upheld limitations involving constitutionally protected political speech rights of an organization, based on the court's wrongly-held belief that the organization's connected corporation is "an unrestrained vehicle" for *unlimited* speech. In so doing, it became the first federal

appellate court to elevate the constitutionally permissible use of disclosure to a governmental interest that, in its own right, may justify a *restriction* on speech. This reasoning conflicts with a ruling by the Fifth Circuit, and, if allowed to stand, gives Congress the power to grant a minor disclosure exemption to any individual or organization, and then restrict its ability to speak, based solely on that white elephant gift.

Over 3,000 connected PACs—constituting more than half of all federally registered PACs—are restricted from fully expressing their political views in the way individuals, other PACs, corporations, labor unions, and issue advocacy organizations can. This Court's intervention is needed to put the issues here to rest, and to provide guidance to the courts below as they wade through a host of federal and state provisions limiting the speech of different organizational forms—including hybrid PACs—relative to others. This case presents the appropriate vehicle for providing that guidance.

For these reasons and those that follow, the Court should grant the petition, and reverse the judgment below.

STATEMENT OF THE CASE

The Act And Its Effect On ELF's Speech: Under the Federal Election Campaign Act (the "Act"), a political committee ("PAC") may register as an organization called a separate segregated fund, more commonly known as a "connected PAC." 52 U.S.C. § 30118(b).[3] Connected PACs are connected

[3] On August 8, 2014, voting and election provisions located in Titles 2 and 42 of the United States Code, including the Federal Election Campaign Act, were transferred to Title 52. No statutory text was altered. The new citations are used herein.

to other organizations, such as corporations, labor unions, and membership or trade associations, and they are limited in how and from whom they may solicit political contributions, as well as in the content and character of their speech. *See* § 30118.[4]

A connected PAC cannot receive contributions from any entity, such as a corporation or union, that is not its connected organization. § 30118(a).[5] The Act also prohibits a connected PAC from soliciting the general public; it may solicit only the statutory "restricted class" of its organization, a small subset of individuals related to the connected organization, like stockholders, members, and certain categories of employees. *See* § 30118(b)(4)(A)-(C). Contributions that a connected PAC may receive from individuals—even those designated for non-contribution activities—are subject to the same restriction on contributions to any "traditional" PAC that may use them for candidate-contribution purposes: a cap of $5,000 a year. 52 U.S.C. § 30116(a)(1)(C). Using the funds acquired from the restricted class, connected PACs can engage in any political speech, including making campaign contributions subject to the

[4] In relevant part, a "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." *See* § 30101(8).

[5] The connected entity may pay for the establishment, administration, and solicitation expenses of the connected PAC, but such payments are expressly excluded from the definition of "contribution" in the Act. *See* § 30118(b)(2).

applicable limits. From these limited funds contributed by a limited selection of individuals, ELF would be expected to fund all of its speech, regardless of whether it was a candidate-contribution or a non-contribution expenditure.

Individuals and other organizations—including non-connected PACs, unions, and corporations—are not subject to these burdens on funding for non-contribution expenditures. Moreover, PACs are subject to absolute disclosure; whereas other organizational forms are subject to disclosure only on the final, distributed form of its independent expenditures.

Factual Background: ELF is one of over 3,000 connected PACs. ELF's connected organization is STII, a social welfare organization that operates as TheTeaParty.net, one of the nation's leading "Tea Party" organizations, and does not make any political expenditures or contributions. ELF was founded by employees of STII to increase civic engagement and promote their values. It does not coordinate any of its expenditure activities with candidates or political party committees or their agents.

ELF currently maintains a direct contribution bank account subject to the limitations, prohibitions, and reporting requirements of the Act. It seeks to further its own political speech on relevant issues by opening a separate non-contribution account to solicit funds from the general public to engage in non-contribution expenditures from that separate account. Compl. ¶ 28 (filed July 10, 2012). Plaintiff Glengary Inc. seeks to make contributions to ELF in excess of current statutory limits for the sole purpose of advancing ELF's ability to engage in non-

contribution expenditures. *Id.* at ¶¶ 25, 42, 69-70. Thus, a "non-contribution account" would allow ELF to solicit and receive contributions from outside of its restricted class, in any amount, and from any permissible source and use those funds for non-contribution speech, but not to provide contributions to candidates.[6] ELF does not dispute that contributions and expenditures from this account would be subject to the reporting requirements at 52 U.S.C. § 30104(a), 11 C.F.R. § 100.19, and 11 C.F.R. § 104.4. *Id.* at ¶ 2. Nor does ELF assert that the statutory exemption from the definition of "contribution" for connected organization funds paid on behalf of the connected PAC necessarily extends to non-contribution accounts. *Id.* at ¶ 12. The traditional or "restricted class" bank account would continue to be used for directly contributing to federal candidates. It also would continue to be subject to the broad restrictions on solicitation to only the restricted class, existing amount and source limits, and regular reporting requirements. *Id.* at ¶¶ 9, 23.

After this Court's decision in *Citizens United* v. *FEC*, 558 U.S. 310 (2010), and the Commission's consent settlement in *Carey* v. *FEC*, 791 F.Supp.2d 121 (D.D.C. 2011),[7] ELF believed that its First Amendment rights permit it to operate a "hybrid" PAC—one with a restricted account and a separate non-contribution account. But ELF believed that it risked prosecution under the Act if it solicited contributions from outside the restricted class, even

---

[6] Non-contribution accounts also are commonly referred to as "*Carey* accounts" by the regulated community.

[7] *See* FEC STATEMENT ON *CAREY* V. *FEC*, *supra* note 2.

if those funds were solicited into and solely used through a segregated non-contribution account consistent with existing regulations. To alleviate its concerns, ELF submitted an advisory opinion request to the Commission, AOR 2012-01. *Id.*, Ex. A. The request asked whether "a connected PAC" may establish a non-contribution account "to solicit and accept contributions from the general public, corporations, and unions not subject to the restrictions of [52 U.S.C. § 30118(b)(4)(a)(i)] and [52 U.S.C. § 30118(b)(4)(B)]." *Id.* at 1, 4. The next month, the Commission issued two opposing draft advisory opinions.

Draft Advisory Opinion A ("Draft A"), concluded that ELF could "establish a non-contribution account and solicit and accept unlimited contributions from individuals, other political committees, corporations, and labor organizations" in addition to STII and its restricted class, provided that ELF continued to adhere to the existing restrictions on soliciting employees. *Id.*, Ex. B at 2. Draft A also looked to the Commission's recent consent judgment in *Carey*, which stated that the Commission would no longer enforce regulatory provisions that "prohibit non-connected political committees from accepting contributions from corporations and labor organizations" nor "limit the amounts permissible sources may contribute to such accounts." *Id.* at 6.

That connected PACs operate differently than non-connected committees was immaterial to the constitutionally protected speech at issue. Even though connected PACs can have their operating costs paid by the connected organization, Draft A stated that the differences between the two structures did not create a different risk of *quid pro*

quo corruption or the appearance of corruption. *Id.* at 6-7. Accordingly, there was no compelling government interest in restricting ELF's ability to organize itself as a hybrid PAC that would operate one account to accept direct candidate-contributable funds from the restricted class, and a second, non-contribution account to receive unlimited contributions for independent expenditures. *Id.* at 8.

Draft Advisory Opinion B ("Draft B") emphasized the differences between connected and non-connected PACs—in particular, the connected PAC's ability to have operating costs paid by the organization to which it was connected without disclosing such costs because Congress intentionally exempted them from the definition of contribution. *Id.*, Ex. C at 6-8. Thus, the contribution restrictions purportedly were constitutionally permissible. *Id.* at 12. Draft B found the second issue, the solicitation prohibition, was moot in light of how it resolved the first. *Id.* at 13.

The Commission later certified that it failed on a vote of 3-3 to approve either of the advisory opinions. *Id.*, Ex. D at 1. Accordingly, no four-vote, binding advisory opinion was issued, and ELF remained at risk of prosecution if it operated a non-contribution account. *Id.* at ¶ 35. Even the Commission itself is divided on this issue.

Because of the Commission's failure to issue a binding advisory opinion, ELF abstained from speech during the 2012 election season in order to avoid prosecution. Due to its small restricted class and the Act's restrictions on its speech and association, ELF could not raise sufficient funds to run non-contribution expenditure campaigns. *See id.* at ¶ 38.

The Proceedings Below: In June 2012, ELF, STII, and Glengary Inc.—as well as two individuals who sought to make contributions designated for non-contribution expenditures in excess of current statutory limits to ELF[8]—filed a complaint requesting declaratory and injunctive relief to prevent the Commission from enforcing portions of the Act as applied to them.

ELF moved for a preliminary injunction shortly thereafter. *See* Pl.'s Mot. Prelim. Inj. (filed July 18, 2012). In response, the Commission moved for dismissal as a matter of law. *See* Def.'s Mot. Dismiss (filed Sept. 25, 2012).

On November 6, 2012, the district court disposed of both motions through an order denying ELF's motion for a preliminary injunction and granting the Commission's motion to dismiss. App. 15-70a. The court recognized it was "not the [c]ourt's prerogative to question the authority of" the Supreme Court's decision in *Citizens United*, but relying heavily on Justice Stevens' "piercing dissent" in *Citizens United*, ruled that "[w]hen a single entity is allowed to make both limited and direct contributions and unlimited independent expenditures, keeping the bank accounts for those two purposes separate is simply insufficient to overcome the appearance that the

[8] The two individuals were Todd Cefaratti, Director and Officer (President) of STII and a member of the restricted class; and Ladd Ehlinger, a member of the general public. *See* Compl. ¶¶ 19, 26, 27, 66-68. These individuals no longer are parties to this case as the D.C. Circuit held that it lacked jurisdiction over their claims as they "were not made through the *en banc* certification process prescribed in 2 U.S.C. § 437h." App. 5a n.1 (citing *Wagner* v. *FEC*, 717 F.3d 1007, 1016 (D.C. Cir. 2013)).

entity is in cahoots with the candidates and parties that it coordinates with and supports." App. 54-55a, 64a; *see also* App. 47a, 34-35a n.13. The court pushed further, stating that the reasoning underlying constitutional protection for hybrid PACs "is naïve and simply out of touch with the American public's clear disillusionment with the massive amounts of private money that have dominated the political system, particularly since *Citizens United*." App.55a. For that reason, it ruled that the contribution and solicitation restrictions do not violate the First Amendment, as applied to ELF. App. 67-68a.

ELF timely filed a notice of appeal on January 2, 2013. On August 5, 2014, the D.C. Circuit ruled in favor of the Commission, holding that ELF had no right to speak due to the connected PAC form being a purported "statutory artifact," and the purported fact that its connected organization, STII, "is already capable of sweeping solicitation" and "unrestrained" speech." App. 13a, 2a. The court dismissed the fact that ELF is a separate corporation with its own free speech rights, or that STII has a right *not* to speak, and even applied a lower level of scrutiny based on its belief that there no longer is a practical need to organize in this way. App. 10a ("this idiosyncratic and outmoded congressional arrangement is not deserving of the closest sort of scrutiny"). Thus, the court determined the constitutional political speech rights of an organization based on its wrongly-held belief that the organization's choice of form is not a practical vehicle for speech.

REASONS FOR GRANTING THE WRIT

This case presents critical issues for review on which the circuits are intractably divided. First, the circuits are divided on whether segregated non-contribution accounts sufficiently address any anticorruption rationale for limiting the non-contribution activities of hybrid PACs. Second, the circuits are divided on whether a disclosure interest—separate from its permissible use as a tool of anti-corruption in providing the electorate with information about the sources of election-related spending—justifies *restrictions* on hybrid PACs' non-contribution activities, and ultimately that of other organizational forms.

Moreover, the D.C. Circuit's decision conflicts with this Court's decision in *Citizens United* and others that the government cannot restrict political speech because of the speaker's organizational identity. Similarly, it conflicts with this Court's decision in *Citizens United* that non-contribution expenditures and their attendant fundraising activities do not implicate the anticorruption interest as a matter of law. Lastly, the D.C. Circuit's definition of the anticorruption interest to include within its rationale a disclosure interest runs directly counter to this Court's decision in *Citizens United* and others that the anticorruption interest is limited to *quid pro quo* corruption.

I. THE CIRCUITS ARE INTRACTABLY DIVIDED ON WHETHER A PAC THAT MAKES RESTRICTED DIRECT CONTRIBUTIONS MAY ENGAGE IN UNRESTRICTED NON-CONTRIBUTION ACTIVITIES WITH A SEPARATE ACCOUNT.

Citizens United resolved the right of corporations, unions, nonprofits, and other associations to make non-contribution expenditures without limits as to their source and amount. *Citizens United*, 558 U.S. at 345, 364-65. Courts after *Citizens United* then addressed the next logical question: whether limitations on contributions to organizations that make only non-contribution expenditures are constitutional. The courts uniformly responded by striking down such restrictions. *See Fund For La.'s Future* v. *La. Bd. of Ethics*, 2014 WL 1764781, at *7 (E.D. La. May 2, 2014) (cataloguing cases); *see also McCutcheon* v. *FEC*, 134 S.Ct. 1434, 1442 n.2 (2014) ("A 'Super PAC' is a PAC that makes only independent expenditures . . . . The base and aggregate limits govern contributions to traditional PACs, but not to independent expenditure PACs.").

Now, as recently forewarned by the Fifth Circuit, contributions designated for use in non-contribution expenditures by hybrid PACs to accounts restricted for that purpose "appears destined to be a coming campaign-finance law battleground." *Catholic Leadership Coalition*, 2014 WL 3930139, at *25. This case is that prediction realized.

The lines drawn by the circuits are twofold. First, the circuits are divided on whether the existence of a segregated non-contribution account eliminates the government's interest in preventing

actual or apparent corruption (the "anticorruption interest")—whether limited to *quid pro quo* corruption or broadly construed as including disclosure as held by the court below. *Compare Republican Party of N.M.* v. *King* ("*Republican Party of New Mexico*"), 741 F.3d 1089, 1097-1101 (10th Cir. 2013) *with Vt. Right to Life Comm., Inc.* v. *Sorrell* ("*Vermont Right to Life*"), 758 F.3d 118, 140-45 (2d Cir. July 2, 2014); *and Stop This Insanity*, App. 12-13a. Second, the circuits are divided on whether the disclosure interest justifies restrictions on hybrid PACs' non-contribution activities. *Compare Catholic Leadership Coalition*, 2014 WL 3930139, at *15-16 *and Ala. Democratic Conference* v. *Broussard* ("*Alabama Democratic Conference*"), 541 F. App'x 931, 933 (11th Cir. 2013) *with Stop This Insanity*, App. 12-13a.

A. The D.C. and Second Circuits Directly Conflict with the Fifth and Tenth Circuits on Whether Hybrid PACs Can Be Prohibited.

1. The D.C. Circuit's decision aligns with the Second Circuit in deepening a direct conflict with the Tenth Circuit's decision in *Republican Party of New Mexico* and the Fifth Circuit's decision in *Catholic Leadership Coalition* that laws capping contributions to non-contribution accounts of hybrid PACs and other restrictions are constitutionally impermissible.

The Tenth Circuit in *Republican Party of New Mexico* analyzed the constitutionality of state laws prohibiting the solicitation, contribution, and acceptance of funds greater than $5,000 to PACs—including hybrid PACs—that were designated for non-contribution expenditures. 741 F.3d at 1091.

Granting the plaintiffs' preliminary injunction, the court expressly rejected the district court's ruling in this case that a hybrid PAC's use of separate bank accounts for direct contributions and non-contribution expenditures was insufficient to overcome the appearance of *quid pro quo* corruption. *Id.* at 1101 ("*Stop This Insanity* does not offer a compelling rationale why combining two activities, neither of which by itself is corrupting, into a single entity suddenly increases the risk of real or apparent *quid pro quo corruption*.").

The court ruled that after *Citizens United*, a hybrid PAC's "direct contribution does not alter the non-coordinated nature of its *independent expenditures*; there still must be some attendant coordination with the candidate or political party to make corruption real or apparent." *Id.*[9] The court also reasoned that in any event, the government's anticorruption interest with respect to hybrid PACs was satisfied through both direct contribution limits and anti-coordination laws. *Id.* at 1097, 1101.

In its opinion, the Tenth Circuit also disagreed with the Eleventh Circuit's approach—in an unpublished disposition—of treating corruption as a fact based inquiry: "*Citizens United* did not treat corruption as a fact question to be resolved on a case-by-case basis. Instead, the Court considered whether

---

[9] *See also Lair* v. *Murry*, 871 F. Supp. 2d 1058, 1068 (D. Mont. 2012) (striking down state statute that prevented corporations from making contributions to hybrid PACs designated for independent expenditures); *Thalheimer* v. *City of San Diego*, 2012 WL 177414, at *13 (S.D. Cal. Jan. 20, 2012) (striking down contribution limit as it applied to contributions to hybrid PACs designated for independent expenditures).

independent speech is the type that poses a risk of *quid pro quo* corruption or the appearance thereof." *Id.* at 1096 n.4 (citing *Citizens United*, 558 U.S. at 360).[10] Further, the court rejected the Eleventh Circuit's suggestion that hybrid PACs could pose a unique risk of circumvention of individual contribution limits because that scenario "concerns only the control over the PAC's agenda. It does not affect the funds available in the PAC's hard-money account, which is subject to strict restrictions on the amount it may raise from a single donor and contribute to single candidate." *Id.* at 1102 n.9.

---

[10] The Eleventh Circuit, in *Alabama Democratic Conference* opinion, considered whether a ban on transfers between PACs was unconstitutional as applied to a hybrid PAC that wanted to receive funds from other PACs, which it would then deposit into a separate bank account used only for non-contribution expenditures. 541 F. App'x at 932. The court held that in the as-applied challenge, whether separate accounts eliminated all corruption concerns was a question of fact and the state had produced sufficient evidence below to withstand summary judgment and remanded the case. *Id.* at 934-36. In so holding, the court held at that stage of the proceedings, *Citizens United* did not render the law unconstitutional because "[i]n prohibiting limits on independent expenditures, *Citizens United* heavily emphasized the independent, non-coordinated nature of those expenditures, which alleviates concerns about corruption." *Id.* at 935. Thus, the court reasoned, "[w]hen 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." *Id.*

Similarly, the Fifth Circuit in *Catholic Leadership Coalition* considered facial and as applied challenges to state laws banning a type of state PAC, which made both non-contribution expenditures and direct contributions, from exceeding $500 in contributions and expenditures until sixty days after it appointed a treasurer. *Id.* at *1-5. Relying primarily on *Citizens United* and *McCutcheon*, the court struck down the 60-day, 500-dollar limit because it did not directly combat corruption and rejected the state's arguments that it was properly tailored because interested speakers had other opportunities for speaking during the 60-day period. *Id.* at *14, *16-*18 & n.27. Similarly, the court held that whatever disclosure interest the state had, it was insufficient to justify the limitation. *Id.* at *15. The court also questioned if the D.C. Circuit's expansion of the anticorruption interest to include disclosure in this case "is permissible at all," but held that in any event, it was not properly tailored as the state could address any "loopholes" by strengthening its disclosure requirements. *Id.*

The Second Circuit went the other way. In *Vermont Right to Life*, the court analyzed an as-applied challenge to a state law setting a $2,000 limit on contributions to PACs from a single source in any two-year general election cycle. 758 F.3d at 139. After finding that the PAC was a de facto hybrid PAC and not a true independent expenditure only PAC because it was enmeshed financially and organizationally with another PAC that made direct contributions,[11] the court, citing the district court's

---

[11] *But see N. Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274 (4th Cir. 2008). In *Leake*, the Fourth Circuit rejected the state's

opinion here, held that restrictions on *all* hybrid PACs could be justified because having separate accounts, while potentially relevant, "does not prevent *coordinated* expenditures—whereby funds are spent in coordination with the candidate." 758 F.3d at 141, 145.

The D.C. Circuit's decision below similarly held that restrictions on solicitations and contributions can validly prohibit a PAC from creating a non-contribution account. The court reasoned that the decision to form a connected PAC subject to these restrictions was purely voluntary and an attempt to avoid disclosure requirements. App. 8-10a; *see also* App. 5a, 12a. Conflating the rights of STII and ELF, it also asserted that nothing prevented STII from speaking on ELF's behalf or restricted amount or manner in which STII could spend money. App. 7-8a, 11a.

2. In the process, the D.C. Circuit's decision resulted in a second circuit split. The decision conflicts with the Fifth Circuit's holding in *Catholic Leadership Coalition*, and the Eleventh Circuit's ruling in *Alabama Democratic Conference* that the disclosure interest cannot justify restrictions on

similar argument that a PAC was not actually an independent expenditure committee because it was "closely intertwined" with related PACs. Rather, even if it "share[s] staff and facilities with its sister and parent entities, it is independent as a matter of law." *Id.* at 294 n.8. The court also recognized that the state was essentially requesting it to pierce the corporate veil, but it "decline[d] to do so particularly absent any evidence that the plaintiffs are abusing their legal forms or any legal authority that considers [political committees] and their sponsoring corporation as identical entities." *Id.* (quotation and marks omitted).

funds given to hybrid PACs for non-contribution expenditures. *See* App. 12-13a.

The district court here had relied on Justice Stevens's dissent in *Citizen's United* to find that the anti-corruption interest justified the restrictions at issue here. App. 47a, 55-56a. The Commission itself abandoned that rationale on appeal, instead arguing that the disclosure interest justified restrictions on solicitation and contributions. The D.C. Circuit agreed, ruling in direct conflict with this court that "the evolving technological and political landscape has altered the scope of the anticorruption interest" such that it is not so "anemic" as to be limited to *quid pro quo* corruption. App. 12a. It then characterized *McCutcheon* as "intimat[ing] disclosure is an obvious antidote to the anticorruption rationale," and defined that rationale with unprecedented breadth in holding that the disclosure interest falls within it. *See* App. 12a.

Using this newly fashioned interest, the court justified restrictions on ELF's non-contribution activities because striking them down would "stifle the government's ability to achieve [its] endeavor" in "protecting the First Amendment rights of the public to know the identity of those who seek to influence their vote." App. 13-14a. But that reasoning stood against the Eleventh Circuit's in its unpublished disposition. *Alabama Democratic Conference*, 541 F. App'x at 933 (this Court only has upheld disclosure requirements because they are "a less restrictive alternative to more comprehensive regulations of speech" and "has never held that a government interest in transparency is sufficient to justify limits on contributions or expenditures."). And the Fifth Circuit followed suit, in its precedential decision,

expressly disagreeing with the D.C. Circuit's reasoning on the disclosure interest here. *Catholic Leadership Coalition*, 2014 WL 3930139, at *15.

In sum, fundamental disagreements exist among at least four circuits regarding the constitutionality of restrictions on hybrid PACs' non-contribution activities. This level of uncertainty and patchwork constitutional protections for core political speech across the circuits confirm the urgent need for this Court's intervention.

B. The Anticorruption And Disclosure Interests Do Not Justify Restricting Non-coordinated Spending And Soliciting For Non-Contribution Expenditures.

Citizens United and *McCutcheon* clarified that there is only one governmental interest that may justify restrictions on political speech in connection with the campaign finance regime: preventing the appearance of, or actual, *quid pro quo* corruption. *Citizens United*, 558 U.S. at 359; *McCutcheon*, 134 S.Ct. at 1450-51. Mere ingratiation and access do not suffice. *Citizens United*, 558 U.S. at 359-60; *McCutcheon*, 134 S.Ct. at 1441, 1452. In distinguishing between impermissible *quid pro quo* corruption and mere ingratiation and access, the First Amendment dictates that any uncertainty be resolved in favor of protecting political speech rather than suppressing it. *McCutcheon*, 134 S.Ct. at 1451. And this Court has "consistently rejected attempts to suppress campaign speech based on other legislative objectives." *Id.* at 1450.

In *Citizens United*, the Court was unequivocal that independent expenditures are by definition not

coordinated with candidates and as a matter of law cannot lead to the appearance of *quid pro quo* corruption. *Id.* at 357, 360; *see also Am. Tradition P'ship*, v. *Bullock*, 132 S.Ct. 2490, 2491 (2012) (striking down a state law banning corporations from making expenditures in connection with a candidate or a political committee that supports or opposes a candidate or political party).

Under the logic of *Citizens United*, it follows—as even the Commission has recognized[12]—that (1) soliciting, receiving, and spending money to make non-contribution expenditures, while (2) independently making direct candidate contributions from a separate account that is separately funded and subject to amount and source restrictions does not risk the appearance of, or actual, *quid pro quo* corruption beyond the scope of the direct contributions themselves.

But any risk of *quid pro quo* corruption posed by the direct contributions already is resolved by the direct contribution limits, anti-coordination laws, and anti-bribery laws. *See Republican Party of New Mexico*, 741 F.3d at 1101 ("combining two activities, neither of which by itself is corrupting, into a single entity [does not] suddenly increase the risk of real or

---

12 Under current FEC enforcement policy, non-connected political committees and non-profit entities may engage in unrestricted independent expenditures and [for non-connected political committees] restricted direct contributions so long as they use separate accounts. *See, e.g.*, FEC STATEMENT ON *CAREY* V. *FEC*, *supra* note 2; Explanation and Justification for Final Rules on Funds Received in Response to Solicitations, 75 Fed. Reg. 13223, 13224 (Mar. 19, 2010).

apparent *quid pro quo* corruption"). Indeed, the direct contribution limits themselves are merely a prophylactic measure "because few if any contributions to candidates will involve *quid pro quo* arrangement." *McCutcheon*, 134 S.Ct. at 1458 (quoting *Citizens United*, 558 U.S. at 357). Thus, restricting non-contribution activities on top of these laws stacks prophylaxis-upon-prophylaxis.

Similarly, to the extent that the government's interest in preventing corruption also can encompass regulations that prevent circumvention of laws that prevent corruption—*e.g.*, contribution limits—the segregated bank accounts,[13] their attendant accounting requirements, and the other reporting requirements for PACs ensure that contributions designated for non-contribution activities will be used accordingly.[14]

And once shorn of an anticorruption justification, there is no constitutionally sufficient interest in abridging a hybrid PAC's non-contribution activities.

The disclosure interest fares no better in justifying restrictions on political speech. Although the D.C. Circuit is correct that the Court in *McCutcheon* recognized that disclosure requirements may "deter actual corruption and avoid the appearance of corruption by exposing large

[13] Indeed, this Court in *McCutcheon* proposed segregated, nontransferable accounts as an alternative to restricting direct contributions through aggregate limits. *Id.* at 1458.

[14] Moreover, the restrictions are not narrowly tailored to any anti-circumvention corruption interest because multiple alternatives exist that do not stifle a hybrid PACs non-contribution activities. *See id.* (detailing alternatives that are less restrictive than aggregate limits on direct contributions).

contributions and expenditures to the light of publicity," 134 S.Ct. at 1459-60 (quotation and marks omitted), it did not hold that these financial transactions *must* be publicly disclosed—only that disclosure may be adequate and is a constitutionally permissible means to achieve the anti-corruption interest. Nor did it come close to suggesting that minor disclosure exemptions somehow justify otherwise-unconstitutional restrictions on political speech.

The Court has sanctioned disclosure requirements *because* they are "a less restrictive alternative to flat bans on certain types or quantities of speech" and "do not impose a ceiling on speech." *Id.*; *Citizens United*, 558 U.S. at 369. *See also Catholic Leadership Coalition*, 2014 WL 3930139, at *15 n.25 & 26 (questioning the permissibility of the D.C. Circuit's efforts to link disclosure requirements to the anticorruption interest and recognizing that disclosure laws "are generally meant to be an *alternative* to, and not necessarily a justification for, the firm limits on political speech set by expenditure limits). Indeed, the Court appears to have never held that it is constitutionally permissible to restrict contributions or expenditures simply by failing to require disclosure.

To the contrary, in *Citizens Against Rent Control* v. *Berkley*, 454 U.S. 290 (1981), this Court rejected the government's assertion that an ordinance limiting contributions to PACs formed to support or oppose ballot measures submitted to the public was necessary as a prophylactic measure to make known the identity of supporters and opponents of the measures. *Id.* at 298-99. The Court reasoned: "The integrity of the political system will be adequately

protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions." *Id.* at 299-300. Accordingly, because there was "no significant state or public interest in curtailing debate and discussion of a ballot measure," the "limits on contributions which in turn limit[ed] expenditures plainly impair[ed] freedom of expression" and were struck down. *Id.*

In any event, the restrictions here are asymmetrical to whatever merit a purported disclosure interest has in abridging ELF's speech as applied. The only thing ELF need not report are the operating costs STII may pay on its behalf with regard to its direct contribution activities.[15] But STII already discloses its entire operating budget, as a 501(c)(4) nonprofit corporation, to the IRS on its annual form 990 or related forms. Every other dollar received or disbursed in any way by ELF is disclosed. Indeed, ELF must report its non-contribution expenditures like all other PACs. And like the regulatory scheme at issue in *Citizens Against Rent Control*, ELF must disclose contributions it receives over $200, including contributor name, address, occupation, and name of employer. *See* 11 C.F.R. § 104.3; 11 C.F.R. § 114.5. *See also Citizens United*, 558 U.S. at 338 (detailing some of the disclosures connected PACs must make). Likewise, the connected organization's identity always is disclosed.

[15] ELF does not assert that payments by STII for costs to solicit the general public for its non-contribution account and activities are necessarily within the scope of the exemption to the definition of "contribution;" a determination properly left to the Court.

ELF—like all connected PACs—is required to use the connected organization's name within its own name. *See* 11 C.F.R. § 102.14(c).

That ELF must disclose the names of its contributors exposes that the D.C. Circuit's reliance on a purported disclosure interest is critically flawed. STII, as a 501(c)(4) nonprofit corporation, can accept unlimited amounts of donations but is not required to publicly disclose its donors. The Court recently recognized this very point in *McCutcheon*: "The existing aggregate limits may in fact encourage the movement of money away from entities subject to disclosure . . . . Individuals can, for example, contribute unlimited amounts to 501(c) organizations, which are not required to publicly disclose their donors." 134 S.Ct. at 1460 (citing 26 U.S.C. § 6104(d)(3)).

Thus, the D.C. Circuit's justification of the restrictions based on a disclosure interest and its admonishments that "[i]f the Fund wants to solicit freely, it must do so in the light" rings hollow. "Rhetoric ought not obscure reality." *Citizens United*, 558 U.S. at 355.

II. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *CITIZENS UNITED* THAT THE FIRST AMENDMENT PROHIBITS POLITICAL SPEECH RESTRICTIONS BASED ON ORGANIZATIONAL FORM.

Citizens United is unequivocal in establishing that the government cannot impose speech-based restrictions because the speaker is an association rather than a corporation, a union, or an individual. *Id.* at 342-43; *First Nat'l Bank of Boston* v. *Bellotti*,

435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual."). Put simply, after *Citizens United*, the government cannot penalize "certain disfavored associations of citizens" because they opt for a particular organizational form. 558 U.S. at 356.[16]

These principles extend to connected PACs like ELF, which is simply a collection of STII's employees grouping together seeking to engage in political speech separately from STII and independently from any candidates or political parties. *See* § 30101(4) (defining political committee).

The D.C. Circuit, however, wrongly refused to apply *Citizens United* to this case. First, the court distinguished *Citizens United* by conflating ELF's separate speech rights with those of STII. *See* App. 7-8a (holding that *Citizens United* is inapposite because "[n]othing prevents the corporation from speaking on behalf of the PAC; in fact the regulatory scheme specifically provides for such activity, albeit with strings attached"). This is flat wrong.[17]

[16] The Supreme Court has thus only recognized one narrow exception to the prohibition against identity-based distinctions—when the government performs a uniquely governmental function in limited settings, such as special restrictions within the military, corrections systems, and public schools. *See id.*at 341 (cataloguing cases).

[17] The court also characterized *Citizens United* as "indicat[ing] these segregated funds were capable of speaking not unduly restrained by their various obligations" and that it never "suggest[ed] the statutory scheme for segregated funds 'muzzled' their speech." App. 6-7a. That this Court did not overturn the restrictions on connected PACs, however, is not because it found them constitutionally permissible; rather, the restrictions on Citizens United's speech was the particular burden on political speech that the Court faced in *Citizens United*. *See Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2820 (2011) (rejecting Arizona's attempt to distinguish *Davis* because "the reach of that opinion is limited to asymmetrical contribution limits. It is because that was the particular burden on candidate speech we faced in *Davis*.").

In *Citizens United*, this Court expressly recognized that a connected PAC is a separate association, distinct from its connected organization. 558 U.S. at 337 ("A PAC is a separate association from the corporation."). Thus, the connected PAC's speech rights could not be imputed to its connected organization. *Id.* (the connected PAC's "exemption from [§30118's] expenditure ban . . . does not allow corporations to speak"). And contrary to the D.C. Circuit's characterization of ELF and STII as "two parts of the same whole," *see* App.11a, they are not.

Despite the D.C. Circuit's skepticism that ELF has "a distinct set of constitutional protections attendant to it," *id.*, this Court has regularly reminded the lower courts that organizations such as connected PACs have First Amendment rights to engage in political speech. *See, e.g.*, *Citizens United*, 558 U.S. at 343; *see also Catholic Leadership Coalition*, 2014 WL 3930139, at *16 n.27. Indeed, the Court has expressly rejected the notion that a connected PAC's "form of organization or method of solicitation diminishes [its] entitlement to First Amendment protection." *FEC* v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985).

Further, the D.C. Circuit's reliance on the fact that STII "begot the fund" and does not exist wholly

independent from STII could have dangerous, wide-ranging implications. Under its reasoning, the government could restrict the speech of wholly-owned subsidiaries of corporations because they do not exist separately from the control of the company that owns them. And no PAC or other association of individuals can exist separately from the desire of its contributors to speak. That STII may pay for ELF's administrative and solicitation costs does not transform ELF into a mere conduit for STII's own speech.

Therefore, it is irrelevant whether STII chooses to speak, how much it chooses to speak, or why it chooses to speak or not speak. STII is a separate organization, and its ability to speak is no more justification for restricting ELF's speech as does the right to speak of any other company, person, or organization.[18]

The D.C. Circuit's second reason for finding *Citizens United* inapposite fares no better. Specifically, it refused to sanction what it

[18] In any event, STII does not want to speak and it should not be forced to do so. Its 501(c)(4) status was pending for more than three years during the time this case arose, which overlapped with the IRS scandal that occurred from May 2012 through 2013, and is ongoing. *See, e.g.*, Richard Rubin, *Big-Money Politics Groups Get Clarity From IRS They Hate*, BLOOMBERG, http://www.bloomberg.com/news/2014-02-19/big-money-politics-groups-get-clarity-from-irs-they-hate.html. And now, as a 501(c)(4), it is subject to amorphous and confusing rules about how much political speech it may make before it risks losing its exempt status. *See, e.g.*, DANIEL WERFEL, IRS, CHARTING A PATH FORWARD AT THE IRS: INITIAL ASSESSMENT AND PLAN OF ACTION 22, 24-25 (June 24, 2013), http://online.wsj.com/public/resources/documents/IRS_InitialAssessmentAndPlanOfAction-2013.pdf.

characterized as the "illogical conclusion" that *Citizens United* permits STII and its employees' to "do things the hard way"—namely, that instead of forming a non-connected PAC, they voluntarily choose a connected PAC despite knowing that subsidization of their operating costs would require them to trade their speech rights. App.8-9a.

Citizens United is not inapposite merely because STII and its employees had the idea to form a connected PAC. Connected PACs do not cede their First Amendment rights simply by organizing in a way that allows them to receive operating expenses from another organization without disclosing the amount of operating expenses they receive. Rather, the court's reasoning otherwise is based on two flawed premises: (1) that Congress's grant of an exemption enables it to require fundamental speech rights as the "trade-off"; and (2) the availability of other avenues of speech for an association's constituent parts excuses the imposition of an unconstitutional speech burden.

Connected PACs are, to be sure, given a statutory exemption that Congress is under no obligation to confer. But so too are other associations and private individuals given all sorts of special advantages that the government need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies. *See Austin* v. *Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting). And if the disclosure exemption creates an unfair advantage or something that "no political action committee has," *see* App. 10a, it is Congress's role, not the Judiciary's, to eliminate the "advantage" through methods that do not unnecessarily abridge the fundamental rights to

speech and association to which connected PACs and their contributors are entitled. *See McCutcheon*, 134 S.Ct. at 1458 ("If Congress agrees that [the ability of party committees to transfer money freely] is problematic, it might tighten its permissive transfer rules. Doing so would impose a lesser burden on First Amendment rights, as compared to aggregate limits that flatly ban contributions beyond certain levels.").

It is a bedrock constitutional principle that the government cannot exact as the price of a benefit the forfeiture of First Amendment rights. *Citizens United*, 558 U.S. at 351 (internal quotation marks omitted). *See also Catholic Leadership Coalition*, 2014 WL 3930139, *16 n. 27 (rejecting the state's argument that because it grants special privileges to certain types of PACs, it may regulate them as it pleases without speech restrictions having to withstand constitutional scrutiny). But that is exactly the effect of the D.C. Circuit's decision. Congress has not yet changed disclosure requirements for connected PACs in light of *Citizens United*. But such Congressional inaction cannot justify the continued unconstitutional suppression of ELF's independent speech.

Importantly, under the D.C. Circuit's logic, the government could simply undo *Citizens United* and restrict the speech of corporations, labor unions, non-connected PACs and non-profit entities simply by granting even minor disclosure exemptions. If the government can strip constitutional rights by granting purportedly offsetting statutory benefits, no speaker is safe from Congress's generosity.

Second, under *Citizens United* and others, the availability of other avenues of speech for an association's constituent parts does not excuse the imposition of an unconstitutional burden on organizations wanting to engage in speech. *See, e.g.*, *Spence* v. *Washington*, 418 U.S. 405, 411, n.4 (1974) *(per curiam)* (Although a prohibition's effect may be "'minuscule and trifling,'" a person "'is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place'") (quotation omitted). Indeed, at the time *Citizens United* was decided, the Citizens United organization operated a connected PAC for a decade and made candidate contributions. But this did not prevent the Court from implicitly rejecting Justice Stevens' position that if Citizens United wanted to speak right before the primary, all it needed to do was "abjure business contributions or use the funds in its PAC, which by its own account is "one of the most active conservative PACs in America." 558 U.S. at 419 (Stevens, J., dissenting). *See also McConnell* v. *FEC*, 540 U.S. 93, 256 (2003) (Scalia, J., dissenting) (banning newspapers' use of the partnership form "would be an obvious violation of the First Amendment, and it is incomprehensible why the conclusion should change when what is at issue is the pooling of funds for the most important (and most perennially threatened) category of speech: electoral speech"); *Tex. for Free Enter.* v. *Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (rejecting state's argument that "corporations have plenty of other opportunities for speech—they may speak themselves or create their own independent PACs" because this Court has expressly rejected that line of

reasoning (citing *Citizens United*, 558 U.S. at 357)). The Act's limitations on connected PACs must rise and fall on their own merits.

III. THIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE THAT SHOULD BE SETTLED BY THIS COURT.

1. Connected PACs are a major avenue for political speech. Thus, the question of what restrictions on them are constitutionally allowable is exceptionally important. As of June 30, 2014, of the 5,618 PACs registered with the FEC, 3,042—over 54%—are connected PACs.[19] So, far from a "vintage relic," App. 6a, this case presents relevant issues for more than half of the federally-registered PACs in existence today and any ruling by this Court will impact the thousands of PACs that hold this form.

Even if true, the D.C. Circuit's characterization of connected PACs as "the hard way" of engaging in associational political speech because they "are no longer necessary for independent expenditures," App. 6a, also does not dilute their entitlement to protection under the First Amendment. That STII's employees voluntarily chose to organize ELF as a connected PAC is not "doing things the hard way." It is doing things the "legal and congressionally sanctioned way." Their choice of that available mode of expression is still protected: the First Amendment mandates that "citizens must be able to discuss

19 *See* FEC, PAC Count – 1974 to Present, http://www.fec.gov/press/resources/paccount.shtml (last visited Sept. 28, 2014). In contrast, only 1,701 are Non-connected PACs, 796 are Independent Expenditure-Only PACs (Super PACs), and 79 are Non-connected PACs with Non-contribution accounts.

issues, great or small, through the means of expression they deem best suited to their purpose." *Hill* v. *Colorado*, 530 U.S. 703, 781 (2000); *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790–791 (1988); *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988).

And necessary or not, connected PACs exist. Even if the lowly connected PAC organizational form is utilized, the association has political speech rights after *Citizens United* that cannot be infringed upon for naught. And after *Citizens United*, "any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority." *See* 558 U.S. at 326.

2. Without the Court's intervention, there is no clear answer as to whether laws that burden the non-contribution activities of these hybrid PACs are constitutional. The deadlock in the circuits—both on the constitutionality of restrictions on hybrid PACs non-contribution activities and on the sufficiency of the disclosure interest—is clear evidence of the confusion.

Further, currently, at least 15 states allow some form of a hybrid PAC, and the Commission similarly has consented to non-connected PACs making both restricted direct contributions and unrestricted non-contribution expenditures from separate segregated accounts.[20] Absent clarity from this court, improper interpretation will continue to chill, or risk chilling,

20 These include Texas, New Mexico, Alabama, California, Delaware, Maine, Minnesota, Mississippi, Missouri, Montana, New Jersey, North Dakota, Oregon, Utah, and Virginia.

this most fundamental speech. *See Citizens United*, 333-34; *see also U.S.* v. *Congress of Indus. Orgs.*, 335 U.S. 106, 139-40 (1948) (Rutledge, J., concurring) ("when regulation or prohibition touches [the making of political contributions and expenditures], this Court is duty bound to examine the restrictions and to decide in its own independent judgment whether they are abridged within the Amendment's meaning. That office cannot be surrendered to legislative judgment, however weighty").

3. Lastly, the rights at issue here are of the utmost importance, necessitating the Court's intervention. It is unassailable that political speech is the primary object of First Amendment protection. *See, e.g.*, *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). And "[b]ecause the FEC's business is to censor, there inheres the danger that [it] may well be less responsive than a court . . . to the constitutionally protected interests in free expression.'" *Citizens United*, 558 U.S. at 355 (quoting *Freedman* v. *Maryland,* 380 U.S. 51, 57-58 (1965)). ELF deserves court protection now because the right to engage in political speech is not a boon to be awarded or restricted at the grace of the Commission or Congress. Rather, it is a fundamental right of every person that may not be restricted under the First Amendment absent an appropriately tailored restriction that furthers a sufficient government interest.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

PATRICIA E. ROBERTS
WILLIAM & MARY LAW SCHOOL APPELLATE AND SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

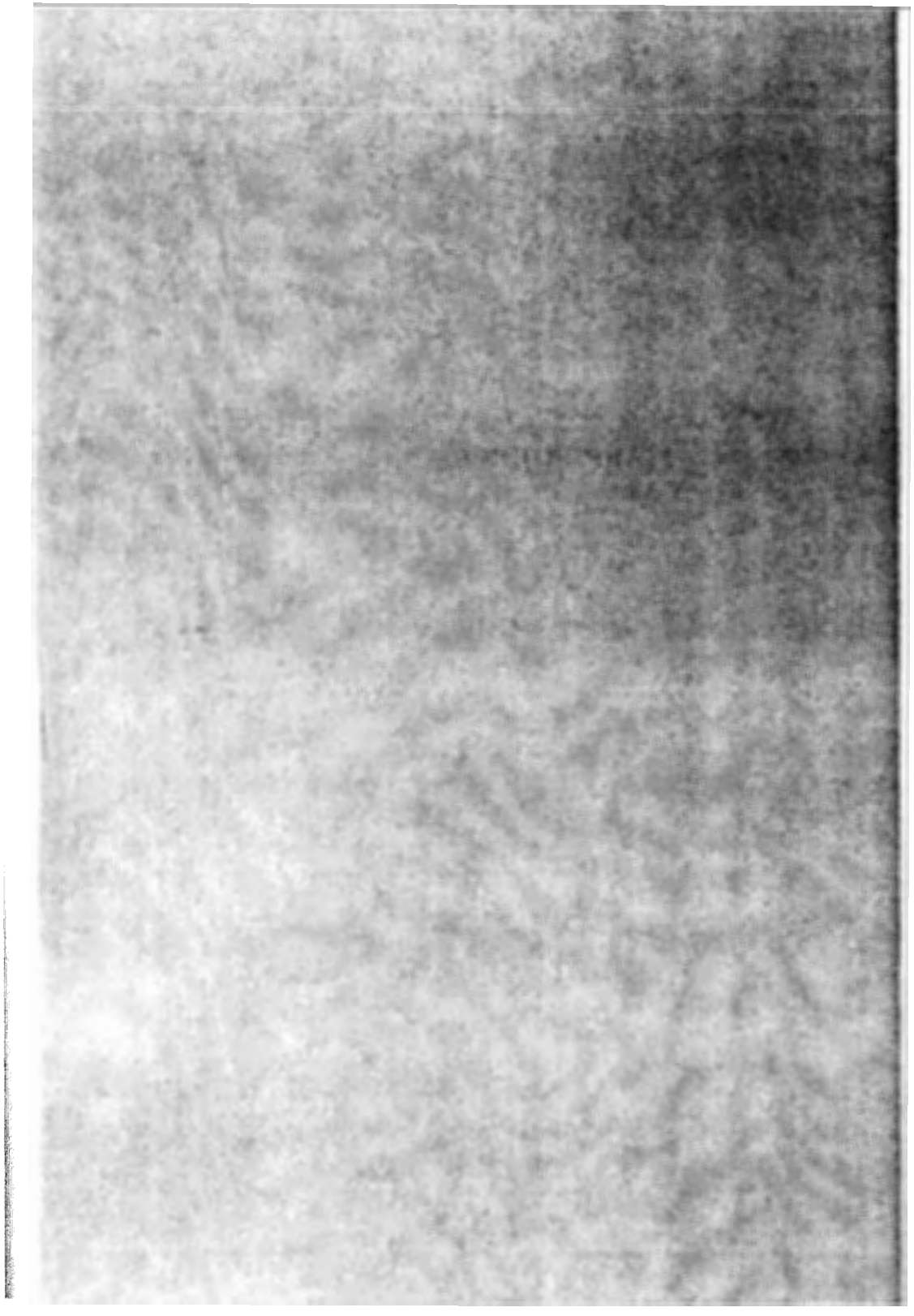
DAN BACKER
DB CAPITOL STRATEGIES PLLC
203 South Union Street
Suite 300
Alexandria, VA 22314
Telephone: 202-210-5431

TILLMAN J. BRECKENRIDGE*
TARA A. BRENNAN
REED SMITH LLP
1301 K Street, NW
Washington, DC 20005
Telephone: 202-414-9200
Facsimile: 202-414-9299
tbreckenridge@reedsmith.com

*Counsel of Record

Counsel for Petitioner

APPENDICES



APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5008

STOP THIS INSANITY INC EMPLOYEE LEADERSHIP FUND, ET AL.,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendants-Appellee.

Appeal from the United States District Court
for the District of Columbia.
No. 1:12-cv-01140—Beryl A. Howell, District Judge.

Argued: November 19, 2013
Decided and Filed: August 5, 2014

Before: BROWN and GRIFFITH, Circuit Judges;
SENTELLE, Senior Circuit Judge.

COUNSEL

ARGUED: Tara A. Brennan, REED SMITH LLP, Washington, D.C., for Appellant. Erin Chlopak, FEDERAL ELECTION COMMISSION, Washington D.C., for Appellee

ON BRIEF: Dan Backer, DB CAPITOL STRATEGIES, PLLC, Alexandria, Virginia, Patricia E. Roberts, WILLIAM AND MARY LAW SCHOOL,

Williamsburg, Virginia, Tillman J. Breckenridge, REED SMITH LLP, Washington, D.C., for Appellant. Anthony Herman, Lisa J. Stevenson, Kevin Deeley, Erin Chlopak, Steve Hajjar, FEDERAL ELECTION COMMISSION, Washington, D.C. for Appellee.

BROWN, J., delivered the opinion of the court. SENTELLE, J., concurs in the judgment.

OPINION

BROWN, Circuit Judge.

The iconic musician Mick Jagger famously mused, "You can't always get what you want. But if you try sometimes, well, you just might find, you get what you need." The Rolling Stones, *You Can't Always Get What You Want*, *on* Let It Bleed (Decca Records 1969). Here, Stop This Insanity—a grassroots organization—*wants* to remove the congressionally-imposed binds on solicitation by separate segregated funds, a type of political action committee connected to a parent corporation. What it *needs*, however, it already has—an unrestrained vehicle, in the form of that parent corporation, which can engage in unlimited political spending. Because this less-obsolete and less-onerous alternative exists, we decline Stop This Insanity's invitation for us to tinker with what has become a statutory artifact.

I

The Federal Election Campaign Act sets forth ground rules for, *inter alia*, the participation of corporations in the electoral process. *See* 2 U.S.C. § 441b; *FEC v. Beaumont*, 539 U.S. 146, 149 (2003). Corporations, for example, cannot contribute directly

to candidates for federal office or parties. 2 U.S.C. § 441b(a). And before the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), they could not use their treasuries to pay for independent expenditures, i.e., funds used to expressly advocate for or against a candidate. *See* 2 U.S.C. § 441b(a); *see also id.* § 431(17); *Citizens United*, 558 U.S. at 320–21, 372. But the pre- *Citizens United* landscape did not leave corporations completely exiled from the political process. Instead, the Act permitted limited corporate participation through separate segregated funds, a type of political action committee. 2 U.S.C. § 441b(b)(2), 431(4)(B). "Though the treasuries of a corporation and its fund [were to be] kept separate, a corporation [could] nonetheless control how the separate segregated fund [spent] its money." *FEC v. NRA*, 254 F.3d 173, 179–80 (D.C. Cir. 2001) (citations omitted). A fund was "separate . . . only in the sense that there [was] a strict segregation of its monies from the corporation's other assets." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (internal quotation marks omitted).

These funds, however, came with strings attached. They were subject to organizational, recordkeeping, and reporting requirements. *See* 2 U.S.C. §§ 432–34. The Act also placed constraints on the funds' ability to solicit. For one, the Act restricted *whom* the funds could solicit: only the connected company's stockholders, executives, and administrative personnel, in addition to their respective families. *See id.* § 441b(b)(4)(A)(i); *see also Citizens United*, 558 U.S. at 321. Solicitation of the public was off limits. *See McConnell v. FEC*, 540 U.S. 93, 118 n.3 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 310 ("As a general rule,

[the Act] permits corporations . . . to solicit contribution to their PACs from their shareholders or members, but not from outsiders."). The other major restriction came in the form of *when* the funds could solicit: twice yearly to any corporate employee or family member thereof, with responses being anonymous. *See* 2 U.S.C. § 441b(b)(4)(B). But with the strings came benefits: because the funds were so closely tied to their parent corporations, they were not required to disclose the corporation's contributions or expenditures for "the establishment, administration, and solicitation of contributions." *Id.* § 441b(b)(2)(C). *Citizens United*, of course, did away with the ban on corporate independent expenditures. But the funds— now functionally obsolete—still remained.

Stop This Insanity, Inc. ("STII" or "the Corporation") is a corporation that had a past life as a "nonconnected," standalone political action committee engaged in political advocacy. *See* Appellee's Br. at 14. It later deregistered as such a committee, and instead formed a segregated fund—the Employee Leadership Fund ("the Fund"). *See* J.A. at 10. The Corporation asked the Federal Election Commission ("the Commission") for guidance on whether the Fund could open a separate unrestricted account devoted to making independent expenditures that could solicit the general public. *See* J.A. at 31–34. The Commission's response was the regulatory equivalent of a shrug—one memorandum said yes, while another one said no. *See* J.A. at 41–71. At an impasse, the Commission declined to issue advice. J.A. at 73.

Unhappy with this nonresponse, STII, the Fund, two individuals, and another corporation filed a complaint in district court, alleging the restrictions on the segregated fund were unconstitutional. J.A. at 4–11. The plaintiffs moved for a preliminary injunction. J.A. at 79–81. The Commission moved to dismiss. J.A. at 185–89. Siding with the Commission, the district court dismissed the case. *See Stop This Insanity, Inc. Employee Leadership Fund v. FEC*, 902 F. Supp. 2d 23 (D.D.C. 2012). The plaintiffs timely appealed.[1]

II

Simply put, Stop This Insanity would like to use its segregated fund to solicit the entire public while concealing its expenses for such solicitation. It claims *Citizens United* compels such a result. Even assuming the Corporation's constitutional analysis is correct, it is far from a foregone conclusion that the Act is severable in a way that would eliminate the restrictions but leave intact the partial waiver on disclosure. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) ("The more relevant inquiry in evaluating severability is whether the statute will function *in a manner consistent with the intent of Congress*." (emphasis added)). Thankfully, we need not make that determination, for STII's arguments fall short on the merits. We review *de novo* the district court's grant of a motion to dismiss for failure to state a claim. *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012).

---

1 We lack jurisdiction over the individuals' claims, as they were not made through the en banc certification process prescribed in 2 U.S.C. § 437h. See Wagner v. FEC, 717 F.3d 1007, 1016 (D.C. Cir. 2013).

A

Political participation is integral to our democratic government; for this reason, limitations on political contributions and expenditures "operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). Accordingly, limits on independent expenditures, which do not implicate the anticorruption rationale, are subjected to the highest form of scrutiny and are generally unconstitutional. *See, e.g.*, *Citizens United*, 558 U.S. at 340, 357. Limits on direct contributions to candidates to avoid corruption or the appearance of corruption, however, are tolerated, subjected to a milder form of scrutiny. *See Buckley*, 424 U.S. at 25; *see also McConnell*, 540 U.S. at 140–41.

Congress crafted the segregated fund scheme at a time when this reality was not fully realized—in other words, at a time when direct participation by corporations was banned. Segregated funds were limited vehicles through which corporations could participate in the political process. *See NRA*, 254 F.3d at 179 ("Notwithstanding [the Act's] prohibition[s], . . . the statute does permit corporations to participate in the electoral process in a limited fashion."). After *Citizens United*, segregated funds became a vintage— yet still operable—relic. Though these funds have the advantage of being able to directly contribute to candidates— something parent corporations still cannot do—they are no longer necessary for independent expenditures. And yet, STII decided to form a separate segregated fund.

The crux of the Corporation's argument is simple: *Citizens United* prohibits restrictions based on distinctions between organizational entities, and such restrictions are subject to our highest form of scrutiny. Because segregated funds are singled out for the solicitation restrictions, STII reasons the constraints should be subjected to the more exacting half of the *Buckley* paradigm.

We do not share the Corporation's confidence that *Citizens United* is apposite here. This case does not present an "outright ban" on political speech, *see Citizens United*, 558 U.S. at 337; it is governmental "regulat[ion] [of] corporate political speech," not suppression, *see id.* at 319. Indeed, the *Citizens United* Court even acknowledged the existence of these segregated funds—as the so-called counterparts to the then-speechless corporate entities, the funds formed a critical part of the Court's analysis. *See id.* at 321. The Court indicated these segregated funds were capable of speaking, not unduly restrained by their various obligations. In no uncertain terms, the Court stated "a PAC created by a corporation can still speak." *Id.* at 337; *see id.* at 338 ("PACs have to comply with these regulations just to speak."); *id.* at 339 ("PACs, furthermore, must exist before they can speak."). Never did the Court suggest the statutory scheme for segregated funds "muzzled" their speech. *See* Appellants' Br. at 15.

There are other reasons for considering *Citizens United* inapposite. The corporation in that case was thrust into a scenario where its only avenue of speech was a type of entity—the political action committee—that could not speak on behalf of the corporation and was a "burdensome alternative[]."

Id. at 337 ("A PAC is a separate association from the corporation. . . . Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems. . . . PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations."). Contrary to the representations of Appellants' counsel at oral argument, the converse is not true. Nothing prevents the corporation from speaking on behalf of the PAC; in fact, the regulatory scheme specifically provides for such activity, albeit with strings attached. *See* 11 C.F.R. § 114.5(g). Moreover, independent expenditures are *less* burdensome through the corporate alternative. Despite the availability of a more robust option—at least, when it comes to independent expenditures—the Corporation has decided to do things the hard way. And now, trapped in a snare it has fashioned for itself, STII decries its inability to use the Fund in the way it sees fit—without the limits Congress attached to the operation of these funds.

That observation exposes the critical flaw in the Appellants' argument. This case does not present a choice between "unfettered political speech and subjection to discriminatory fundraising limitations." *Davis v. FEC*, 554 U.S. 724, 739 (2008); *cf. Buckley*, 424 U.S. at 57 n.65. STII's decision to form the more cumbersome segregated fund was purely voluntary; the statutory scheme did not compel the Corporation to form the segregated fund, lest it be without a vehicle for political speech in the form of independent expenditures. The Corporation even acknowledged the tradeoff; in its advisory opinion request to the Commission, STII noted the

"distinction between Connected and Non- Connected PACs," and "the trade-off between the subsidized administrative and operating costs . . . and the corresponding restriction on fundraising." J.A. at 33. By clothing itself in the letter of *Citizens United*, the Corporation claims there is a constitutional right to do things the hard way. We cannot sanction such an illogical conclusion.

As the Appellants observe, the Court did make it clear the First Amendment prohibits the silencing of an entire class of speakers, i.e., corporations, *see Citizens United*, 558 U.S. at 341–42, because they were "disfavored associations of citizens," *id.* at 356. In conjunction with this observation, the Appellants also cite our pre-*Citizens United* decision in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), where we held "hybrid" political action committees are entitled to unlimited expenditure accounts. According to the Appellants' legal arithmetic, *Citizens United* "eliminated distinctions between" various organizational forms; ergo, it should have access to the same type of unlimited expenditure account sought in *EMILY's List*, notwithstanding the fact that the Fund is not a "hybrid" political action committee. *See* Appellants' Br. at 21.

But it would be disingenuous to say the Corporation is simply seeking equalization across different types of organizations. The type of account EMILY's List sought in that case also came with strings: disclosure requirements, the sort the Appellants are endeavoring to avoid. *Cf. EMILY's List*, 581 F.3d at 19 n.16 ("This case does not involve reporting and disclosure obligations."). What the

Appellants are looking for, no political action committee has.

Solicitation restrictions are difficult to categorize, as they do not fit neatly into the *Buckley* framework. But *Citizens United* aside, we have other reasons for concluding the restrictions here are not properly treated as constraints on independent expenditures. For one, they "do[] not restrict the amount or manner in which . . . [a political entity] can *spend* money." *Siefert v. Alexander*, 608 F.3d 974, 988 (7th Cir. 2010) (emphasis added). Nor can we say the restriction truly silences the segregated fund as the speaker—instead, it serves to "limit contributions . . . from certain persons or groups," i.e., non-employees, in exchange for administrative ease. *Wolfson v. Concannon*, 750 F.3d 1145, 1153 (9th Cir. 2014) (emphasis omitted). Though STII suggests the First Amendment allows the unfettered ability to solicit, "[n]either the right to associate nor the right to participate in political events is absolute. Nor are the management, financing, and conduct of political campaigns wholly free from governmental regulation." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973) (citations omitted); *see id.* at 567 n.13 (citing, *inter alia*, a ban on the solicitation of political contributions). Though we cannot speak to solicitation restrictions generally, this idiosyncratic and outmoded congressional arrangement is not deserving of the closest sort of scrutiny.

B

What *Citizens United* does do, however, is highlight the oddity of the segregated funds' existence in the wake of that case. STII insists we

treat the Fund as if it existed in isolation, with a distinct set of constitutional protections attendant to it. But it is unclear whether our analysis should be so formalistic. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, ---S. Ct. ----, 2014 WL 2921709, at *13 (U.S. June 30, 2014). After all, the Corporation begot the Fund, the Corporation runs the Fund, and there is a great deal of—if not complete— overlap between the political speech of the Corporation and that of the Fund. *See Nat'l Right to Work Comm.*, 459 U.S. at 200 n.4 ("The separate segregated fund may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates' contributions to the fund will be spent to assist."). If the Corporation and the Fund are two parts of the same whole, neither likely has a First Amendment claim; if the Fund is unable to speak on an issue or candidate of concern, the Corporation can, making any burden "merely theoretical," rather than substantial. *See Buckley*, 424 U.S. at 19. And that would extinguish any First Amendment claim. *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 418 (6th Cir. 2014) (describing the nature of the "burden imposed on core First Amendment activity" as "largely theoretical and speculative").

But let us assume STII is right in stating the Fund should be assessed in isolation. We must discern whether the Government has demonstrated "a sufficiently important interest" and "employ[ed] means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. STII is resolute in asserting there can be no governmental interest other than preventing *quid pro quo* corruption, which it claims is not present here. *See* Reply Br. at 8; *see also EMILY's List*, 581

F.3d at 6 ("[T]he Court has recognized a strong governmental interest in combating corruption and the appearance thereof. This, indeed, is the only interest the Court thus far has recognized as justifying campaign finance regulation." (citations omitted)).

The Commission does not necessarily dispute the first half of that observation; instead, its position reflects an anticorruption interest more robust than the anemic one portrayed by the Appellants. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (plurality opinion) ("Disclosure requirements are in part 'justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending.'" (quoting *Citizens United*, 558 U.S. at 367)). The evolving technological and political landscape has altered the scope of the anticorruption rationale. *See id.* at 1460 ("Today, given the Internet, disclosure offers much more robust protections against corruption. . . . Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided."). Although *McCutcheon* intimates disclosure is an obvious antidote to corruption and so appropriately included within the anticorruption rationale, the correlation is not self-evident and disclosure cannot be reflexively substituted as the Commission's *raison d'etre*. Not every intrusion into the First Amendment can be justified by hoisting the standard of disclosure. *Buckley*, 424 U.S. at 64.

As the Appellants point out, we observed in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010)

(en banc), that "[a]n informational interest in 'identifying the sources of support for and opposition to' a political position or candidate is not enough to justify [a] First Amendment burden." *Id.* at 692 (citing *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981)). But the *en banc* court, in rejecting First Amendment challenges to organizational and reporting requirements, remarked "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." *Id.* at 698. The Commission clings to that interest now, claiming it is "protect[ing] the . . . First Amendment rights of the public to know the identity of those who seek to influence their vote." Appellee's Br. at 39 (citing *Citizens United*, 558 U.S. at 369–71). There may be circumstances in which disclosure requirements could facilitate intimidation and give free rein to animus in a way that impoverishes and inhibits public debate instead of protecting First Amendment concerns. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958); *see also McConnell*, 124 S. Ct. at 735–36 (Thomas, J., concurring in the judgment). But this is no such case; STII makes no attempt to refute the legitimacy of the interest invoked here or examine how closely the restrictions on the segregated fund hew to the interest. Instead, its response is "only quid pro quo"—hardly a response at all. Therefore, we are satisfied with the Commission's explanation for maintaining the status quo. If the Fund wishes to solicit freely, it must do so in the light.

STII is already capable of sweeping solicitation. And yet, it wants a vehicle capable of soliciting

without transparency. The Court has endorsed disclosure as "a particularly effective means of arming the voting public with information," *McCutcheon*, 134 S. Ct. at 1460, and the Appellants' approach would stifle the Government's ability to achieve that endeavor. Our Constitution does not compel such a result.

III

We may never know why the Appellants wish to do things the hard way. The Constitution, however, does not guarantee a right to be obstinate. Try as it might, STII will get no satisfaction. The district court's dismissal is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRIC OF COLUMBIA

CIVIL ACTION No. 12–1140(BAH)

STOP THIS INSANITY, INC, EMPLOYEE LEADERSHIP FUND
and,
STOP THIS INSTANITY, INC
and,
GLENGARRY LLC
and
TODD CEFARATTI
and
LADD EHLINGER — PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION — DEFENDANT

MEMORANDUM OPINION

Plaintiffs Stop This Insanity, Inc. Employee Leadership Fund ("the Leadership Fund"), Stop This Insanity, Inc. ("STI"),[1] Glengary LLC, Todd

[1] The plaintiffs refer to STI as both "Stop the Insanity, Inc." and "Stop This Insanity, Inc.' in their Complaint. *Compare* Compl. ¶ 17, *with id.* ¶ 18. It appears that the correct name is Stop This Insanity, Inc. *See* Ariz. Corp. Comm'n, Corps. Div., http://starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/co

Cefaratti, and Ladd Ehlinger bring this as-applied First Amendment challenge against three provisions of the Federal Election Campaign Act ("FECA"), namely 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) (which limit the dollar amount of contributions to political committees); and 441b(b)(4)(A)(i) (which restricts the pool of citizens from which connected political committees established by a corporation may solicit contributions).[2] The Leadership Fund is a "connected" political action committee ("PAC")[3] or "separate segregated fund" of the corporation STI. Compl. ¶ 17, ECF No. 1. The Leadership Fund seeks

rp- detail.p?name-id=15854462 (last visited Nov. 5, 2012).

2 The plaintiffs also reference that they challenge the application of the source restrictions in 2 U.S.C. § 441b(a), which prohibits, *inter alia,* political committees from accepting contributions from corporations. *See* Compl. ¶ 1, ECF No. 1; Pls.' Mem. in Supp. Mot. Prelim. Inj. ("Pls.' Mem.") at 1, ECF No. 4–1. The plaintiffs do not clearly articulate the nature of their challenge to § 441b(a). In fact, the plaintiffs do not cite that provision anywhere in their three causes of action, and they do not say that they seek declaratory or injunctive relief from that provision in their prayer for relief.*See* Compl. at 15–21. Because the plaintiffs only mention this provision in passing, the Court does not construe the plaintiffs' Complaint to state a claim for relief against that provision, and the Court will not further address § 441b(a) in this opinion.

3 The term political action committee or "PAC" is generally used as a synonym for "separate segregated fund." It "normally refers to organizations that corporations or trade unions might establish for the purpose of making contributions or expenditures that the [FECA] would otherwise prohibit." *FEC v. Akins,* 524 U.S. 11, 15, 118 S. Ct. 1777, 141 L.Ed.2d 10 (1998); *see also* BLACK'S LAW DICTIONARY 1276 (9th ed. 2009) (defining PAC as "[a]n organization formed by a special-interest group to raise and contribute money to the campaigns of political candidates who the group believes will promote its interests).

declaratory and injunctive relief that would allow it to solicit and accept unlimited contributions to finance unlimited independent political expenditures through an independent expenditure-only account not subject to the restrictions set forth in §§ 441a(a)(1)(C), 441a(a)(3), and 441b(b)(4)(A)(i). *Id.* ¶ 1. In their three count Complaint, the plaintiffs seek a declaratory judgment that the prohibitions contained in these portions of the FECA are unconstitutional as applied to their proposed solicitation and contribution activities. *Id.* at 20–22. The plaintiffs also seek preliminary and permanent injunctive relief that would prohibit the defendant Federal Election Commission ("FEC") from enforcing §§ 441a(a)(1)(C), 441a(a)(3), and 441b(b)(4)(A)(i) against the Leadership Fund and any individual or corporate contributors to an independent expenditure-only account established by the Leadership Fund. *See id.*

I. BACKGROUND

STI is a not-for-profit social welfare organization, incorporated in Arizona, which is currently seeking tax-exempt status under § 501(c)(4) of the Internal Revenue Code. *See* Compl. ¶ 18.[4] The Leadership

4 An organization that is "not organized for profit but operated exclusively for the promotion of social welfare . . . and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes," is exempt from taxation under § 501(c)(4). According to its Articles of Incorporation, STI is a "*political* non-partisan nonprofit organization" that "will not represent any candidate or party" and "gather[s] donations and donate[s] to any candidate or party that represents original U.S. Constitutional principles." *See* Articles of Incorporation, http://images.azcc.gov/scripts/cgi/dwispart2.pl (filed Feb. 25, 2010) (emphasis added).

Fund is a separate segregated fund ("SSF") that was established by and connected to STI and registered with the FEC as a political committee on January 4, 2012. Compl. Ex. B at 3, ECF No. 1–1. Under the FECA, a corporation may establish an SSF to engage in political activities, *see* 2 U.S.C. § 441b(b)(2)(C), and "[s]uch a PAC . . . may be wholly controlled by the sponsoring corporation," *FEC v. Beaumont,* 539 U.S. 146, 149, 123 S. Ct. 2200, 156 L.Ed.2d 179 (2003). All SSFs, however, must register as "political committees" under the FECA. *See* 2 U.S.C. §§ 431(4)(B), 433.[5] Likewise, all political committees, including SSFs, are required to abide by certain organizational, record-keeping, and reporting requirements, *see* 2 U.S.C. §§ 432, 433, 434, as well as contribution limits, *see id.* § 441a. Under the contribution limits, no person is allowed to make "contributions" to any "other political committee" (which includes SSFs) "in any calendar year which, in the aggregate, exceed $5,000." *Id.* § 441a(a)(1)(C). Additionally, SSFs are uniquely required to observe certain limits upon the universe of people from whom they solicit contributions. Specifically, subject to certain limited exceptions, it is unlawful "for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families." *Id.* § 441b(b)(4)(A)(i).[6] The Leadership Fund asserts that these restrictions on the solicitations and contributions of connected PACs are unconstitutional as applied to it, in light of recent developments in the law of campaign finance and the First Amendment.

5 Other types of associations may also establish SSFs, including labor organizations, membership organizations, or cooperatives. *See* 2 U.S.C. § 441b(b)(2)(C). This case, however, only involves an SSF established by a corporation.

Currently, the Leadership Fund maintains a single bank account into which it receives "hard money"[7] contributions that are subject to the contribution limits, solicitation restrictions, and reporting and disclosure requirements of the FECA. Compl. Ex. A at 2, ECF No. 1–1.[8] The Leadership Fund wants to use the funds from this bank account to make direct contributions to candidates for federal political office. Compl. ¶ 23. The Leadership Fund, however, would also like to expand its political activities to include "independent expenditures," *id.*, which are expenditures "expressly advocating the

6 The FECA defines "executive or administrative personnel" to mean "individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities." 2 U.S.C. § 441b(b)(7).

7 The term "hard money" refers to "contributions subject to [FECA's] source, amount, and disclosure requirements." *See Shays v. FEC,* 528 F.3d 914, 917 (D.C.Cir.2008) (alteration in original) (internal quotation marks omitted). Conversely, "soft money" refers to "[p]olitical donations made in such a way as to avoid federal regulations or limits." *Id.* (alteration in original) (internal quotation marks omitted).

8 The FECA defines "contributions" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office" or "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U.S.C. § 431(8)(A).

election or defeat of a clearly identified candidate" but that are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents," 2 U.S.C. § 431(17). Since independent expenditures currently enjoy fewer restrictions than direct contributions to candidates, the Leadership Fund would like to establish a second, separate bank account, for which it would like to solicit unlimited contributions from the general public in order to finance its "independent expenditures." Compl. Ex. A at 2; *see also Carey v. FEC*, 791 F.Supp.2d 121, 130–32 (D.D.C. 2011) (approving "separate accounts for hard-money and soft-money contributions and expenditures"). This separate account would not be used to contribute directly to candidates, political parties, or other political committees, and is therefore sometimes referred to as a "non-contribution" account or, more accurately, an "independent expenditure-only account."

To that end, the Leadership Fund submitted an advisory opinion request to the FEC on January 4, 2012, asking the FEC "whether it may open a[n] [independent expenditure-only] account . . . to accept contributions from individuals, corporations, and unions that is not subject to the limitations and prohibitions of 2 U.S.C. § 441a(a)(1)(C) or § 441b . . . to conduct Independent Expenditures and proportionally pay [ ] an appropriately tailored share of administrative expenses." Compl. Ex. A at 1; *see also* 2 U.S.C. § 437f(a) (requiring the FEC to render a written advisory opinion in response to a "complete written request concerning the application of [the FECA] or a rule or regulation prescribed by the

[FEC], with respect to a specific transaction or activity by the person").

On February 17, 2012, the FEC issued two draft advisory opinions in response to the Leadership Fund's request. The first draft advisory opinion ("Draft A") concluded that the Leadership Fund "may establish a[n] [independent expenditure-only] account and solicit and accept unlimited contributions from individuals, other political committees, corporations, and labor organizations, STI itself, and STI's restricted class" for the purpose of financing independent expenditures. Compl. Ex. B at 2. The second draft advisory opinion ("Draft B"), however, reached the opposite conclusion: "the [FECA] and [FEC] regulations prohibit [the Leadership Fund] and STI from establishing a[n] [independent expenditure-only] account for [the Leadership Fund] that would receive unlimited contributions solicited from all STI employees and the general public for the purpose of financing independent expenditures." *Id.* Ex. C at 4, ECF No. 1–1. Both of these advisory opinions recognized that none of the recent judicial decisions issued in the realm of campaign finance and the First Amendment directly address whether FECA's contribution limits and solicitation restrictions are constitutional as applied to an SSF, *i.e.*, a political committee connected to a corporation or labor organization. *Id.* Ex. B at 7; *id.* Ex. C at 6–7.

On March 2, 2012, the FEC certified that it had failed on a vote of 3–3 to approve either draft advisory opinion. *See* Compl. Ex. D at 1, ECF No. 1–

1.[9] Without the FEC's blessing, the Leadership Fund was (and continues to be) unable to solicit contributions for independent expenditures without being subject to the contribution limits in § 441a(a) or the solicitation restrictions in § 441b(b)(4)(A) because the Leadership Fund alleges that it "will face a credible threat of prosecution if it solicits or accepts contributions to a[n] [independent expenditure-only] account in excess of the limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3)" or "in derogation of the restriction at 2 U.S.C. § 441b(b)(4)(A)(i)." Compl. ¶¶ 51, 52. Feeling "required to mute itself and curtail its activities" during the 2012 election cycle, *id.* ¶ 37, the Leadership Fund—along with its connected corporate entity (STI) and three potential donors who wish to make contributions to the Leadership Fund but are currently prohibited by the FECA from doing so (Glengary LLC, Todd Cefaratti, and Ladd Ehlinger)—filed the Complaint in the instant action on July 10, 2012. Pending before the Court are the plaintiffs' Motion for Preliminary Injunction and the FEC's Motion to Dismiss.[10] For the reasons discussed below, the Court will deny the plaintiff's Motion for Preliminary Injunction and will grant the FEC's Motion to Dismiss.

---

9 The FEC is required to approve any advisory opinion by the affirmative votes of four members. *See* 11 C.F.R. § 112.4(a) (2012).

10 The FEC's Motion to Dismiss became fully briefed on October 18, 2012.

II. LEGAL STANDARDS

A. Preliminary Injunction

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, 101 S. Ct. 1830, 68 L.Ed.2d 175 (1981). It is "an extraordinary and drastic remedy" and "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L.Ed.2d 162 (1997) (emphasis and internal quotation mark omitted). Plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits of their claims; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tip in their favor; and (4) and injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20, 129 S. Ct. 365, 172 L.Ed.2d 249 (2008); *accord Gordon v. Holder,* 632 F.3d 722, 724 (D.C.Cir.2011).

Historically, these four factors have been evaluated on a "sliding scale" in this Circuit, such that "[i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp.,* 571 F.3d 1288, 1291–92 (D.C.Cir. 2009). Recently, however, the continued viability of that approach has been called into some doubt, as the D.C. Circuit has suggested, without holding, that a likelihood of success on the merits is an independent, free-standing requirement for a preliminary injunction. *See Sherley v. Sebelius,* 644 F.3d 388, 392–93

(D.C.Cir.2011) ("[W]e read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" (citation omitted) (quoting *Davis,* 571 F.3d at 1296 (Kavanaugh, J., concurring))). Absent binding authority or clear guidance from the Court of Appeals, however, the Court finds that the most prudent course is to bypass this unresolved issue and proceed to explain why a preliminary injunction is not appropriate under the "sliding scale" framework. If the plaintiffs cannot meet the less demanding "sliding scale" standard, then they cannot satisfy the more stringent standard alluded to by the Supreme Court and the Court of Appeals.

That being said, in meeting the requisite burden for injunctive relief, "[i]t is particularly important for the movant to demonstrate a likelihood of success on the merits." *Konarski v. Donovan,* 763 F.Supp.2d 128, 132 (D.D.C.2011). Indeed, "absent a 'substantial indication of probable success [on the merits], there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review.' " *Am. Bankers Ass'n v. Nat'l Credit Union Admin.,* 38 F.Supp.2d 114, 140 (D.D.C.1999) (alteration in original) (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C.Cir.1977)). Assessing the likelihood of success on the merits "does not involve a final determination of the merits, but rather the exercise of sound judicial discretion on the need for interim relief." *Nat'l Org. for Women v. Soc. Sec. Admin.,* 736 F.2d 727, 733 (D.C.Cir.1984) (internal quotation marks omitted). "As an extraordinary remedy, courts should grant such relief sparingly." *Konarski,* 763

F.Supp.2d at 133 (citing *Mazurek,* 520 U.S. at 972, 117 S. Ct. 1865); *see also Dorfmann v. Boozer,* 414 F.2d 1168, 1173 (D.C.Cir.1969) ("The power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised." (internal quotation marks omitted)).

B. Motion to Dismiss

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face" and to "nudge[ ] [his or her] claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007); *see also* FED.R.CIV.P. 12(b)(6). "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009) (alteration in original) (quoting *Twombly,* 550 U.S. at 557, 127 S. Ct. 1955). Instead, the complaint must plead facts that are more than " 'merely consistent with' a defendant's liability"; "the plaintiff [must] plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly,* 550 U.S. at 556, 127 S. Ct. 1955); *accord Rudder v. Williams,* 666 F.3d 790, 794 (D.C.Cir.2012). The Court "must assume all the allegations in the complaint are true (even if doubtful in fact) . . . [and] must give the plaintiff the benefit of all reasonable inferences derived from the facts alleged." *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.,* 525 F.3d 8, 17 (D.C.Cir.2008) (citations and internal quotation marks omitted).

III. DISCUSSION

This is the most recent attempt by a non-profit entity to invalidate, on First Amendment grounds, federal regulations related to independent political expenditures. Such challenges within this Circuit and before the Supreme Court have enjoyed almost universal success in recent years on the premise that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC,* 558 U.S. 310, 130 S. Ct. 876, 909, 175 L.Ed.2d 753 (2010); *see also SpeechNow.org v. FEC,* 599 F.3d 686, 696 (D.C.Cir.2010) ("[T]he government can have no anti-corruption interest in limiting contributions to independent expenditureonly organizations."); *EMILY's List v. FEC,* 581 F.3d 1, 12 (D.C.Cir.2009) ("[L]imiting donations to and spending by non-profits in order to prevent corruption of candidates and officeholders represents a kind of 'prophylaxis-upon-prophylaxis' regulation to which the Supreme Court has emphatically stated, 'Enough is enough.' " (quoting *FEC v. Wis. Right to Life, Inc.* ("*WRTL* "), 551 U.S. 449, 478–79, 127 S. Ct. 2652, 168 L.Ed.2d 329 (2007))). It is of course not the Court's prerogative to question the authority of these decisions, but as the following discussion makes clear, the implications of *Citizens United* and its progeny do not compel the relief the plaintiffs seek. The Court will first assess the plaintiffs' probability of success on the merits before evaluating the plaintiffs' showing on the other three preliminary injunction factors.

A. Probability of Success on the Merits

In assessing the viability of the plaintiffs' as-applied constitutional challenge, it is critical to observe that this is a case about regulating the solicitation and fundraising activities of "connected" SSFs—PACs that are established, administered, and subsidized by corporations. SSFs have unique characteristics that come to bear on the Court's analysis below.

First, although all political committees must disclose the amount of all "contributions" they receive and the source of any such contributions over $200, *see* 2 U.S.C. §§ 434(b)(2)(A), 434(b)(3)(A), the FECA specifically exempts from the definition of "contributions" any funds used for "the establishment, administration, and solicitation of contributions to a [SSF] to be utilized for political purposes by a corporation," *id.* § 441b(b)(2)(C). Therefore, any funds provided by a corporation to finance the administration and solicitation of contributions to its SSF need not be disclosed to the government and need not count against the contribution limits established for political committees. *See* 2 U.S.C. § 441a(a)(1)(C) (limiting contributions to "other political committees," which includes SSFs); *id.* § 434 (requiring disclosure of all contributions and the source of any contributions over $200).

Second, although an SSF's solicitation activities are permitted to benefit from undisclosed corporate subsidization, the FECA limits the universe of people the SSF may solicit: An SSF may generally solicit contributions only from its connected corporation's "stockholders and their families and its executive or

administrative personnel and their families." *Id.* § 441b(b)(4)(A)(i). The SSF (or its connected corporation) may also solicit rank-and-file employees of the connected corporation to contribute to the SSF as long as the solicitations are: (1) made in writing; (2) addressed to the employees at their residence; (3) made only twice per calendar year; and (4) designed such that the SSF and its connected 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."[11] *Id.* § 441b(b)(4)(B). Thus, there is a major statutory trade-off for SSFs: an SSF can have all of its administrative and solicitations costs paid for by its connected corporation and need not report the amount or source of those funds, but in order to enjoy those financial, non-disclosure, and non-reporting benefits the SSF must limit its solicitation base. If, however, a political committee wishes to solicit contributions from the general public, it must disconnect from its affiliated corporation, pay its own administrative and solicitation expenses, and disclose and report the amount and source of all funds raised—including any funds that go toward administration and solicitation expenses. In essence, as the FEC points out, the plaintiffs are seeking relief that would create such a large loophole in political committee disclosure

11 This statutory mechanism, although admirably intended to prevent rank-and-file corporate employees from feeling coerced into making political contributions, appears to be easy to circumvent. For example, any corporation intent on discovering which employees failed to contribute to its connected PAC could refuse to accept any employee contributions of $50 or less and, with this contribution minimum, could thereby deduce which employees gave and which employees did not.

requirements that those requirements would be meaningless. *See* Def.'s Opp'n to Pls.' Mot. Prelim. Inj. ("Def.'s Opp'n") at 15, ECF No. 6 ("This lawsuit, however, seeks to have the statutory disclosure exception swallow the rule . . . .").

Third, since *Citizens United,* SSFs have become vestiges of a bygone world of campaign finance. Section 441b's original purpose was "to prohibit contributions or expenditures by corporations or labor organizations in connection with federal elections," and the SSF was created to "permit[ ] some participation of unions and corporations in the federal electoral process." *FEC v. Nat'l Right to Work Comm.* ("*NRWC* "), 459 U.S. 197, 201, 103 S. Ct. 552, 74 L.Ed.2d 364 (1982). This legislative compromise prevented corporations from directly engaging in political spending, while permitting corporations' beneficial owners and employees to pool their personal resources to engage in organized political speech. SSFs continue to be a mechanism through which the beneficial owners and employees of corporations can band together to make direct contributions to candidates and political parties, which corporations are still prohibited from doing directly under the FECA and First Amendment jurisprudence. *See, e.g., Beaumont,* 539 U.S. at 161–63, 123 S. Ct. 2200 (upholding § 441b(a)'s prohibition on direct political contributions by corporations); *see also Green Party of Conn. v. Garfield,* 616 F.3d 189, 199 (2d Cir.2010) ("*Beaumont* and other cases applying the closely drawn standard to contribution limits remain good law. Indeed, in the recent *Citizens United* case, the [Supreme] Court . . . explicitly declined to reconsider its precedents involving campaign *contributions* by corporations to

candidates for elected office."). Yet, corporations no longer need SSFs to engage in unlimited independent expenditures with general treasury funds. The Supreme Court eliminated this dependency in *Citizens United* by allowing corporations themselves (rather than just their constituent members, officers, employees, etc.) to engage in unlimited independent political expenditures. *See Citizens United,* 130 S. Ct. at 913. Thus, it bears mentioning that the relief sought by the plaintiffs in the instant action is completely unnecessary to allow the plaintiffs to engage in unlimited independent expenditures, individually or together. Rather, this case narrowly touches upon the particular accounting mechanism through which the plaintiffs may make those expenditures.

Finally, the Supreme Court has recognized that SSFs are inherently suspect in certain respects by virtue of the fact that a single entity (corporation, labor union, etc.) pays all of their administration expenses. In *California Medical Association v. FEC* ("*Cal–Med* "), 453 U.S. 182, 101 S. Ct. 2712, 69 L.Ed.2d 567 (1981), the Supreme Court observed:

> If unlimited contributions for administrative support are permissible, individuals and groups like CMA could completely dominate the operations and contribution policies of independent political committees such as CALPAC. Moreover, if an individual or association was permitted to fund the entire operation of a political committee, all moneys

> solicited by that committee could be converted into contributions, the use of which might well be dictated by the committee's main supporter. In this manner, political committees would be able to influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committee's operations would be able to do acting alone. In so doing, they could corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit.

Cal–Med, 453 U.S. at 198 n. 9, 101 S. Ct. 2712. Connected SSFs can essentially accept "unlimited contributions for administrative support" because of the exemption in 2 U.S.C. § 441b(b)(2)(C) and therefore officials with control of the money spigot at the connected corporation can "completely dominate the operations and contribution policies" of the SSF. *See id.* Moreover, SSFs may also accept unlimited amounts of undisclosed money from the connected corporation to pay for solicitations. *See* 2 U.S.C. § 441b(b)(2)(C). Because of this, SSFs are "able to influence the electoral process to an extent disproportionate to their public support," and can do so to an extent "far greater than the [connected corporation] would be able to do acting alone." *Cal–Med,* 453 U.S. at 198 n.19, 101 S. Ct. 2712; *see also EMILY's List,* 581 F.3d at 12 n.10 ("The requirement that certain administrative expenses be funded in part with hard money prevents a contributor from essentially taking control of a non-profit and thereby

circumventing limits on individual contributions to candidates." (citing *Cal-Med,* 453 U.S. at 198–99 n.19, 101 S. Ct. 2712)).

With these facts in mind, the Court will first discuss recently established First Amendment principles regarding independent expenditures and the continuing vitality of campaign finance regulations. Then, with those principles in tow, the Court will proceed to evaluate the probability that the plaintiffs will succeed on the merits of their claims that the contribution and solicitation limitations in §§ 441a(a)(1)(C), 441a(a)(3), and 441b(b)(4)(A)(i) are unconstitutional as applied to SSFs that engage in both direct candidate contributions and express advocacy.

1. First Amendment Principles

The First Amendment, which provides that "Congress shall make no law TTT abridging the freedom of speech," U.S. CONST. amend. I, is an enduring bulwark against improper intrusions upon "the exercise of rights so vital to the maintenance of democratic institutions," *Schneider v. New Jersey,* 308 U.S. 147, 161, 60 S. Ct. 146, 84 L.Ed. 155 (1939). The First Amendment "is broadly staked on the view that our country and our people" should enjoy broad freedom to engage in "a robust and uninhibited debate that is subject only to minimum controls necessary for the vitality of our democratic system." *See Nat'l Broad. Co. v. FCC,* 516 F.2d 1101, 1132 (D.C.Cir.1975). Relevant to the context of the instant case, "[t]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Citizens United,* 130 S. Ct. at 898 (quoting *Eu v. S.F. Cnty. Democratic Cent.*

Comm., 489 U.S. 214, 223, 109 S. Ct. 1013, 103 L.Ed.2d 271 (1989)). Although allowing such a robust national conversation is certain to create passionate and, at times vitriolic, factions, "[f]actions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false." *Id.* at 907 (citation omitted) (citing The Federalist No. 10 (James Madison)).

The vitality of the First Amendment, however, is also predicated on the fact that the important rights subject to its protection are not absolute, and in certain contexts, must give way to other compelling governmental interests.[12] *See, e.g., Times Film Corp. v. City of Chicago,* 365 U.S. 43, 47, 81 S. Ct. 391, 5

---

12 The Supreme Court has repeatedly recognized this principle in myriad contexts in recent years. *See, e.g., Holder v. Humanitarian Law Project,* —— U.S. ——, 130 S. Ct. 2705, 2727, 177 L.Ed.2d 355 (2010) (rejecting idea that "it is possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent activities" in upholding statute that criminalized appellant's efforts to provide humanitarian and political support to organizations considered by the government to be "foreign terrorist organizations"); *Morse v. Frederick,* 551 U.S. 393, 403, 127 S. Ct. 2618, 168 L.Ed.2d 290 (2007) ("The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may."); *Beard v. Banks,* 548 U.S. 521, 533–35, 126 S. Ct. 2572, 165 L.Ed.2d 697 (2006) (upholding Pennsylvania prison regulation that prevented some prison inmates from having any access to newspapers, magazines, or photographs); *Garcetti v. Ceballos,* 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L.Ed.2d 689 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

L.Ed.2d 403 (1961) ("It has never been held that liberty of speech is absolute."); *Marshall v. United States,* 176 F.2d 473, 474 (D.C.Cir.1949) ("The rights guaranteed by the First Amendment are not absolute, and are subordinate to the greater rights of the general public interest, and to the right of the government to maintain and protect itself."); Frederick Schauer, *Harm(s) and the First Amendment,* 2011 SUP.CT. REV. 81, 81 ("The First Amendment has always had a delicate relationship with harm."). Therefore, ironically, some speech must be restricted in order to permit a healthy, functioning democracy to march onward. *See, e.g.,* LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 178 (2005) ("In liberal societies, free speech is important because it is believed to produce valuable consequences such as more truth, better democratic politics, and more individual self-development. But this means that any freedom of speech principle carries with it a commitment to constrain speech that destroys these things."). One oft-discussed kind of potentially harmful speech is money spent in the context of the electoral process. When money is conceptualized as speech, as the Supreme Court has,[13] and when that

13 *See, e.g., Citizens United,* 130 S. Ct. at 898 ("Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a 'restriction on the amount of money a person or group can spend on political communications during a campaign,' that statute 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.' " (quoting *Buckley v. Valeo,* 424 U.S. 1, 19, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976))). Justice Stevens has observed that this conceptualization may be problematic:

pecuniary speech is given free reign to influence the election of those entrusted to lead and shape the character of our democracy, a legitimate and complex question arises about what constitutional limits can be placed on the flow of money spent with a political purpose—limits intended to prevent behavior that corrodes the very legitimacy and integrity of our democratic institutions. In *Citizens United,* the Supreme Court reviewed—and rejected—the governmental interests used over the years to limit political speech, including "an antidistortion interest," and a "shareholder-protection interest," and concluded that while "[t]he appearance of influence or access TTT will not cause the electorate to lose faith in our democracy," activity that "lead[s] to, or create[s] the appearance of, *quid pro quo* corruption" is a sufficiently compelling governmental interest to justify limits on political speech. *Citizens United,* 130 S. Ct. at 909–13.

Both parties agree that corporate entities have the same First Amendment right as individuals to

> Money is property; it is not speech.
>
> Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398, 120 S. Ct. 897, 145 L.Ed.2d 886 (2000) (Stevens, J., concurring).

engage in unlimited independent political expenditures. *See* Def.'s Opp'n at 1 (stating that "a corporation's First Amendment right to finance independent campaign advocacy" is "undisputed and not at issue here"). The Supreme Court established that principle nearly three years ago in *Citizens United*. *See* 130 S. Ct. at 909 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."). The D.C. Circuit has also established that other campaign finance regulations are unconstitutional as applied to *non-connected* political committees (*i.e.*, political committees not established by a candidate, political party, labor union, or corporation). In *EMILY's List*—a case decided shortly before *Citizens United*—the D.C. Circuit held that nonconnected political committees, which make direct contributions to candidates and political parties, have a constitutional right also to accept unlimited contributions to finance "expenditures—such as [ballot initiative] advertisements, get-out-the-vote efforts, and voter registration drives," so long as they "ensure, to avoid circumvention of individual contribution limits by [their] donors, that [their] contributions to parties or candidates come from a hard-money account." *See EMILY's List*, 581 F.3d at 12.[14] Six months later, shortly after *Citizens United*

[14] In *EMILY's List*, the D.C. Circuit held unconstitutional several FEC regulations that required non-profit entities registered as political committees to spend "hard money" to pay for the costs of engaging in certain political expenditures (*e.g.*, generic voter turnout and registration drives, generic party advocacy) and limited the manner in which such groups could solicit funds used to support or oppose the election of a clearly identified federal candidate. *See EMILY's List*, 581 F.3d at 16–18.

was decided, the D.C. Circuit held in *SpeechNow* that the contribution limits in 2 U.S.C. § 441a(a) were unconstitutional as applied to contributions made by individuals to a non-connected political committee that made only independent expenditures because "the government can have no anti-corruption interest in limiting contributions to independent expenditure only organizations." *SpeechNow*, 599 F.3d at 695–96 ("The contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) violate the First Amendment by preventing [individuals] from donating to SpeechNow in excess of the limits by prohibiting SpeechNow from accepting donations in excess of the limits."). Finally, in *Carey*, another Judge on this Court held that a non-connected political committee may operate simultaneously as both a multicandidate political committee (making direct candidate contributions) and an independent expenditure-only political committee by establishing separate bank accounts for each activity. *See Carey*, 791 F. Supp. 2d at 130–32.

A number of precepts—some broad, others narrow—can be derived from this body of recent case law. First, *EMILY's List* and *Carey* have endorsed the hybridization of political committees—at least when such political committees are not connected to a candidate, political party, corporation, or labor union. In other words, "[t]he constitutional principles that govern TTT a hybrid non-profit entity follow ineluctably from the well-established principles governing the other two categories of non-profits," which either (1) make only direct contributions to

candidates or (2) make only "expenditures for political activities."[15] *EMILY's List,* 581 F.3d at 12. An important aspect to acknowledge about *EMILY's List,* however, is that although it began with a very broad discussion of First Amendment principles, the Circuit's holding was ultimately quite narrow. The case invalidated certain FEC regulations because they required a non-connected, non-profit political committee to use its hard-money (*i.e.,* direct candidate and party contribution) account to pay for certain soft-money activities, namely "expenditures such as advertisements [about ballot initiatives], get-out-the-vote efforts, and voter registration drives." *Id.* at 16. The Court's holding was that "non-profits may not be forced to use their hard money accounts" to pay for such expenditures. *Id.* Thus, *EMILY's List* clearly announced that *some* level of hybridization is acceptable for registered political committees, but the Court left open the question of how much hybridization is too much. *Carey,* in turn, extended *EMILY's List.* The court in *Carey* held that a non-connected political committee could combine direct contribution activities with not only generic political expenditures but also "independent expenditures," which by definition are expenditures that "expressly

15 The Circuit in *EMILY's List* was careful not to use the statutory term of art "independent expenditure," which is an expenditure "expressly advocating the election or defeat of a clearly identified candidate," 2 U.S.C. § 431(17), because the plaintiff in *EMILY's List* did not engage in any express advocacy communications that would have been considered "independent expenditures." The Court instead referred more generally to "expenditures for political activities" or simply "expenditures." *See EMILY's List,* 581 F.3d at 6–9, 11–12.

advocat[e] the election or defeat of a clearly identified candidate." *Carey,* 791 F.Supp.2d at 132; *see also* 2 U.S.C. § 431(17) (defining "independent expenditure"). The "soft money" expenditures in *EMILY's List* are distinct from the express advocacy contained in independent expenditures, *see, e.g., Citizens United,* 130 S. Ct. at 910–11 ("This case, however, is about independent expenditures, not soft money."),[16] yet *Carey* did not distinguish between the express advocacy communications it was presented with and the generic soft-money expenditures addressed in *EMILY's List.* On the contrary, the court in *Carey* concluded that "[the plaintiff] and EMILY's List are identical in that regard." *Id.* at 130. *Carey* also dismissed any corruption concerns that might be present with a hybrid political committee that makes both direct candidate contributions and express advocacy communications, citing the holdings of *Citizens United* and *SpeechNow:* independent expenditures do not give rise to corruption or the appearance of corruption. *See id.* at 135 (citing *Citizens United,* 130 S. Ct. at 909 and *SpeechNow,* 599 F.3d at 693). The court observed that: "*EMILY's List* specifically

16 *See also McConnell v. FEC,* 540 U.S. 93, 123–24, 124 S. Ct. 619, 157 L.Ed.2d 491 (2003) (noting that "[political] parties could also use soft money to defray the costs of 'legislative advocacy media advertisements,' even if the ads mentioned the name of a federal candidate, so long as they did not expressly advocate the candidate's election or defeat"); *EMILY's List,* 581 F.3d at 12 n.11 ("[U]nder *Austin* [*v. Michigan Chamber of Commerce,* 494 U.S. 652, 110 S. Ct. 1391, 108 L.Ed.2d 652 (1990)], the soft-money account into which [corporate and labor union] donations are deposited cannot be used to fund express-advocacy election activities that for profit corporations and unions are themselves banned from conducting.").

addressed a hybrid nonprofit entity that both made independent expenditures and contributed directly to federal candidates, campaigns, and parties—and found no problem." *Id.*[17] In sum, *EMILY's List* approved of some hybridization for non-connected political committees, but the D.C. Circuit has yet to endorse the expansion of allowable hybrid activity announced in *Carey*.

The second precept to glean from these cases is the genesis of so-called "Super PACs"—political committees that can raise unlimited money to engage in unlimited electioneering communications, so long as their activities are not made "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate, his or her authorized political committee, or a national, State, or local committee of a political party. 2 U.S.C. § 441a(a)(7)(B). These "Super PACs" are permitted to exist by virtue of two cases. The first is the Supreme Court's decision in Citizens United, which held that corporations could not be prevented from engaging in their own unlimited political speech funded from the corporation's general treasury so long as that speech is in the form of independent expenditures. *See Citizens United*, 130 S. Ct. at 909. The second is the D.C. Circuit's decision in *SpeechNow*, which held that individuals can contribute unlimited amounts to

17 This sentence in particular suggests that the *Carey* court felt constrained by the Circuit's precedent in *EMILY's List* to decide the case as it did. Additionally, "[t]he *Carey* court was constrained by the D.C. Circuit's recent decision in [*SpeechNow*], holding unconstitutional contribution limits to independent expenditure groups." *McCutcheon v. FEC*, No. 12–1034, 893 F.Supp.2d 133, 138 n.2, 2012 WL 4466482, at *3 n.2 (D.D.C. Sept. 28, 2012) (three judge panel).

a non-connected political committee, as long as the political committee is engaged solely in independent expenditures. *See SpeechNow*, 599 F.3d at 694 ("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 appearance of corruption."). Essentially, as long as a non-connected political committee engages only in independent expenditures, it is now permitted to receive unlimited amounts of money from both individuals and corporations. *See, e.g.*, FEC Advisory Op. 2010–11, 2010 WL 3184269, at *2 (July 22, 2010) ("Following *Citizens United* and *SpeechNow*, corporations, labor organizations, and political committees may make unlimited independent expenditures from their own funds, and individuals may pool unlimited funds in an independent expenditure-only political committee. It necessarily follows that corporations, labor organizations and political committees also may make unlimited contributions to organizations . . . that make only independent expenditures." (footnote omitted)).

Importantly, in allowing unlimited money to flow into the electoral process for express advocacy, both *SpeechNow* and *Citizens United* heavily emphasized the non-coordinated nature of independent expenditures, which serves as an essential counterweight to concerns about corruption or the appearance of corruption. *See Citizens United*, 130 S. Ct. at 908 ("'The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a quid pro quo for improper

commitments from the candidate.'" (quoting *Buckley*, 424 U.S. at 47, 96 S. Ct. 612)); *id.* at 910 ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."); *SpeechNow*, 599 F.3d at 693 ("The independence of independent expenditures was a central consideration in the Court's decision [in *Citizens United*]."); id. ("[A] lack of coordination diminishes the possibility of corruption."). Hence, there can be little doubt that the independence of independent expenditures is the lynchpin that holds together the principle that no limits can be placed on contributions for such expenditures. If express advocacy for particular federal candidates were to lose its independence (either in reality or appearance), it stands to reason that the doctrine carefully crafted in *Citizens United* and *SpeechNow* would begin to tumble back to Earth.

The third and final precept, which loomed large behind the development of the first two precepts, is that the government's interest in preventing corruption or the appearance of corruption endures as a compelling justification to restrict certain kinds of political speech. In particular, courts continue to recognize that preventing corruption or the appearance of corruption is sufficiently important to regulate entities that engage in direct contributions to candidates and political parties, including "multicandidate political committees," which are political committees that "ha[ve] made contributions to 5 or more candidates for Federal office." 2 U.S.C. § 441a(a)(4); *see Citizens United*, 130 S. Ct. at 908 ("The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the

reality or appearance of corruption."); *SpeechNow*, 599 F.3d at 695 ("Limits on direct contributions to candidates, 'unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption.'" (quoting *Citizens United*, 130 S. Ct. at 909)); *EMILY's List*, 581 F.3d at 11 ("In order to prevent circumvention of limits on an individual donor's contributions to candidates and parties, the [Supreme] Court has held that non-profit entities can be required to make their own contributions to candidates and parties ... out of a hard-money account that is subject to source and amount restrictions.").

Specifically, Congress explicitly carved out "multicandidate political committees" to be entities that engage in direct contributions to candidates and political parties because such direct contributions foment "the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Buckley*, 424 U.S. at 28, 96 S. Ct. 612; see also 2 U.S.C. § 441a(a)(2) (limiting contributions made by "multicandidate political committees").[18]

---

18 The Supreme Court was clear in its seminal campaign finance decision of the twentieth century (*Buckley*) that "[b]y contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20, 96 S. Ct. 612. This is because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support," and hence although "contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at

21, 96 S. Ct. 612 (emphasis added)

> In light of this distinction, any political contribution enjoys, ex ante, a lesser quantum of First Amendment protection than any type of political expenditure. See *id.* at 23, 96 S. Ct. 612 ("[E]xpenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do ... limitations on financial contributions."); see also *McConnell*, 540 U.S. at 152 n.48, 124 S. Ct. 619 ("Given FECA's definition of 'contribution,' the $5,000 and $25,000 limits restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and numerous other non-coordinated expenditures."), *overruled in part on other grounds by Citizens United*, 558 U.S. 310, 130 S. Ct. 876; *Cal–Med*, 453 U.S. at 196, 101 S. Ct. 2712 (plurality opinion) ("[T]he 'speech by proxy' that [a non-profit] seeks to achieve through its contributions to [a PAC] is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection."); *McCutcheon*, 893 F.Supp.2d at 138, 2012 WL 4466482, at *3 ("Every contribution limit may 'logically reduce[ ] the total amount that the recipient of the contributions otherwise could spend,' but for now, 'this truism does not mean limits on contributions are simultaneously considered limits on expenditures that therefore receive strict scrutiny.'" (quoting *Republican Nat'l Comm. v. FEC*, 698 F.Supp.2d 150, 156 (D.D.C.2010))); Richard Wolf Hess, *No Fair Play for Millionaires? McCain–Feingold's Wealthy Candidate Restrictions and the First Amendment*, 70 U. Chi. L. Rev. 1067, 1077 (2003) ("The Buckley Court ratified contribution limits by recognizing that although contribution limits do affect free speech rights, contributions are less deserving of protection than other forms of political speech. The *Buckley* Court considered contributions as derivative, or conduit-type speech . . . ."). For this reason, the *Buckley* Court was ultimately untroubled by limits on political contributions because the overall effect of contribution limits "is merely to require candidates and political committees to raise funds from a greater number of persons." *See Buckley*, 424 U.S. at 21–22, 96 S. Ct. 612.

For this very reason, the Supreme Court has long validated the government's ability to restrict the amount of contribution that may be given to multicandidate political committees. *See Cal–Med*, 453 U.S. at 203, 101 S. Ct. 2712 (Blackmun, J., concurring) ("Multicandidate political committees are therefore essentially conduits for contributions to

> The Supreme Court, however, started to narrow *Buckley*'s critical distinction, without explanation, only five years after the case was decided. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296–97, 102 S. Ct. 434, 70 L.Ed.2d 492 (1981) ("*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate."). *SpeechNow* followed the Supreme Court down this path, saying that "the limits upheld in Buckley were limits on contributions made directly to candidates." *SpeechNow*, 599 F.3d at 695. Although this narrowing of *Buckley* is at odds with language from other Supreme Court precedents cited above (*Cal–Med* and *McConnell*), the D.C. Circuit's narrow interpretation of *Buckley* binds this Court.

candidates, and as such they pose a perceived threat of actual or potential corruption."); *see also Thalheimer v. City of San Diego*, 645 F.3d 1109, 1120 (9th Cir.2011) (noting that "the direct donor relationship" of a multicandidate political committee "present[s] a risk of actual or apparent quid pro quo corruption" (citing *Cal–Med*, 453 U.S. at 197, 101 S. Ct. 2712)). The Supreme Court has also clearly recognized that "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27, 96 S. Ct. 612.

This sets the stage for the constitutional question presently before the Court: Does the government have a sufficiently compelling interest in limiting contributions to (and solicitations by) connected political committees that engage in both express advocacy communications and direct candidate contributions? All that such a hybrid organization needs to do, according to *Carey*, is establish two separate bank accounts—one for direct contributions and one for independent expenditures—and voilà: the appearance of corruption and undue influence magically disappear. Yet, the allowances of such hybrid PACs transmogrify Congress's intent in compartmentalizing "multicandidate political committees" from other kinds of political associations. When a PAC gives directly to candidates with its right hand and engages in express advocacy with its left hand, the risk that the PAC's hybrid spending will appear corrupting and corrosive is manifest. When the public sees a hybrid PAC hand a check to a candidate or party leader

while that PAC simultaneously spends unlimited amounts on highly visible electioneering communications that directly advocate for that candidate's election, the façade of "independence"—even if formally observed by using separate funds or accounts—appears non-existent to the public. Thus, the "belief that quid pro quo arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics." *Citizens United*, 130 S. Ct. at 961 (Stevens, J., dissenting); see also id. at 962 ("[A] large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations." (quoting *McConnell v. FEC*, 251 F.Supp.2d 176, 623–24 (D.D.C.2003), *overruled in part by* 540 U.S. 93, 124 S. Ct. 619, 157 L.Ed.2d 491 (2003))).[19]

The instant case lies at the intersection of these three precepts, addressing whether a single connected PAC is permitted to engage in limited

---

19 The Court of Appeals' holding in *SpeechNow*, which struck down as unconstitutional limits on individuals' contributions to independent expenditure-only groups, did not account for the newly minted approval of "hybrid" PACs in *EMILY's List*. Indeed, *SpeechNow* never even cited to *EMILY's List*. Although *SpeechNow* purported to limit its holding to "contributions to independent expenditure-only organizations," 599 F.3d at 696, the plaintiffs invite the Court to conclude that the dual-account model supplied by *EMILY's List* for hybrid PACs be read in tandem with *SpeechNow* to expand *SpeechNow's* holding to any organization that engages in some amount of independent expenditure activity. The Court declines the plaintiffs' invitation.

direct contributions funded from one bank account and simultaneously engage in unlimited express advocacy communications funded from another bank account. With these precedents in mind, the Court will now assess the probability of success of the plaintiffs' constitutional claims.

2. Contribution Limits

First, the plaintiffs challenge the constitutionality of the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) as applied to SSFs that make both direct contributions and express advocacy communications. Those provisions prohibit making contributions to any "other political committee" (including SSFs) that exceed $5,000 in any calendar year and also prohibit making contributions that aggregate more than $57,500 biennially.[20] Plaintiffs Glengary LLC and Todd Cefaratti claim that they are both interested in making contributions to the Leadership Fund that exceed these limits and are prohibited from doing so by these restrictions. *See* Compl. ¶¶ 25–26, 71. Those contribution limits for individuals, such as plaintiff Cefaratti, have already been held unconstitutional as applied to non-connected political committees. *See SpeechNow*, 599 F.3d at 696.

The plaintiffs contend that the broad-based discussion of contribution limits in *SpeechNow* and

[20] The $57,500 biennial cap applies to all contributions that are not made "to candidates and the authorized committees of candidates," though of the $57,500 cap no more than $37,500 "may be attributable to contributions to political committees which are not political committees of national political parties." 2 U.S.C. § 441a(a)(3)(B).

EMILY's List dictate a result in the plaintiffs' favor. Those cases are distinguishable, however, and therefore do not control the outcome of the instant case. First, although *EMILY's List* was a facial challenge, the regulations challenged in that case only dealt with solicitation and allocation restrictions, not contribution limits. *EMILY's List,* 581 F.3d at 15–18 (outlining provisions of challenged regulations). Hence, to the extent the Court's analysis touched upon contribution limits, it was pure dicta. Second and perhaps more importantly, although the non-profit plaintiff in *EMILY's List* engaged in "expenditures," none of the expenditures at issue involved express advocacy for or against a clearly identified federal candidate. Rather, the expenditures involved in *EMILY's List* were either issue-based advocacy or voter turnout and registration activities. *See id.* at 12 (noting that EMILY's List "makes expenditures for advertisements, get-out-the-vote efforts, and voter registration drives"); *EMILY's List v. FEC,* 569 F. Supp. 2d 18, 33 (D.D.C.2008) (noting that advertisements at issue were "five advertisements supporting two ballot initiatives in Missouri that ... do not contain any references to clearly identified federal candidates"), *reversed by* 581 F.3d 1 (D.C.Cir.2009).[21]

[21] The Circuit panel in *EMILY's List* was also very careful to emphasize repeatedly that its "constitutional analysis of non-profits applie[d] only to *non-connected* non-profits." *EMILY's List,* 581 F.3d at 22 n.21 (emphasis in original); *see also id.* at 8 ("[T]his case concerns the FEC's regulation of *non-profit entities* that are not connected to a candidate, party, or for-profit corporation."); *id.* at 16 n.15 ("Our constitutional analysis of donations and spending limits applies both to non-connected

Thus, *EMILY's List* did not address contribution limits, and in particular it did not address the potential anti-corruption interests implicated by contribution limits on hybrid PACs that engage in both direct contributions and express advocacy—a critical distinction from the facts of the instant case. The distinction is critical primarily because express advocacy has an inherently stronger nexus to particular candidates, which materially alters the constitutional analysis of hybrid political committees. *See FEC v. Mass. Citizens for Life, Inc.* ("*MCFL* "), 479 U.S. 238, 249, 107 S. Ct. 616, 93 L.Ed.2d 539 (1986) ("*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons."); *Wis. Right to Life, Inc. v. FEC,* 466 F. Supp. 2d 195, 209 (D.D.C. 2006) ("The common denominator between express advocacy and its functional equivalent, as the Supreme Court defined it in *McConnell,* is the link between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office.... [I]t is the absence of that link which obviates the likelihood of political corruption and

non-profits registered as political committees with the FEC and to non-connected non-profits that are not so registered."). The Circuit did not explicitly state why non-connectedness was important to its analysis, though the repeated emphasis on non-connectedness implies that it was in fact important. Nevertheless, this Court will not venture to speculate as to the doctrinal importance of the non-connected nature of the non-profit at issue in *EMILY's List,* other than to observe that the entity at issue in the instant case (the Leadership Fund) is, by contrast, a *connected* political committee.

public cynicism in government where the ad, on its face, is devoid of any language the purpose of which is advocacy either for or against a particular candidate for federal office."). Additionally, *EMILY's List* did not consider the propriety of "hybrid" PACs in a post-*Citizens United* world of unlimited corporate funding—a factor that does, and should, likewise modify the anti-corruption calculus.[22]

Similarly, *SpeechNow* is distinguishable from the instant case because it involved limits on contributions by individuals to unincorporated non-profit associations that *only* engage in independent expenditures. *See SpeechNow,* 599 F.3d at 689 ("[W]e hold that the contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to individuals' contributions to SpeechNow."); *see also id.* at 696 ("[W]e only decide these questions as applied to contributions to SpeechNow, an independent expenditure-only group."). Clearly, *SpeechNow* does not control the instant case because this case deals with a "hybrid" PAC that seeks to engage in *both* independent expenditures and direct candidate contributions.[23]

22 This is notwithstanding the partially concurring opinion in *EMILY's List,* which observed that the results of the majority's decision "are in tension—perhaps irreconcilable tension—with *McConnell.*" *EMILY's List,* 581 F.3d at 39 (Brown, J., concurring); *see also id.* at 37 ("This novel argument [that hybrid political committees may exist] is not without considerable charm, but one must read *Cal–Med* with a squint to see that holding.").

23 It also appears that the plaintiffs in *SpeechNow* and *EMILY's List* were not established, administered, or subsidized by a corporation and thus were "non-connected," unlike the Leadership Fund in the instant action.

See Compl. ¶ 23 (noting that the Leadership Fund "wants to make contributions to federal candidates" and "is also interested in making independent expenditures"). Indeed, *SpeechNow* observed that "[t]he independence of independent expenditures was a central consideration in the [Supreme] Court's decision [in *Citizens United*]," 599 F.3d at 693, though as the Court's preceding analysis makes clear, the "independence" of hybrid PAC expenditures is suspect.

"The Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption." *Id.* at 692; *see also Colo. Republican Fed. Campaign Comm. v. FEC,* 518 U.S. 604, 615, 116 S. Ct. 2309, 135 L.Ed.2d 795 (1996) ("[R]easonable contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors."). As the Court in *Buckley* and the plurality in *Cal–Med* articulated, the government's interest in "deal[ing] with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions," is directly implicated when contributions are made to groups that in turn make direct contributions to candidates or political parties. *Buckley,* 424 U.S. at 28, 96 S. Ct. 612; *see also Cal–Med,* 453 U.S. at 194, 101 S. Ct. 2712 (plurality opinion) ("[Contribution] limitations serve [ ] the important governmental interests in preventing the corruption or appearance of corruption of the political process that might result if such contributions were not restrained."). This anti-corruption interest continues to justify the

$5,000 annual cap on hybrid PACs like the Leadership Fund that desire to make both independent electioneering expenditures, including express advocacy communications, and direct contributions to federal parties and candidates. The Supreme Court observed as much in *Cal–Med* when the plurality held:

> If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee ... which advocates the views and candidacies of a number of candidates.

Cal–Med., 453 U.S. at 183–84, 101 S. Ct. 2712 (plurality opinion) (citation omitted).

As discussed above, the government's interest in preventing the appearance of political corruption and undue influence is at its zenith when individuals and organizations give money directly to political candidates and political parties. As the Supreme Court prophetically stated over thirty-five years ago:

> Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the

> communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.

Buckley, 424 U.S. at 26–27, 96 S. Ct. 612. This has been the justification for contribution limits to multicandidate political committees for decades. *See, e.g., Cal–Med,* 453 U.S. at 197–98, 101 S. Ct. 2712 (plurality opinion) (holding that limits on contributions to multicandidate political committees "further the governmental interest in preventing the actual or apparent corruption of the political process").

When a single entity is allowed to make both limited direct contributions and unlimited independent expenditures, keeping the bank accounts for those two purposes separate is simply insufficient to overcome the appearance that the entity is in cahoots with the candidates and parties that it coordinates with and supports. Although such an entity may maintain separate bank accounts, it need not maintain separate management or hold itself out to the public as engaging in two distinct activities. Thus from the perspective of any citizen who does not scrutinize the entity's bank statements, all of the entity's spending (direct contributions and express advocacy communications) is coming from the same place. *See N.C. Right to Life, Inc. v. Leake,*

525 F.3d 274, 336 (4th Cir.2008) (Michael, J., dissenting) ("It is hard to understand how [an independent expenditure-only PAC] could, whether intentionally or not, avoid incorporating the coordinated campaign strategies used by [its affiliated direct contribution-only PAC] into its own ostensibly independent campaign work. Similarly, it is hard to understand how a donor, approached by the same fundraiser on behalf of both [PACs], could not believe that his or her contributions to each would be linked."); *see also Vt. Right to Life Comm., Inc. v. Sorrell,* 875 F.Supp.2d 376, 408 (D.Vt.2012) (noting that "the structural melding" between an independent expenditure-only PAC and a direct contribution PAC "leaves no significant functional divide between them for purposes of campaign finance law," and their "nearly complete organizational identity poses serious questions"). To conclude that a "hybrid" PAC's direct contributions to (and attendant coordination with) candidates and parties do not infect, or appear to infect, all of its operations in the political arena is naïve and simply out of touch with the American public's clear disillusionment with the massive amounts of private money that have dominated the political system, particularly since *Citizens United.*[24] *See Citizens*

---

24 *See* Brennan Ctr. for Justice, *National Survey: Super PACs, Corruption, and Democracy* 2–3 (2012) (reporting that 73% of respondents in national poll agreed that "there would be less corruption if there were limits on how much could be given to Super PACs," 77% "agreed that members of Congress are more likely to act in the interest of a group that spent millions to elect them than to act in the public interest," and 65% said that "they trust government less because big donors to Super PACs have more influence than regular voters"); *see also* Morgan Little, *Poll: Americans Largely in Favor of Campaign Spending Limitations,* L.A. Times (Sept. 16, 2012) (reporting that recent national

United, 130 S. Ct. at 964 (Stevens, J., dissenting) ("A democracy cannot function effectively when its constituent members believe laws are being bought and sold."). Although "[a] non-profit that makes 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," *EMILY's List,* 581 F.3d at 12, such a hybrid PAC also does not lose its status as a multicandidate political committee merely by making independent expenditures.

This is, of course, not to say that an organization like the Leadership Fund forfeits its First Amendment rights simply by virtue of wanting to make both direct contributions and independent electioneering expenditures. Those rights remain unscathed. Further, the burden on the plaintiffs to comply with the current contribution limits is minimal. If banding together to engage in unlimited political speech is their goal, the plaintiffs could easily form an independent expenditure-only PAC (*i.e.,* a Super PAC) and receive contributions in unlimited amounts. *Compare SpeechNow,* 599 F.3d at 697 ("[P]laintiffs argue that the additional burden that would be imposed on SpeechNow if it were required to comply with the organizational and reporting requirements applicable to political committees is too much for the First Amendment to

poll conducted by the Associated Press and the National Constitution Center found that 83% of Americans "believe there should be at least some limits on the amount of money corporations, unions and other organizations are permitted to contribute to groups seeking to influence the outcome of presidential and congressional races").

bear. We disagree."), *with* Pls.' Reply Mem. in Supp. Mot. Prelim. Inj. ("Pls.' Reply") at 11, ECF No. 7 ("The FEC cannot require [the Leadership Fund] to clone itself to make independent expenditures."). Therefore, the contribution limits at 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) are constitutional as applied to the Leadership Fund, insofar as the Leadership Fund operates as a single entity that makes both direct contributions and express advocacy communications.[25]

3. Solicitation Restrictions

Next, the plaintiffs challenge the constitutionality of the FECA's restrictions on the group of people from whom an SSF may solicit contributions. Section 441b(b)(4)(A)(i) of the FECA makes it unlawful "for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel." SSFs may also solicit the rank-and-file employees of their connected corporations as long as the solicitations are: (1) made in writing; (2) addressed to the employees at their residence; (3) made only twice per calendar year; and (4) designed such that the SSF and its connected corporation "cannot determine who

25 As discussed above, this holding does not prevent the Leadership Fund or any of the other plaintiffs from engaging in unlimited independent expenditures. It merely imposes a narrow limit on the mechanism through which they may do so. For example, STI could establish a second connected PAC that engaged in only independent expenditures. Also, any or all of the plaintiffs could establish a non-connected political committee that engages in only independent expenditures.

makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution." *Id.* § 441b(b)(4)(B). The plaintiffs state, however, that they do not challenge the validity of these latter restrictions, which regulate the manner in which rank-and-file employees may be solicited. *See* Pls.' Mem. in Supp. Mot. Prelim. Inj. ("Pls.' Mem.") at 3, ECF No. 4–1 ("Plaintiffs do not challenge ... the prohibition on soliciting employees of the SSF not in the restricted class more than twice annually subject to certain restrictions." (citing 2 U.S.C. § 441b(b)(4)(B))). Rather, the plaintiffs seek to expand the scope of people who may be solicited beyond the limited group of individuals associated with the host corporation through an ownership or employment interest. In essence, however, the direct solicitation restrictions for rank-and-file employees would be swallowed if the relief sought by the plaintiffs were granted (and STI and the Leadership Fund were permitted to solicit from the general public) because the general public necessarily would include rank-and-file employees.

Soliciting money for political spending is distinct from either making political contributions or making independent political expenditures, though all three activities enjoy First Amendment protection. The Supreme Court has held that "[s]oliciting financial support is undoubtedly subject to reasonable regulation," so long as that regulation is "undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech." *Vill. of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 632, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980); *see also Friends of the Vietnam Veterans Mem.'l v. Kennedy,* 116 F.3d 495,

497 (D.C.Cir.1997) ("The cases protecting the right to solicit contributions in a public forum do so not because the First Amendment contemplates the right to raise money, but rather because the act of solicitation contains a communicative element." (citing *Village of Schaumburg,* 444 U.S. at 632, 100 S. Ct. 826)) Therefore, the plaintiffs go too far in arguing that, "After *Citizens United* and related cases all associations have a fundamental right to associate by soliciting contributions to fund independent expenditures." Pls.' Reply at 14.

It is not completely clear what level of scrutiny applies when examining the constitutional validity of restrictions on solicitation activities. A number of courts have held that, so long as the solicitation restrictions are content neutral, they need not withstand strict scrutiny. *See, e.g., McConnell,* 540 U.S. at 138–39, 124 S. Ct. 619 (applying less than strict scrutiny to solicitation restriction because it "in no way alter[ed] or impair[ed] the political message 'intertwined' with the solicitation"); *EMILY's List,* 581 F.3d at 35 (Brown, J., concurring) ("After *McConnell,* ... solicitation rules are subject only to this lesser scrutiny."); *Blount v. SEC,* 61 F.3d 938, 941–42 (D.C.Cir.1995) ("The intensity with which we scrutinize [a solicitation *46 restriction] depends on whether the rule is content-based, eliciting 'strict' scrutiny, or content-neutral, eliciting only 'intermediate' scrutiny."). In the instant case, the solicitation restrictions appear to be content neutral because they are "justified without reference to the content of the regulated speech," *see Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976), but the Court need not decide this question

because, as the subsequent discussion reveals, the solicitation restrictions challenged by the plaintiffs would survive even strict scrutiny.

Although the Court is mindful that solicitation activities are "characteristically intertwined with informative and perhaps persuasive speech," *Village of Schaumburg,* 444 U.S. at 632, 100 S. Ct. 826, the plaintiffs have altogether failed to allege or describe how their proposed solicitation activities would include a "communicative element."[26] *See Kennedy,* 116 F.3d at 497. The plaintiffs have discussed their proposed solicitation activities solely in terms of how those solicitations will allow them to raise particular amounts of money, *see, e.g.,* Compl. ¶¶ 27, 40–41, 43; Pls.' Mem. at 6 ("[The Leadership Fund] wants to solicit Mr. Ehlinger to make a $1,500 contribution to a[n] [independent expenditure-only] account . . . ."); *id.* at 10 ("[The Leadership Fund] would like to solicit contributions for its independent expenditures in amounts greater than $5,000.00 per calendar year."), but the act of soliciting money in certain amounts, by itself, does not warrant strong First Amendment protection—even if it is for the purpose of *later* engaging in protected speech. *See Kennedy,* 116 F.3d at 497 (observing that the First Amendment does not contemplate "the right to raise

---

26 The FEC has stated that one of its concerns is that the Leadership Fund will solicit the general public through expressive or persuasive conduct, but the plaintiffs do not address this possibility in their Complaint or their briefing. *See* Def.'s Opp'n at 16 (noting "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").

money"). Nevertheless, the Court is wary of labeling the plaintiffs' proposed solicitations as pure commercial speech, particularly because this Circuit has recognized that the solicitation of campaign funds "is close to the core of protected speech." *Blount,* 61 F.3d at 941 (citing *Village of Schaumburg,* 444 U.S. at 632, 100 S. Ct. 826). A restriction on solicitation activity thus generally "cannot be sustained unless it serves a sufficiently strong, subordinating interest that the [government] is entitled to protect." *Village of Schaumburg,* 444 U.S. at 636, 100 S. Ct. 826; *see also id.* at 637, 100 S. Ct. 826 (noting that restriction on solicitation activities "may serve [the government's] legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms").[27]

---

27 The plaintiffs seem to believe that the right to engage in unrestricted solicitation of funds follows ineluctably from the holding in *Citizens United* because, in the plaintiffs' view, every campaign finance regulation that has any nexus to independent expenditures is also unconstitutional. *See, e.g.,* Pls.' Reply at 14. Yet, this is clearly not so. For example, courts have consistently upheld the FECA's organizational, reporting, and disclosure requirements—requirements that continue to apply to independent expenditure-only organizations, despite the fact that compliance with such requirements imposes costs that necessarily divert organizational resources away from independent expenditure activity. *See Citizens United,* 130 S. Ct. at 916 ("[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."); *SpeechNow,* 599 F.3d at 697 (rejecting plaintiffs' argument that organizational and reporting requirements on political committees are violative of the First Amendment).

The Supreme Court established long ago, however, that the federal government has a number of "sufficiently strong" interests in limiting the solicitation activities of SSFs. *See NRWC,* 459 U.S. at 206–10, 103 S. Ct. 552. The plaintiffs are incorrect in arguing that the Supreme Court's decision in *NRWC,* upholding the FECA's solicitation restrictions, was only "based upon an antidistortion rationale thoroughly rejected by the Supreme Court in *Citizens United.*" Pls.' Reply. at 14 n.12. *NRWC* discussed the constitutionality of the very same solicitation restrictions that that plaintiffs challenge in the instant action. The plaintiff in *NRWC* challenged the solicitation restrictions in 2 U.S.C. § 441b(b)(4)(A), arguing (as the plaintiffs do here) that they restricted the ability of the corporation's SSF to associate with people who shared its political beliefs. *See NRWC,* 459 U.S. at 206–07, 103 S. Ct. 552; *see also* Pls.' Reply at 14 (arguing for "fundamental right to associate by soliciting contributions"). The Court rejected this challenge on several grounds. First, the Court pointed to an anti-distortion rationale, *i.e.,* ensuring that "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests,' " as well as a shareholder protection rationale, *i.e.,* "to 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," and found that both were "sufficient to justify the

[solicitation restrictions] at issue." *NRWC,* 459 U.S. at 207–08, 103 S. Ct. 552. Significantly, the Court then went on to discuss a third key rationale that supported the solicitation restrictions: "the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *Id.* at 208, 103 S. Ct. 552. The Court stated that "[i]n order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations" and that "[w]hile § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress's judgment that it is the potential for such [corrupting] influence that demands regulation." *Id.* at 209–10, 103 S. Ct. 552. Therefore, contrary to the plaintiffs' assertion, the Supreme Court in *NRWC* also relied upon the well-established and compelling anti-corruption rationale in upholding § 441b's solicitation restrictions. Nothing in *Citizens United* or any other Supreme Court case has displaced the holding in *NRWC,* and this Court is bound to follow it here.

Yet another important consideration implicated by the solicitation restrictions challenged in this case is the government's interest in protecting the First Amendment rights of a corporation's employees. This concern was not addressed by the majority in *Citizens United* or the Court of Appeals in *EMILY's List* and *SpeechNow,* but it is vitally important to the health of American democracy. *See NRWC,* 459 U.S. at 206, 103 S. Ct. 552 (observing that FECA's restrictions on SSF solicitations were intended to prevent such solicitations from "coerc[ing] members

of the corporation holding minority political views"). As Justice Stevens noted in his piercing dissent, "[t]he majority seems oblivious to the simple truth that laws such as [the FECA] do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other." *Citizens United,* 130 S. Ct. at 976 (Stevens, J., dissenting). "The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve." *Id.* at 977.

Providing corporations with an unlimited political voice may bring more and louder voices to the national political dialogue as the *Citizens United* majority repeatedly emphasized and lauded, but allowing unlimited amplification of corporate political speech will also inevitably chill the political speech of corporate employees whose views diverge from their corporate employers. The plaintiffs assure the Court that they will abide by the FECA's other applicable solicitation restrictions, such as the restriction on only soliciting rank-and-file employees twice per year under certain restrictions, "the requirement to 'inform each employee it solicits of the political purposes of [the SSF]' and 'of his right to refuse to contribute without any reprisal.' " Pls.' Reply at 6, 16 (quoting Def.'s Opp'n at 23). Yet, as one commentator has noted, "the inherent potential for coercion in employer-employee relationships ... cannot simply be undone by prohibiting explicit or implicit threats or discrimination." Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post–Citizens United Environment,*

120 Yale L.J. Online 17, 24 (2010). Rather, "it is in the best interest of all involved to keep political discussions and partisanship out of the public and private workplace." *Id.* The relief sought by the plaintiffs would do just the opposite. As noted above, allowing STI and the Leadership Fund to solicit funds from the general public would essentially do away with the FECA's strict limitations on how corporate employees may be solicited because all corporate employees are also members of the general public. The danger that rank-and-file employees would be exposed to repeated public solicitations from their employer's PAC[28]—via direct mail, radio, television, or other public media of the corporation's choice—and would thereby feel coerced to contribute or adopt a particular political viewpoint at work, represents an unacceptable risk of infringing those employees' First Amendment rights. Preventing such an outcome would essentially require rewriting the statute to account for the existence of general-public solicitation, which is a task for the Congress, not this Court.

The solicitation restrictions in § 441b are also narrowly drawn to serve the foregoing governmental interests because the restrictions are tailored to match the special benefit that Congress extended to SSFs—exempting all funds used for "the establishment, administration, and solicitation of contributions to a [SSF]" from the definition of "contributions." *See* 2 U.S.C. § 441b(b)(2)(C). This

---

28 Corporate employees would be well aware that they are being solicited by their employer's PAC because each SSF is required to "include the name of its connected organization" in its name. 2 U.S.C. § 432(e)(5).

exemption, as discussed above, evidences a delicate statutory balancing of burden and benefit: An SSF's solicitation speech may be subsidized by its connected corporation, so long as those solicitations are limited to corporate insiders and employees. *See id.* § 441b(b). The statutory exemption allows connected PACs to avoid the disclosure and reporting requirements that would otherwise apply to contributions *49 that fund political solicitations. Consequently, donations to the general treasury of the non-profit corporation in any amount from any source may be funneled, without disclosing or reporting the amount or the source, to the connected PAC for use in solicitations.[29] Removing the statute's restrictions on the breadth of such solicitations would allow the disclosure and reporting exception to swallow the rule.

SSFs are creatures of statute—they were crafted by Congress to enjoy certain benefits that other, non-connected PACs cannot enjoy, and it is therefore eminently reasonable and important for connected PACs to abide by Congress's countervailing restriction on the universe of people to whom SSFs' solicitations may be directed. *See Cal-Med,* 453 U.S.

---

[29] This is yet another distinction between the instant case and *EMILY's List*. The plaintiff in *EMILY's List*, unlike the plaintiff STI in the instant action, was registered as a political committee and thus was required to disclose the amount and source of any "contributions," i.e., any monies given to the organization "for the purpose of influencing any election for Federal office." *See* 2 U.S.C. § 431(8)(A); *EMILY's List*, 581 F.3d at 16 n.15. STI is a 501(c)(4) non-profit that need not disclose the source or amount of any contributions to its general treasury.

at 201, 101 S. Ct. 2712 ("[T]he segregated funds that unions and corporations may establish pursuant to § 441b(b)(2)(C) are carefully limited in [the manner and scope of their solicitations]."). The solicitation restrictions do not limit the content or frequency of the plaintiffs' solicitation messages, and therefore it would be inappropriate to upset the careful legislative balance struck in § 441b(b). The FEC's "reasonable regulation" upon the solicitation of financial support to SSFs is therefore permissible because it exercises "due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech." *See Village of Schaumburg,* 444 U.S. at 632, 100 S. Ct. 826.

* * *

In sum, the plaintiffs have not demonstrated a likelihood of success on the merits of their claims. Although the Court will continue to discuss the other three preliminary injunction factors in assessing the plaintiff's Motion for Preliminary Injunction, the foregoing conclusion about the merits of the plaintiffs' claims is sufficient to grant the FEC's Motion to Dismiss. As a result, the Leadership Fund may establish two separate bank accounts that may be used for direct contributions and independent expenditures (including express advocacy). Insofar as the Leadership Fund chooses to remain as a single entity that engages in both direct candidate contributions and express advocacy communications, however, the Leadership Fund may not solicit contributions beyond the limits on such solicitations contained in 2 U.S.C. § 441b(b)(4), and the Leadership Fund also may not accept any

contributions in excess of the limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3).

B. Irreparable Harm

The plaintiffs claim that they will suffer irreparable harm if the Leadership Fund is not allowed immediately to "solicit and accept unlimited contributions in order to conduct independent expenditures." Pls.' Mem. at 33. This claim, however, is highly dubious in light of the numerous alternative ways that the plaintiffs could engage in unlimited political speech. Most notably, the plaintiffs could form a Super PAC that paid its own administrative and solicitation costs and could therefore solicit unlimited contributions from the general public to finance unlimited independent expenditures. The plaintiffs respond to this option by arguing that operating a Super *50 PAC would be burdensome. *See* Pls.' Reply at 11–12 (citing *MCFL,* 479 U.S. at 254–55, 107 S. Ct. 616). The plaintiffs argue that the "additional requirements" of administering a Super PAC " 'may create a disincentive for [plaintiffs] to engage in political speech.' " *Id.* at 12 (alteration in original) (quoting *MCFL,* 479 U.S. at 254, 107 S. Ct. 616). Yet, the plaintiffs do not say why the organizational, reporting, and record-keeping requirements of administering a Super PAC would be any more burdensome than the (identical) organizational, reporting, and record-keeping requirements of administering an SSF. It appears that what the Leadership Fund would really like is to have its cake and eat it too—enjoy the benefits of an SSF (corporate subsidization of administration and solicitation expenses) while also enjoying the benefits

of a Super PAC (unlimited fundraising abilities). Choices have consequences, and requiring the plaintiffs to live with the limitations of the entity they chose to establish (an SSF) entails no more of an injury than requiring a "social welfare" organization to begin paying taxes if it chooses to operate its business for profit. *See* 26 U.S.C. § 501(c)(4).

C. Balance of Equities and Public Interest

For many of the same reasons already discussed, the balance of equities tips in favor of the FEC rather than the plaintiffs. Granting the plaintiffs the relief they request would force the FEC to ignore the congressionally mandated limits on the fundraising activities of SSFs without a sound constitutional basis for doing so. Also, though the plaintiffs may not be capable of raising the amount of funds they would be capable of raising as a Super PAC, that wound is self-inflicted. Furthermore, the plaintiffs do not seek a preservation of the status quo, but rather they seek fundamental change in how SSFs are regulated by the FEC, which would undoubtedly require new agency guidance and other burdens that are at least equal, if not far greater, than any burdens that would result from establishing a separate Super PAC to engage in the unlimited fundraising the plaintiffs desire. Finally, and perhaps most importantly, " '[t]he presumption of constitutionality which attaches to every Act of Congress is ... an equity to be considered in favor of [the government] in balancing hardships.' " *Bowen v. Kendrick,* 483 U.S. 1304, 1304, 108 S. Ct. 1, 97 L.Ed.2d 787 (1987) (Rehnquist, C.J., in chambers) (quoting *Walters v. Nat'l Ass'n of*

Radiation Survivors, 468 U.S. 1323, 1324, 105 S. Ct. 11, 82 L.Ed.2d 908 (1984)). That equity is in full effect here.

The public interest would also not be served by granting the injunctive relief requested by the plaintiffs. As discussed above, the provisions challenged by the plaintiffs serve important governmental interests intended to protect the integrity of the electoral process. Therefore, enjoining the enforcement of those provisions would palpably disserve the public interest, absent a strong countervailing First Amendment reason for doing so.

IV. CONCLUSION

In sum, the plaintiffs have failed to satisfy any of the four preliminary injunction factors in connection with their First Amendment claims, and thus they have failed to state a plausible claim for relief. Therefore, for the reasons discussed above, the plaintiffs' Motion for Preliminary Injunction, ECF No. 4, is DENIED. For the same reasons, the FEC's Motion to Dismiss, ECF No. 8, is GRANTED.

An appropriate Order accompanies this Memorandum Opinion.

APPENDIX C

UNITED STATES CODE
TITLE 52—VOTING AND ELECTIONS
SUBTITLE III—FEDERAL CAMPAIGN FINANCE
CHAPTER 301—FEDERAL ELECTION CAMPAIGNS
SUBCHAPTER I—DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

Sec. 30101 Definitions

(4) The term "political committee" means--

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $ 1,000 during a calendar year or which makes expenditures aggregating in excess of $ 1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 30118(b) of this title; . . . .

(8)(A) The term "contribution" includes--

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

(B) The term "contribution" does not include-- . . .

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 30118(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(9)(A) The term "expenditure" includes--

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include-- . . .

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the

Commission in accordance with section 30104(a)(4)(A)(i) of this title, and in accordance with section 30104(a)(4)(A)(ii) of this title with respect to any general election; . . .

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 30118(b) of this title, would not constitute an expenditure by such corporation or labor organization; . . . .

Sec. 30104 Reporting requirements

(a) Receipts and disbursements by treasurers of political committee; filing requirements.

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report. . . .

(4) All political committees other than authorized committees of a candidate shall file either--

(A)

(i) quarterly reports, in a calendar year in which a regularly scheduled general election is held, which shall be filed no later than the 15th day after the last day of each calendar quarter: except that the report for the quarter ending on December 31 of such calendar year shall be filed no later than January 31 of the following calendar year;

(ii) a pre-election report, which shall be filed no later than the 12th day before (or posted by any of the following: registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, or delivered to an overnight delivery service with an on-line tracking system, if posted or delivered no later than the 15th day before) any election in which the committee makes a contribution to or expenditure on behalf of a candidate in such election, and which shall be complete as of the 20th day before the election;

(iii) a post-general election report, which shall be filed no later than the 30th day after the general election and which shall be complete as of the 20th day after such general election; and

(iv) in any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year; or

(B) monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month and shall be complete as of the last day of the month, except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year.□ Notwithstanding the preceding

sentence, a national committee of a political party shall file the reports required under subparagraph (B).

(5) If a designation, report, or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii) or subsection (g)(1)) is sent by registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, the United States postmark shall be considered the date of filing the designation, report or statement. If a designation, report or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii), or subsection (g)(1)) is sent by an overnight delivery service with an on-line tracking system, the date on the proof of delivery to the delivery service shall be considered the date of filing of the designation, report, or statement. . . .

(7) The reports required to be filed by this subsection shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward.

(8) The requirement for a political committee to file a quarterly report under paragraph (2)(A)(iii) or paragraph (4)(A)(i) shall be waived if such committee is required to file a pre-election report under paragraph (2)(A)(i), or paragraph (4)(A)(ii) during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter. . . .

Sec. 30116 Limitations on contributions and expenditures

Sec. 30116(a)(1)(C)

(a) Dollar limits on contributions.

(1) Except as provided in subsection (i) and section 30117 of this title, no person shall make contributions-- . . .

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $ 5,000;

Sec. 30116(a)(3)

(a) Dollar limits on contributions.

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than--

(A) $ 37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $ 57,500, in the case of any other contributions, of which not more than $ 37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

Sec. 30118 Contributions or expenditures by national banks, corporations, or labor organizations

(a) In general. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) Definitions; particular activities prohibited or allowed. . . .

(2) For purposes of this section and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 79l(h)), the term "contribution or expenditure" includes a contribution or expenditure, as those

terms are defined in section 30101 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock. . . .

(4)

(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful--

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or

administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $ 50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established

by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members. . . .

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

No. 14-____

IN THE

Supreme Court of the United States

STOP THIS INSANITY, INC., *et al.*,
Petitioners,
v.
FEDERAL ELECTION COMMISSION,
Respondent.

CERTIFICATE OF SERVICE

I, Tillman J. Breckenridge, certify that on this 29th day of September, 2014, three copies of the Petition for Writ of Certiorari for Petitioners, Stop This Insanity, Inc., Stop This Insanity, Inc. Employee Leadership Fund, and Glengary Inc. were sent by overnight delivery to:

Lisa J. Stevenson
Deputy General Counsel – Law
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

Counsel for Respondent Federal Election Commission

Donald B. Verrilli, Jr.
U.S. Department of Justice
950 Pennsylvania Ave., N. W.
Room 5614
Washington, D.C. 20530-0001

Solicitor General of the United States.

I further certify that all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2014

Tillman Breckenridge /(TAB)

Tillman J. Breckenridge
Reed Smith LLP
1301 K Street, N.W.
Washington, D.C. 20005
(202) 414-9285

Counsel for Petitioner

No. 14-____

IN THE

Supreme Court of the United States

STOP THIS INSANITY, INC., *et al.*,
Petitioners,
v.

FEDERAL ELECTION COMMISSION,
Respondent.

WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Certiorari for Petitioners Stop This Insanity, Inc., Stop This Insanity, Inc. Employee Leadership Fund, and Glengary Inc. contains 8,537 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on 29 September, 2014.

Tillman J. Breckenridge
Reed Smith LLP
1301 K Street, N.W.
Washington, D.C. 20005
(202) 414-9285

Counsel for Petitioner