UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STOP THIS INSANTITY INC. EMPLOYEE LEADERSHIP FUND, *et al.*,	
Plaintiffs,	Civ. No. 12-1140 (BAH)
v.	
FEDERAL ELECTION COMMISSION,	REPLY IN SUPPORT OF MOTION TO DISMISS
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Plaintiffs' Opposition to the Commission's Motion to Dismiss (Docket No. 9) ("Pls.' Opp'n") is largely premised on a fundamental misunderstanding of the role of a "separate segregated fund" ("SSF") under the Federal Election Campaign Act ("FECA"). Plaintiffs' opposition also relies on irrelevant facts — such as how many employees they have (Pls.' Opp'n at 3) — and the misleading suggestion that their SSF "may be unable to bear" the costs of administering an independent-expenditure-only political committee (*id.* at 7).

Plaintiffs' opposition focuses primarily on differentiating plaintiff Stop This Insanity Inc. ("STI") from its SSF, plaintiff Stop This Insanity Inc. Employee Leadership Fund ("STIELF"). To the extent plaintiffs argue that STI and STIELF are distinct legal entities, the Commission has no quarrel with that uncontroversial proposition. But plaintiffs go further: They claim that, because the corporation and the SSF it created and controls are separate entities, *STI's* current and undisputed ability to directly finance unlimited political advocacy has no bearing on whether *STIELF* should be granted the ability to do the same. The relevant statutes do not support that argument.

FECA prohibits a corporation from making contributions to candidates, political parties, or other political committees. 2 U.S.C. § 441b(a). FECA's SSF provision is explicitly an exception to this prohibition. 2 U.S.C. § 441b(b)(2)(C) ("For purposes of this section . . . the term 'contribution' . . . shall not include . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes *by a corporation* . . . .") (emphasis added). The SSF mechanism thereby permits *the sponsoring corporation* to solicit individual contributions to its SSF, so that *the sponsoring corporation* can use its SSF to contribute to candidates and political committees. Thus, as its name implies, the purpose of an SSF is to serve as a "fund" of "segregated" money for the sponsoring corporation to use to finance what would otherwise be prohibited political contributions. By definition, no SSF can ever exist apart from the corporation's desire to engage in such spending, and the corporation can exercise complete control over how the SSF's funds are spent.

As the Commission has noted previously, STI can already engage in the activity at issue here, either directly or by creating a separate independent-expenditure-only political committee. (Def.'s Opp'n to Pls.' Mot. for Prelim. Inj. at 6-7, 26 (Docket No. 6) ("FEC Inj. Opp'n").) STI's proposal to use the SSF mechanism for its entirely permissible independent expenditures therefore has no basis in the role SSFs actually play in FECA's regulatory scheme.[1] Instead, as plaintiffs freely admit, their proposal would merely help STI avoid being subject to FECA's disclosure requirements. (*See* Pls.' Reply Mem. in Support of Mot. for Prelim. Inj. at 5 n.6 (Docket No. 7) (acknowledging STI's desire to avoid disclosure requirements applicable to

[1] STI's very presence in this lawsuit belies plaintiffs' argument: Under the theory expressed in their opposition — whereby all that is at issue here is STIELF's activity, unrelated to STI's activity — STI would seem to lack standing to bring this suit.

political committees).) Such evasion of disclosure presents no basis for striking down an Act of Congress.

Plaintiffs' opposition contains four additional substantive errors. First, plaintiffs appear to believe that they have a constitutional right to compete effectively with other political entities, and they argue that their small size will make this difficult unless they obtain the relief they seek. (*See* Pls.' Opp'n at 3 ("[H]ow can seven individuals gather the funds necessary to affect the 2012 elections through independent expenditure speech . . . ?").) But this argument is noncognizable on its face, for the Supreme Court has explicitly rejected consideration of "'[t]he ancillary interest in equalizing . . . relative financial resources'" in political campaigns. *Davis v. FEC*, 554 U.S. 724 738 (2008) (quoting *Buckley v. Valeo*, 424 U.S. 1, 54 (1976)). Neither the Commission nor the Court is empowered to bend the rules to help small groups compete with larger ones.

Second, plaintiffs similarly invoke their size in suggesting that if STIELF were required to "clone itself to make independent expenditures," STIELF could face "administrative costs that many small entities may be unable to bear." (Pls.' Opp'n at 6-7 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254-55 (1986)).) This is irrelevant, as the Commission has never suggested that *STIELF* should — or could — create a second entity or account to engage in independent expenditures; to the contrary, that is plaintiffs' position. The Commission's advisory opinions would allow *STI* to finance independent expenditures directly or create a second entity to do so and pay its administrative costs, and there is no allegation that STI lacks funds to pay such costs. (*See* FEC Inj. Opp'n at 9 (noting that STI raised more than $470,000 in seven months).) Plaintiffs' desired relief simply highlights the disclosure they seek to avoid. (*See id.* at 6-8.) Under plaintiffs' scenario in which STIELF creates the second account, STI's

spending on solicitations and administrative costs would be hidden; under the lawful procedures the Commission has established for STI to create its own independent-expenditure committee, that spending would be disclosed. (*Id.* at 14-19.)

Third, plaintiffs rely (Pls.' Opp'n at 1-6) on inapposite court decisions that address separate legal questions. For example, *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), and *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), each concerned the rights of "non-connected" political committees, *i.e.*, committees that are, by definition, *not* SSFs and thus not "connected" to any other entity. Neither case even discussed SSFs, let alone held that such funds have a constitutional right to solicit and finance independent expenditures through an accounting mechanism that would avoid FECA's disclosure obligations and could bypass some of its anti-coercion provisions. (*See* FEC Inj. Opp'n at 1-2, 13-24.)

Finally, equally flawed is plaintiffs' reliance (Pls.' Opp'n at 10) on cases concerning unconstitutional conditions on speech or penalties for engaging in certain speech. *See Speiser v. Randall*, 357 U.S. 513, 516-18 (1958) (invalidating state constitutional amendment that mandated "discriminatory denial of a tax exemption for engaging in [certain] speech."); *Pickering v. Bd. of Educ. Township High School District No. 205, Will County*, 391 U.S. 563, 574-75 (1968) (holding that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment"). In citing these cases, plaintiffs seem to be repackaging their claims as arguments that FECA's disclosure provisions require STIELF's "renunciation of [its] right to speak." (Pls.' Opp'n at 10.) But neither *Speiser* nor *Pickering* is related to any issue presented here, as FECA's disclosure provisions are not "conditions" on speech. Rather, they are independent — and undisputedly constitutional — requirements that further the public's First Amendment interest in being able to

learn who is financing campaign activity. *See Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

CONCLUSION

For all of the foregoing reasons, and those set forth in the Commission's previous briefs, the Commission's Motion to Dismiss should be granted and this case should be dismissed with prejudice under Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

Anthony Herman (D.C. Bar No. 424643)
General Counsel

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel – Law

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Adav Noti (D.C. Bar No. 490714)
Acting Assistant General Counsel

/s/ Erin Chlopak
Erin Chlopak (D.C. Bar No. 496370)
Attorney
echlopak@fec.gov

FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

October 18, 2012