UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Stop the Insanity, Inc. EMPLOYEE LEADERSHIP FUND, et. al. Plaintiffs, v. FEDERAL ELECTION COMMISSION 999 E Street, NW Washington, DC 20463, Defendant.	)	Civil Case No. 12-1140 (BAH)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The FEC's gambit to dismiss Stop this Insanity, Inc. Employee Leadership Fund's (ELF's) claim on the eve of November's election, rather than allow this Court adjudicate it, is both insolent and outrageous.

The FEC states that "STIELF is *prohibited* from opening a second federal account, a 'non-contribution account,' into which it would solicit unlimited individual and corporate contributions, and from which it would finance independent expenditures." Motion to Dismiss ("MtD") at 1 (emphasis added). This stance is outrageous because this case is not about bank administration or how best to handle financial transactions. When the FEC says it can prohibit ELF from "opening… 'a non-traditional account'" it means the FEC deigns to prohibit an association of citizens, a group of employees, a distinct legal entity, from engaging in unlimited independent expenditures despite a wall of precedent to the contrary. *See Citizens United v. FEC,* 130 S. Ct. 876 (2010); *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010) (en banc); *EMILY's List v. FEC,* 581 F.3d 1 (D.C. Cir. 2011); *Carey v. FEC,* 791 F. Supp. 2d 121 (D.D.C. 2011). The FEC seems not to have learned that "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating … the speakers who may address a public issue." *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 698-99 (1990) (Kennedy, J., dissenting), *rev'd on other grounds, Citizens United v. FEC,* 130 S. Ct 878 (2010); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 784-785 (1978).

The FEC's attempt to dismiss this case is insolent because it is a doubling down on the arguments Judge Collyer rejected just sixteen months ago in *Carey v. FEC,* 791 F. Supp. 2d 121 (D. D.C. 2011); arguments so lacking in justification that the FEC was

ordered to pay attorneys' fees to plaintiffs in the *Carey* case.[1] ELF comes to this court seeking to raise the funds necessary to make independent expenditures, an approach three commissioners opined must, of constitutional force, be permitted[2] but three other commissioners would not allow. In defending the opinion of its latter three commissioners, the FEC acknowledges that ELF, itself, wants to speak: "[S]TIELF seeks to open such an account." But the FEC dismisses, and would have this Court dismiss, ELF's desire to speak on the refuted argument that there are plenty of other legal entities who can speak in the coming election: "STI itself can already…solicit and spend such funds—either directly or through the creation of a PAC." MtD at 1-2.

The FEC makes literally the same argument today that was flatly rejected in *Carey*:

> The Commission responds that Plaintiffs' alleged injuries are neither actual nor certain because [plaintiffs] could fund the planned $6,300 expenditure in at least 'four obvious ways:'
>
> - Combine a $5,000 contribution from [one plaintiff] with $1,300 [in] existing funds;
> - Accept $5,000 from [one plaintiff] and combine it with $1,300 from another donor or combination of donors;
> - *Set up a separate entity that accepts contributions of unlimited amounts [an independent-expenditure-only-political-action-committee]*;
> - *Have [one plaintiff] simply pay for the planned ad [it]self.*

Carey, 791 F. Supp. 2d at 134 (emphasis added). Judge Collyer was neither impressed with these FEC proposals nor fooled. She understood instantly that "[e]ach of these proposals … would require Plaintiffs to forego their First Amendment rights that are guaranteed by the Constitution and recognized by this Circuit." *Id.*

[1] *Carey v. FEC*, 2012 U.S. Dist. LEXIS 70783, 2012 WL 1853869 (D.D.C. May 22, 2012).
[2] *See* Draft A at 5-7 in Advisory Op. 2012-01, Employee Leadership Fund.

A. The FEC Has No Authority to Order That Other Associations Exercise ELF's Speech Rights

It is axiomatic that in the First Amendment context, a "Court does not assess the credibility of Plaintiffs' sworn allegations." *Carey*, 791 F. Supp 2d at 134. But as the FEC keeps insisting that ELF's speech is STI's and STI's speech is ELF's, Plaintiffs have no choice but to explain its operation beyond its verified complaint to discredit the FEC's assertion. As of October 8, 2012, the most recent date counsel has at hand there were seven employees of STI who qualified as members of its restricted class. *See* Affidavit of Dan Backer, attached as Exhibit A. All others at the administrative or executive level, who might qualify as members of the restricted class, are disqualified because they are independent contractors of STI, not employees. *Id.* STI has sworn by verified complaint it has no interest in making independent expenditures in the 2012 campaign. VC ¶ 5. STI recognizes that engaging in independent expenditures may jeopardize its status a 501(c)(4) social welfare organization, now pending with the Internal Revenue Service. *Id.* The FEC warns STI of this jeopardy as well. *See* FEC Opp'n Memo to Plaintiffs' Motion for Prelimin Inj. at 17, n.11 ("Alternatively, STI can solicit unlimited contributions directly and deposit them into its own treasury [not ELF's]. This might result in STI meeting the criteria to become a PAC [and a 527 organization, not a 501(c)(4), by operation of law]"). No employee of STI has the option of harnessing STI to make independent expenditures in the 2012 election; this is against STI policy. So who will speak for the employees but the employees themselves? And how can seven individuals gather the funds necessary to affect the 2012 elections through independent expenditure speech if they cannot associate with other people through ELF, or solicit the general

public and non-line-level employees and Independent Contractors of STI to contribute the necessary funds?

The Employee Leadership Fund, "ELF," has sworn by verified complaint that it has plans to distribute banner advertisements over various websites during the 2012 election cycle. VC ¶¶ 38-40. Plaintiffs have prepared scripts for such ads and are prepared to raise funds to support their distribution. VC ¶¶ 27, 38, 55. At least two Plaintiffs are each willing and able to contribute $10,000 this year to the independent expenditure advertising campaign. VC ¶ 39. Contribution limits at §§ 441a(a)(1)(C) and 441a(a)(3), however, and specifically their incorrect interpretation by the FEC after *EMILY's List* and *Carey*, prevent ELF from accepting the individual Plaintiffs' contributions and frustrate Plaintiffs' rights to speech and association. One of these potential contributors is outside ELF's restricted class, making ELF unable to solicit him for a $1,500 contribution. *See* 2 U.S.C. § 441b(b)(4)(A)(i).

The FEC continues to mischaracterize the issue in this case by pretending the question is one of disclosure, not the right to speak, and pretending that plaintiffs sue chiefly to vindicate *STI's* speech rights, not ELF's. MtD. at 1-2. But plaintiffs do not sue to vindicate the corporation STI's right to engage in independent campaign activity, they sue to vindicate the separate segregated fund ELF's right to engage in independent campaign activity. This suit must go forward.

It is well established that the "[SSF] is a separate association from the corporation." *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010). And the fact that the plaintiffs may form "a separate committee or PAC, as suggested by the Commission in its [motion to dismiss], does not answer *this* constitutional challenge. While the Commission

might expound on such alternatives, they do nothing to cure the constitutional maladies of its heavy-handed approach." *Carey v. FEC,* 791 F. Supp. 2d 121, 132 (D.D.C. 2011) (emphasis added).

FEC still takes the position, contra *Carey* and *EMILY's List*, that ELF may not establish a *Carey* account to make independent expenditures. MtD at 1. ("Under FECA and Commission regulations, STIELF is prohibited from opening … a 'non-contribution account'). But the D.C. Circuit Court of Appeals has held, as a matter of constitutional law[3], that "non-profit entities are entitled to make their expenditures—such as advertisements, get-out-the-vote efforts, and voter registration drives—out of a soft-money or general treasury account that is not subject to source and amount limits" of the Act. *EMILY's List,* 581 F.3d at 12. The Court made clear that these rights are inviolable by Congress or the FEC: "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. Rather, it simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account." *Id.* The District Court of the District Columbia made the same finding on constitutional grounds in *Carey v FEC*, 791 F. Supp. 2d 121, 132 (D.D.C. 2011).

The FEC believes that those who would associate through ELF must disband and form a new association or forego the right to solicit the general public for the unlimited

[3] The *EMILY's List* court affirmatively stated that its decision adjudicated the constitutional rights of the plaintiffs. "We thus must consider how the constitutional principles outlined above apply to non-profits -- and in particular to three different kinds of non-profits: (i) those that only make expenditures; (ii) those that only make contributions to candidates or parties; and (iii) those [like ELF] that do both." 581 F.3d at 8. *See also Carey v. FEC,* 791 F. Supp. 2d 121, 129 (D.D.C. 2011) ("Commission attempts to limit the scope of the Circuit's recent decision in *EMILY's List* without success. The Circuit's ruling…included binding precedent on the constitutional rights of non-connected political committees, which the Commission unpersuasively argues is *dicta*).

and unrestricted contributions ELF will need to fund its independent expenditures. MtD at 2. But it is not the FEC's place to tell ELF to disband. "The categorical suspension of the right of any person, or of *any association of persons*, to speak out on political matters must be justified by a compelling state need." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting) (emphasis added), *rev'd on other grounds, Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (per curiam). That compelling state need is *quid pro quo* corruption or the appearance of corruption. *Buckley*, 424 U.S. at 18. And the Supreme Court has decided, twice in two years, that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909; *see also, American Tradition Partnership, Inc. v. Bullock*, 11-1179, slip op., (June 25, 2012) (per curiam). The D.C. Circuit Court of Appeals has also made clear its understanding that *Citizens United* "held that the government has *no* anti-corruption interest in limiting independent expenditures." *SpeechNow.org v. FEC*, 599 F.3d 686, 693 (D.C. Cir. (en banc) (emphasis in original).

B. The FEC's Order That Plaintiffs Operate A Second Political Committee To Speak, When A Separate *Carey* Account Will Do, Is Unconstitutional

The FEC cannot require ELF to clone itself to make independent expenditures. *EMILY's List* and *Carey* make clear that the proper remedy is to allow ELF to use a traditional "contribution account" to make contributions to candidates from amount and source restricted funds and a *Carey* account to make its independent expenditures, not force Plaintiffs to create and administer another political committee. "That the avenue left open is more burdensome than the one foreclosed is 'sufficient to characterize [a regulatory interpretation] as an infringement on First Amendment activities.'" *Austin*, 494

U.S. at 708 (Kennedy, J., dissenting); quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) ("*MCFL*"). The additional requirements "may create a disincentive for [plaintiffs] to engage in political speech. Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage." *MCFL,* 479 U.S. at 254-55. *See also Citizens United*, 130 S. Ct. at 897 (establishing a PAC is burdensome); *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").

The FEC argues that Congress has foreclosed the possibility of SSFs engaging in full-throated independent expenditures because Congress has allowed corporations to pay administration and solicitations costs on behalf of SSFs without reporting the costs as contributions or expenditures. ELF has a right to solicit funds for independent expenditures because soliciting those funds furthers speech that cannot be dampened without furthering a compelling state interest, and because engaging in those solicitations is a form of political association. "The First and Fourteenth Amendments guarantee 'freedom to associate with others for the common advancement of political beliefs and ideas.'" *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), quoting *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (additional citation omitted). Governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *NAACP v. State of Alabama, ex. rel. Patterson*, 357 U.S. 449, 460-461 (1958).

The FEC continues to rely on two arguments that must fail. First, FEC argues that, even after *Citizens United, SpeechNow.org, EMILY's List* and *Carey*, corporations may *only* solicit their restricted class to fund independent expenditures "because those are the only kind of solicitations that SSFs can engage in" under the statute. FEC's Memo in Opp'n to Prelim. Inj. at 21. Second, the FEC argues "there is no statutory basis for concluding that spending for solicitations to the general public should be exempt from disclosure." *Id.* What the FEC misses is the operation of the Courts' constitutional holdings. The solicitation restrictions (that do not further the limited purpose of preventing the coercion of employees) are now *unconstitutional* as applied to fundraising for independent expenditures because they pose a burden that cannot meet "the closest scrutiny" in light of *Citizens United, SpeechNow.org* and related cases. The disclosure exemptions passed in 1976, however, are *not* unconstitutional—Congress may exempt groups from disclosure without constitutional consequence at any time. This is a tough pill for the FEC to swallow, but the facts are immutable. After *Citizens United* and related cases, all associations have a fundamental right to associate by soliciting contributions to fund independent expenditures.[4] Therefore, both of the FEC's arguments—that solicitations to the restricted class "are the only kind of solicitations that SSFs can engage in" and that "there is no statutory basis for concluding that spending for solicitations to the general public should be exempt from disclosure"—are wrong. The Constitution commands that all associations be allowed to solicit the general public to fund independent expenditures (with the exception of employees who may only be

[4] The FEC still fails to acknowledge that any solicitation restriction to members of the restricted class upheld by the Supreme Court in *FEC v. National Right to Work Committee,* 459 U.S. 197 (1982) ("*NRWC*"), was based upon an anti-distortion rationale thoroughly rejected by the Supreme Court in *Citizens United v. FEC,* 130 S. Ct. 876, 913 (2010). (rejecting the antidistortion rationale). *See* Plaintiffs' Memorandum of Law in Support of Preliminary Injunction at 34.

solicited twice annually under certain conditions to prevent coercion). That those associations' spending for solicitations to the general public should be exempt from disclosure is Congress' doing. 2 U.S.C. § 441b(b)(2). Congress must correct it in a manner that respects the right of SSFs to engage in unlimited independent expenditures.

The FEC keeps reminding this Court that the "relief that plaintiffs seek … would permit STI to solicit funds from the general public to finance candidate advocacy without disclosing that STI was paying for the solicitations." MtD at 3. This is because of an exemption Congress gave corporations in 1976. There is no reason Congress cannot remove the exemption now that corporations are again allowed to participate in the making of and soliciting funds for independent expenditures. But neither Congress nor the FEC may deploy the exemption as an excuse to keep ELF from exercising its right to make independent expenditures. The FEC also keeps reminding this Court that the Supreme Court has upheld disclosure. MtD at 2. But this is not in dispute; unless the FEC is arguing that SpeechNow.org would be prevented today from accepting funds above the contribution limits if Congress had exempted independent groups from the Act's disclosure requirements before the D.C. Circuit unanimously issued its opinion in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc)? Does the FEC believe the speech rights of EMILY's List would be dramatically different today had Congress exempted non-connected committees from the Act's disclosure provisions at any time before the D.C. Circuit issued its opinion? *See EMILY's List*, 581 F.3d at 12 (D.C. Cir. 2009). Is the FEC arguing that the Supreme Court's ruling in *Citizens United* on unrestricted independent corporate (and union) spending would have been opposite had Congress only had the foresight to exempt, not include, electioneering communications

within the Act's reporting regime? 130 S. Ct. 878 (2010). No. Congressional enactments and agency interpretations must bend to Court interpretations and First Amendment rights.

For this Court to adopt the FEC's rickety arguments would ignore the fact that STI and ELF are separate legal entities each possessing a right to speak under the constitutional doctrine found in *Citizens United, SpeechNow.org, EMILY's List and Carey*. And, that while ELF wishes to speak, STI does not, and should not be forced to speak by the FEC. It would ignore the bedrock principle that Congress' granting corporations and unions the ability to pay an SSF's administrative expenses and solicitation costs exempt from disclosure in 1976 is a benefit Congress has the power to remove, and perhaps should remove, but its continued existence cannot be conditioned on the renunciation of ELF's right to speak. *See Pickering v. Board of Education Township High School Dist. No. 205, Will County,* 391 U.S. 563 (1968); *Speiser v. Randall,* 357 U.S. 513 (1958).

To adopt the FEC's arguments would ignore the doctrine that Congress may not do indirectly what it is prohibited from doing directly. Congress could not put in place an exemption whose enforcement directs the FEC to nullify ELF's right to engage in, and solicit funds for, independent speech. *Speiser,* 357 U.S. 513, 526 (1958) ("this device must necessarily produce a result which the State could not command directly [and] can only result in a deterrence of speech which the Constitution makes free").

C. The FEC's Concerns for Coercion Lack a Factual Predicate

Contrary to the FEC's assertion, Plaintiffs will not solicit employees more than twice per year for either its contribution account or its *Carey* account. *Cf.* MtD at 3-4.

And the FEC's argument that the ability to solicit unlimited amounts for independent expenditures twice yearly will "coerce" employees is nonsense.

Neither ELF nor STI will solicit employees not included in STI's restricted class outside the scope of 2 U.S.C. § 441b(b)(4)(B) and Commission regulations.[5] VC ¶ 9. This means ELF will solicit non-executive employees twice per year, not four times per year. *Cf.* MtD at 3-4. Despite the FEC's unwarranted suggestion, STI will not be "coerc[ing] employees." *Id.* STI and ELF will follow all other applicable laws, whether or not they are specifically referred to in this case, including 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." 2 U.S.C. § 441b(b)(3)(B)-(C).

D. Plaintiffs Do Not Deserve Dismissal; They Are Entitled To Immediate Injunctive Relief so They May Speak

"Plaintiffs' probability of success on the merits is the most critical of the criteria when considering a motion for preliminary injunction," *Carey*, 791 F. Supp. 2d at 128. Plaintiffs have fully demonstrated that probability here. There is simply no justification for preventing ELF from using a *Carey* account to engage in full-throated independent expenditures and soliciting others to do the same. "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney… or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 130 S. Ct. at 889 (2010). But forcing ELF to obtain a declaratory ruling is unfortunately what happened here. There is no legitimate reason, particularly after Judge Collyer's opinion in *Carey*, for the FEC to prevent ELF from opening a *Carey* account to fund

[5] Congress enacted this restriction to prevent line-level employees outside the restricted class from feeling pressured to make contributions on pain of losing their jobs. *See* 122 CONG. REC. H2612 (daily ed. March 31, 1976) (statement of Rep. Thompson). Plaintiffs abide by this restriction and do not challenge it here.

independent expenditures, and certainly no reason to dismiss this case. "Stifling citizens' speech rights during a Presidential campaign runs contrary to the entire history of First Amendment jurisprudence in this country." 791 F. Supp. 2d at 132-33, citing *Citizens United,* 130 S. Ct. at 892 ("political speech … is central to the meaning and purpose of the First Amendment").

As the Supreme Court is well aware, "[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,* 130 S. Ct. at 896, quoting *Freedman v. Maryland,* 380 U.S. 51, 57-58 (1965). ELF deserves court protection now. On the heels of the FEC's losing a string of cases in *Carey, SpeechNow.org, Citizens United* and *EMILY's List,* ELF finds itself caught in the crossfire of what appears to be a rear-guard action to protect the FEC's turf from further diminutions. But this is not the FEC's role, nor ELF's concern.

ELF had the presence of mind to ask the FEC if it may speak, before it spoke, and the FEC was bound to answer. *See* Advisory Opinion 2012-01 (Employee Leadership Fund); 2 U.S.C. § 437f. "[B]ecause the Commissioners could not agree, the Commission staff has been forced into a crabbed reading of *EMILY's List* [and *Carey*] and erroneous proposals to avoid recognizing Plaintiffs' First Amendment rights." 791 F. Supp. 2d 121, 132 (D.D.C. 2011). After all, what justification could possibly warrant dismissing ELF's claim or precluding ELF from speaking in the 28 days between now and the November 6th election?

What the FEC misses in this challenge is that issuing injunctive relief here furthers noble public interests in having citizens being able to associate together and

speak out about political issues and candidates of the day. As Judge Collyer wrote on June 14 of last year, "The race is on right now. Whichever candidates Plaintiffs wish to support and issues they wish to espouse must be freed immediately from the chill of possible FEC enforcement." *Carey*, 791 F. Supp. 2d 121, 133 (D.D.C. 2011). The protection of dissent, free speech, and effective advocacy is of critical public importance, outweighing any supposed governmental interest in maintaining the silencing status quo.

CONCLUSION

For the foregoing reasons, the Court should deny FEC's motion to dismiss, grant Plaintiffs' motion for preliminary injunction and enjoin the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3), the source prohibitions of 441b(a) as applied to the *Carey* account that will finance ELF's independent expenditures, and the solicitation restrictions at 2 U.S.C. § 441b(b)(4)(A)(i)—but not enjoin the restrictions detailed at §§ 441b(b)(3)(A)-(C) and 441b(b)(4)(B).

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Respectfully submitted,

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