

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**

**REPLY IN SUPPORT OF
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 Petitioners

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INTRODUCTION

The petition presents two questions that have divided courts all over the country: whether the government can restrict independent expenditures by organizations that also engage in more heavily regulated campaign and candidate contributions, and whether the disclosure interest can justify a prohibition on speech for some forms of organization. But the government has elected to simply not address these questions, and focus on a question no one asked.

The Fifth Circuit spoke directly to these issues, rejecting Texas's effort to do exactly what the government succeeded at in the decision below: turning a restriction on speech into a disclosure issue. And the Tenth Circuit has plainly rejected the notion that additional restrictions on independent expenditures can be justified by the mere fact that an organization also engages in regulated campaign and candidate contributions as well.

Rather than address these conflicts, the government inverts this Court's settled First Amendment analysis by asserting that Petitioner Stop This Insanity, Inc. Employee Leadership Fund's ("ELF") non-contribution activities can be restricted—unlike with any other PAC, corporation, labor union, non-profit, or individual—because Congress granted connected PACs a modest and sensible disclosure exemption. If Congress chooses to require connected PACs to make the same disclosures as non-connected PACs, it may do so, Pet. 29-30, but the government may not suppress speech based on the white elephant gift of a minor disclosure exemption, Pet. 30. The right to engage in

political speech is not a boon to be awarded or restricted at the grace of the FEC or Congress. Rather, it is a fundamental right of every person and association. It may not be limited, unless the government demonstrates that the restriction is narrowly tailored to avoid unnecessary abridgement of First Amendment rights in furthering a governmental interest that outweighs the burden on speech. Thus, Petitioners Stop This Insanity Inc. (“STII”), ELF, and Glengary Inc. all have a vested interest in ensuring their rights to come together and speak through ELF. And the government cannot satisfy its burden to prohibit their speech.

The government also musters no response to Petitioners’ point that the decision below conflicts with this Court’s decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), nor does it address the petition’s discussion of the importance of the questions presented. It fails to acknowledge that this case asserts the free speech rights of a multitude of individuals that make up the over 3,000 existing connected PACs organized under the Act as of July 1, 2014. Those connected PACs are connected to not-for-profit corporations, for-profit corporations, labor unions, and other organizations. They often are separate entities with their own leadership and speech rights. Most notably, the number of connected PACs under the Act has gone *up* since the Court decided *Citizens United*.

The petition raised these facts, and the government whistles past them without a mention, on its way to adopting the D.C. Circuit’s unsupported conjecture that connected PACs “are ‘a vintage—yet still operable—relic.’” The numerous connected PACs formed after *Citizens United* beg to differ. In any

event, the questions presented here apply well beyond the connected PAC context. That much is evident in the fact that the decisions below were addressed by both the Fifth and Tenth Circuits when deciding similar issues. This Court should intervene now and provide guidance on whether the government may restrict independent expenditures in the name of protecting its interest in regulating unrelated campaign and candidate contributions, or silence such speech purportedly in the interest of disclosure.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED ON BOTH OF THE QUESTIONS PRESENTED.

The circuits are divided on fundamental questions of whether hybrid PACs, like ELF's intended form, may be prohibited consistent with the First Amendment, and what role the disclosure interest plays in that analysis.

In *Catholic Leadership Coalition v. Reisman*, 764 F.3d 409 (5th Cir. 2014), plaintiff advocacy organizations challenged a Texas law limiting independent expenditures for 60 days after a type of PAC was formed. The lead plaintiff was a regulated PAC formed by a 501(c)(4) non-profit advocacy organization—just like ELF. *Id.* at 426. And just as here, the Texas government sought to cast the restriction on speech as a disclosure regulation. The court rejected that notion because “provisions that put a ceiling on speech even if a party is willing to provide all of the information that the government requests constitutes something more than a simple

disclosure requirement.” *Id.* at 426-27.¹ The court ruled that the restrictions “may very well help to improve the transparency of Texas politics, but that does not make it a disclosure regulation.” *Id.* at 427.

The court then evaluated the restrictions based on this Court’s prior rulings establishing that the government must show that a restriction on political speech advances its interest against preventing actual or perceived *quid pro quo* corruption. *Id.* at 428. It held that Texas could not show that the provision combatted corruption. *Id.* “And once Texas is shorn of a direct anticorruption justification for its temporal limitation on independent expenditures, then the state lacks a constitutionally sufficient justification for limiting a general purpose committee’s independent expenditures.” *Id.*

This stands in direct contrast to the decision below. Here, the government was able to successfully recast a restriction on speech as a disclosure regulation.² App. 12-13a. The court then created a new breed of disclosure interest that could be used to justify a restriction on speech, rather than apply the traditional disclosure interest that is

¹ The government oddly claims that ELF can simply start disclosing contributions made by its connected organization, and it would no longer be subject to the limits the Act imposes on connected PACs. Opp. 11 n.3. That is not true. ELF is registered as a connected PAC, and would remain subject to solicitation and contribution restraints, no matter how much information it provided about itself.

² Notably, the disclosure exemption here is an exception to the definition of “contribution” that allows connected PACs not to report certain administrative expenses, such as electricity and rent, 2 U.S.C. § 441b(b)(2)(C), the fractional share of which would be difficult and expensive to determine.

limited to being an informational interest in compelling more speech to be brought into the marketplace of ideas. App. 13-14a.

This new breed of disclosure interest ignores ELF's independent speech rights, and it also fails to recognize the practical effect on speech by its connected corporation, STII. The government claims that the potential non-disclosure of administrative costs compels it to force the communications that would be made by the very transparent PAC to be made by the corporation itself, which lacks many of the disclosure requirements applicable to connected PACs.³ As a result, the D.C. Circuit and government's reasoning paradoxically would yield *less* disclosure, not more of it. Indeed, the constitutionality problem could be resolved in a way that leaves disclosure untouched by simply limiting the scope of the disclosure exemption—and all of the speech restrictions the government claims must come with it—to the hard dollar account. That would be consistent with the Fifth and Tenth Circuit's rulings, which hewed to this Court's precedents. *See, e.g., FEC v. Wisc. Right to Life*, 551 U.S. 449, 469 (2007) (the courts "must give the benefit of any doubt to protecting rather than stifling speech").

That the Fifth Circuit accepted the D.C. Circuit's inaccurate statement that separate segregated funds are no longer needed, and distinguished its decision on that ground, further underscores the division.

³ This line of argument also ignores the fact that some connected organizations, like STII, which is a 501(c)(4) corporation remain limited in the amount of political speech they may make. 26 C.F.R. 1.501(c)(4)-1(a)(2)(ii).

The cases have enough in common that the Fifth Circuit panel felt the need to directly distinguish the opinion below on a ground that turns out to be no distinction at all. As addressed in the petition, and in Section II of this brief, connected PACs organized under the Act retain a real and important role in campaign speech since *Citizens United*, and they deserve to be heard on the unconstitutional denial of their speech rights.

The Tenth Circuit also adopted legal reasoning incongruent with the decision below in *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1097 (10th Cir. 2013). There, the court considered a PAC that made “both independent expenditures and campaign contributions.” *Id.* That PAC maintained separate bank accounts, and “adhere[d] to contribution limits for donations to its candidate account.” *Id.* The court recognized that, given the safeguards against commingling in place, restrictions on contributions to the PAC for use on independent expenditures were unconstitutional as applied. *Id.*

At bottom, that is the issue here: is there a compelling governmental interest to support FEC restricting ELF from forming a separate bank account and engaging in independent expenditures. The Fifth and Tenth Circuits plainly say no such interest exists. “A hybrid PAC’s direct contribution does not alter the unconnected 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.* at 1101.

That is the correct conclusion, particularly in light of the undisputed fact that connected PACs

already can and do make independent expenditures, out of their hard dollar accounts, and the restrictions here limit the scope of potential independent expenditures by PACs connected to smaller organizations because such PACs are restricted to fund raising from only a small number of donors. Indeed, long-standing FEC regulations ensure the operational independence of independent expenditures when made by either connected or non-connected PACs, and there is no reason to believe such rules would not serve their purposes just as effectively when applied to a non-contribution expenditures account. *See, e.g.*, 11 C.F.R. 100.16, 100.17, & 100.22. The Fifth and Tenth Circuits' legal reasoning recognizes the First Amendment structure underlying all of these facts.

Yet, the government asserts that the circuits are not divided because neither the Fifth Circuit nor the Tenth Circuit's "decisions addressed the constitutionality of FECA's regulation of separate segregated funds." Opp. 13. Of course they did not—those cases concerned challenges to state laws and not FECA. Regardless, this point unnecessarily narrows the issues here to FECA, when other circuits' decisions address similar regimes that require the same legal analysis, as noted above. The decision below is part of a growing division among the circuits regarding the government's ability to limit independent expenditures of PACs that also engage in highly-regulated campaign contributions. And this divide will only deepen as at least 15 states allow some form of a hybrid PAC,⁴ and the

⁴ Texas, New Mexico, Alabama, California, Delaware, Maine, Minnesota, Mississippi, Missouri, Montana, New Jersey, North

Commission similarly has consented to non-connected PACs making both restricted direct contributions and unrestricted non-contribution expenditures from separate segregated accounts.

Further, given (1) the conflict between the decision below and *Citizens United*—as established in the petition at 25-31 and left unaddressed by the government and (2) the case’s importance to thousands of separate segregated funds, *see* § II, *post*, this case is appropriate for review by the Court regardless of whether there is a division among the circuits.

The government further asserts that “neither [of the decisions] suggests that another circuit would have decided this case differently.” Opp. 13. That is untrue. As noted in the petition, the legal reasoning applied in both cases conflicts with the D.C. Circuit’s legal reasoning here. Indeed, the Fifth Circuit’s decision *expressly questions* the opinion below. *Catholic Leadership Coalition*, 764 F.3d at 429 & n.26 (questioning whether the decision below’s argument linking disclosure requirements to the anticorruption interest “is permissible at all,” and then noting 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”).

Moreover, the court “reject[ed] Texas’s argument that because it grants special privileges to certain types of political committees, it may regulate the committees as it pleases.” *Id.* at 430 n.27 (“Notwithstanding Texas’s choice to grant certain

Dakota, Oregon, Utah, and Virginia.

privileges to certain types of committees, any restrictions on those committees' political speech . . . must still withstand constitutional scrutiny"). And the Tenth Circuit's decision *expressly disagreed* with the district court's opinion using a rationale that remains applicable now that the D.C. Circuit affirmed. *Republican Party of New Mexico*, 741 F.3d at 1101 (the opinion in "*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 Fifth and Tenth Circuits more than "suggested" they disagreed with the decisions below—they flat out said as much. Indeed, even the Commission could not reach a decision on this issue, splitting evenly in its vote. Compl. Ex. D at 1 (filed July 10, 2012). This case clearly presents issues that have divided the courts, and even the Commission itself. And this Court's guidance is needed to resolve the conflicts and protect vital political speech.

II. THE QUESTIONS PRESENTED RAISE ISSUES OF EXCEPTIONAL IMPORTANCE.

The government does not address any of the points raised by the petition that establish the importance of the issues raised here. It only offers a one-paragraph recitation of the D.C. Circuit's unsupported view that connected PACs are an anachronism. The petition established they are not.

The questions presented here affect all of the 3,042 separate segregated funds in existence.⁵ And

⁵ See FEC, PAC Count – 1974 to Present, <http://www.fec.gov/press/resources/paccount.shtml> (last visited Sept. 28, 2014).

far from being a “vintage relic” as a result of *Citizens United*, the number of separate segregated funds has gone *up* since that decision. *Id.* Connected PACs constitute a robust and increasing share of political activity precisely because it is often essential for individuals to speak collectively to have their voices heard—a right this Court has recognized often. Thus, even if the D.C. Circuit is correct that this is “the hard way” to engage in political speech—and especially when it is the necessary way for any meaningful opportunity to be heard—that does not somehow decrease the organizers’ entitlement to associate and speak as a group on political issues important to them in a non-corrupting manner.

The government does not address (1) the number of connected PACs, (2) the increase in PACs since *Citizens United*, (3) the fact that people are not subject to greater speech restrictions just because they choose “the hard way” to associate as speakers, or (4) the simple fact that “[w]ithout the Court’s intervention, there is no clear answer as to whether laws that burden the non-contribution activities of . . . hybrid PACs are constitutional,” Pet. 33. The Court’s intervention is needed immediately, so that fewer speakers are chilled by federal and state laws limiting speakers’ ability to make independent expenditures as a group.

The government ironically raises the Court’s admonition in *Citizens United* that disclosure requirements “impose[] no ceiling on campaign-related activities,” while touting a regime that does just that, as applied. Opp. 12, quoting *Citizens United*, 558 U.S. at 366. At bottom, the government claims the lack of a disclosure requirement gives the government a right to restrict speech. That is far

from the disclosure concept the Court considered constitutionally tolerable in *Citizens United*. The mere lack of one disclosure requirement does not license the government to restrict speech with impugnty.

The D.C. Circuit and government's solution that ELF and all other connected PACs must destroy themselves and re-form as other organizations is no solution at all. "Just as we do not permit the government to silence the *New York Times* because the reporters could shout-out their stories in Central Park or publish them on the internet, we do not permit the government to silence various political organizations simply because their component parts have other opportunities for speech." *Catholic Leadership Coalition*, 704 F.3d at 430-31; 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").⁶

⁶ This purported solution also suggests that it is appropriate to analyze the ban on ELF's speech as a time, place, and manner restriction, but this Court has rejected that such analysis applies to political speech restrictions. *E.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (noting *Buckley's* rejection of time, place, and manner restriction analysis. See also *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).

Neither is their suggestion that ELF can, with no greater burden, clone itself to make independent expenditures rather than use a non-contribution account. The availability of avenues “more burdensome than the one foreclosed is ‘sufficient to characterize [a regulatory interpretation] as an infringement on First Amendment activities.’” *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 708 (1990) (Kennedy, J., dissenting) (quotation omitted); *MCFL*, 479 U.S. at 263 (“While the burden on MCFL’s speech [establishing a political committee] is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification.”). And establishing a second PAC is a burdensome alternative. *Citizens United*, 558 U.S. at 337; see *FEC v. Massachusetts Citizens for Life, Inc. (“MCFL”)*, 479 U.S. 238, 255 (1986) (creating a PAC “may create a disincentive for [plaintiffs] to engage in political speech”).

Indeed, if the onerous ability to disband and reform or create a second more favored organizational structure is all that justifies restricting speech absent a compelling interest, it is surprising that this Court in *Citizens United* did not uphold the corporate independent expenditure bans because the individuals forming the corporation could merely disband it and engage in the same speech as individuals. Further, 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).⁷

Moreover, if Congress determines that connected PACs in the form of a separate segregated fund should no longer exist in light of *Citizens United*, it may amend the Act. But in more than four years since *Citizens United*, it has not done so. It is not then incumbent upon the Executive to legislate on behalf of Congress by denying the organizations their free speech rights recognized in *Citizens United*, based upon its plainly wrong theory that no one needs connected PACs any more.

⁷ Following the government’s logic, Congress could easily create a form of PAC with disclosure requirements so onerous that no one but the largest corporations and unions could use it effectively, and then restrict the speech of non-connected PACs, and all others, on the claim that they have certain “disclosure exemptions” as compared to this new form of PAC. That cannot possibly be a correct interpretation of the First Amendment right to free speech.

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