UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Stop the Insanity, Inc. EMPLOYEE LEADERSHIP FUND, *et al*	)	
Plaintiffs,	)	
v.	)	Civil Case No. 12-1140 (BAH)
FEDERAL ELECTION COMMISSION	)	
Defendant.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

"[D]isclosure requirements [can] 'impose no ceiling on campaign-related activities.' [The desire for disclosure cannot] 'prevent anyone from speaking.'"
-- Citizens United v. FEC, 130 S. Ct. 876, 914 (2010) (internal citations omitted).

Turn to any news outlet covering politics and you will find the biggest issue being debated in campaign-finance law today is whether an incorporated social welfare organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code, like Karl Rove's Crossroads GPS, should continue to engage in independent political activity without registering a full-fledged political committee.[1] Yet the Federal Election Commission (FEC) receives an advisory opinion request from a social welfare organization and a "political committee" that *want* to make communications from a political committee, and three FEC commissioners will not permit it to do so.

The FEC makes three dumfounding arguments. First, it argues that if a 501(c)(4) organization were investigated by the FEC and found to have crossed over the ill-defined, subjective "major purpose" threshold, which would transform it into a "political committee" under federal campaign law and transfer its exempt status from section 501(c)(4) to section 527 under Internal Revenue law,[2] that organization could run all of its political advertising out of *one* non-connected committee. Opp'n at 8; *see Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). But if the same 501(c)(4) organization were to register a political committee *of its own volition* it would have to register *two* committees—one "separate segregated fund" and one "independent-expenditure-only political committee"—or else sacrifice its right to solicit the public to finance

[1] Dan Eggen, "Influence Industry: IRS may consider tightening rules for nonprofits that influence elections," WASH POST, July 25, 2012, available at http://www.washingtonpost.com/politics/the-influence-industry-irs-says-it-will-consider-changes-to-nonprofit-politics-rules/2012/07/25/gJQArQtu9W_story.html; Julie Bycowicz, "IRS Says It Will Examine Rules for Nonprofit Political Activity," BLOOMBERG, July 23, 2012, available at http://www.bloomberg.com/news/2012-07-23/irs-says-it-will-examine-rules-for-non-profit-political-activity.html

[2] Any organizations whose "major purpose" under campaign law were found to be "campaign activity," *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976), would, by the same determination, have determined its "primary purpose" under tax law to be political activity, *see* 26 U.S.C. § 527, not social welfare. *See* 26 U.S.C. § 501(c)(4).

independent expenditures. Opp'n at 8. The FEC's first argument boils down to this: no "separate segregated fund" may make unlimited and unrestricted independent expenditures, despite the fact that SSFs are distinct legal entities imbued with First Amendment rights. *Id.* This stance is egregious in light of federal court opinions in *Citizens United*, *SpeechNow.org*, *EMILY's List* and *Carey*. It derives, in part, from an advisory opinion based on faulty assumptions issued by the FEC shortly after the D.C. Circuit Court of Appeals handed down *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). The errors in this advisory opinion are discussed below.

The FEC's second argument arises from a holdover provision in the Act: a Congressional exemption for unions and corporations enacted in 1976,[3] long before anyone could have predicted the high court's opinion in *Citizens United*. That provision (still) permits corporations and unions to pay for the solicitations of their SSFs, even as applied to solicitations for independent expenditures, without having to report the expense to the general public. 2 U.S.C. § 441b(b)(4)(C). The FEC argues that Congress' failure to clean-up the exemption to accord with new case law in the past three years is a legitimate reason to restrict an SSF's independent speech; that the Act's holdover "tail" can wag the First-Amendment "dog." Opp'n at 11 ("the statutory disclosure exemption for corporate payments covering the SSF's solicitation expenses … would mean that significant corporate political spending would go undisclosed if the SSF could operate a [*Carey*] account").[4] The FEC's position badly misunderstands that Congressional enactments and agency interpretations must bend to First Amendment rights.

[3] *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475, 490-92 (1976).

[4] The FEC asserts that the term "*Carey* accounts" is "neither a term of art nor a widely used descriptor akin to 'PAC' or 'super PAC." Opp'n at 8, n. 2. The FEC is wrong. Though the D.C. District Court decision creating *Carey* accounts only occurred in 2011, the FEC itself, the media and other interested parties have widely referred to unlimited non-contribution accounts created in the wake of the *Carey* decision as *Carey* accounts. The FEC summary of the advisory opinion request that lead to the present litigation states "ELF asks whether it may open a separate non-contribution account, or 'Carey Account.'" FEC Weekly Digest Week of January 9-13, January 13, 2012, at http://fec.gov/press/press2012/20120113digest.shtml, see also FEC litigation update page at

The FEC's third argument is related: Congress' exemption would also allow a corporation like STI to pay for ELF's solicitations, but the funds used would "not constitute a contribution or an expenditure that would trigger the $1,000 threshold for [STI's] political committee status." Opp'n. at 18. Here again, the answer is for Congress to curtail the exemption, not for the FEC to abrogate the independent speech rights of all SSFs.

The seemingly reasonable position of the FEC—have another association speak for you, one that better cures the disclosure exemption that Congress has yet to correct after *Citizens United*—ignores *Citizens United*. All entities, no matter their form, have a right to engage in independent expenditures without limitation. 130 S. Ct. 876, 913 (2010).

The FEC ignores the fact that STI and ELF are not the same legal entity, but rather separate legal entities, each possessing a right to speak. *Id.* It ignores the holding in *EMILY's List* that a limit on ELF's ability to accept or solicit contributions for independent expenditures works an unconstitutional limit on its independent expenditures. 581 F.3d 1, 12 (D.C. Cir. 2009). It ignores the bedrock Constitutional principle that Congress' granting of a benefit to corporations—that is, allowing them to pay the administrative and solicitation costs of its SSF without those amounts being treated as "expenditures" or "contributions" for *any* purpose before corporations could speak to the public about politics pre-*Citizens United*, and for reporting purposes now—cannot be conditioned on the surrender of the Constitutional right to engage in unrestricted independent advocacy.

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http://www.fec.gov/pages/fecrecord/2012/august/stopthisinsanityvfec.shtml. Campaigns & Elections magazine has referred to the opening of a "Carey account." Sean J. Miller, "Will the FEC grant 'super' fundraising powers?" Campaigns & Elections, Jan. 24, 2012, available at http://www.campaignsandelections.com/campaign-insider/291277/will-the-fec-grant-and39superand39-fundraising-powers.thtml. American Future Fund referred to a "Carey account" in its advisory opinion request earlier this year. *Advisory Opinion Request 2012-25* (American Future Fund/American Future Fund Political Action/McIntosh), April 10, 2012, available at http://saos.nictusa.com/aodocs/1214774.pdf. In a comment submitted to the FEC, the Campaign Legal Center also referred to a "Carey account." *Campaign Legal Center Comment on Advisory Opinion Request 2012-25*, August 3, 2012, available at http://saos.nictusa.com/aodocs/1216314.pdf. The use of the term "*Carey* account" is accordingly a well-known and well-understood descriptor within the regulated community.

By contrast, Plaintiffs' Motion for Preliminary Injunction wholeheartedly accords, rather than contradicts, *cf.* Opp'n at 20, the ruling in *Van Hollen v. FEC*, Civ. No. 11-766, 2012 WL 1066717 (D.D.C. Mar. 30, 2012), that an administrative agency cannot wish away a statute Congress leaves in place because its application creates an "anomalous effect" Congress would not have contemplated. *Id.* It also accords the principle of narrow tailoring. Any association of persons possesses the right to speak independently about candidates without restriction after the opinions in *EMILY's List Citizens United, SpeechNow.org* and *Carey,* and to solicit funds for the same. If Congress wants to ensure that solicitations to the public for funds to make independent expenditures are properly disclosed to the public, Congress' proper, Constitutional remedy is to curtail the exemption it created and foster more public disclosure of corporate solicitations for SSFs.

Doing so accords the principle that Congress may not do indirectly what it is prohibited from doing directly. Congress may not leave in place an exemption whose enforcement has the effect of nullifying ELF's right to engage in, and solicit funds for, independent speech. Nor may the FEC point to the anomalous effect of the exemption in failing to approve ELF's plans.[5]

Plaintiffs' injuries are real. They are entitled to injunctive relief.

RECAPITULATION OF FACTS

Stop This Insanity Inc. Employee Leadership Fund (ELF) is the "separate segregated fund" of the incorporated 501(c)(4) social welfare organization Stop This Insanity, Inc. (STI). ELF wants to open a *Carey* account to solicit contributions from the general public to finance

[5] The FEC cites to *Johnson v. Robison*, 415 U.S. 361 (1974) and *Robertson v. FEC*, 45 F.3d 486 (D.C. Cir. 1995) to support its argument that the FEC lacks the power to decide whether certain interpretations of statutes are unconstitutional. Opp'n at 21, n.15. While it is true that agencies are generally considered unable to adjudicate the constitutionality of enactments, agencies may be "influenced by constitutional considerations in the way [they] interpret or appl[y] statutes." *Branch v. FEC*, 824 F.2d 37, 47 (D.C. Cir. 1987). That FEC was unable to determine whether an association has the right to engage in unlimited and unrestricted independent expenditures after the opinions in *Citizens United, EMILY's List, SpeechNow.org* and *Carey* takes its fealty to *Johnson, supra,* and *Robertson, supra,* too far.

independent expenditures. ELF plans to distribute banner advertisements over various websites during the 2012 election cycle and 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, at least one of whom is outside the restricted class of ELF, 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 the FEC's incorrect interpretation after *EMILY's List* and *Carey*, prevent ELF from accepting the individual Plaintiffs' contributions and frustrate Plaintiffs' rights to speech and association.

ELF seeks to enjoin the contribution limits at 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3), the source prohibitions at § 441b(a), the solicitation restrictions at § 441b(b)(4)(A)(i), and applicable regulatory requirements as they apply to Plaintiffs. ELF will not solicit STI for funds to its *Carey* account to finance independent expenditures, as STI has no interest in jeopardizing its pending 501(c)(4) status with the Internal Revenue Service.[6] ELF will accept funds from STI only to pay its administrative expenses and solicitation costs pursuant to 2 U.S.C. § 441b(b)(2)(C). VC ¶ 11.

Neither ELF nor STI will solicit STI employees who are not included in STI's restricted class outside the parameters set forth at 2 U.S.C. § 441b(b)(4)(B) and Commission regulations.[7] VC ¶ 9. This means ELF will solicit non-executive employees outside of its restricted class only twice per year. *Cf.* Opp'n. at 23.

[6] STI has no desire to make contributions to a *Carey* account of the SSF to fund independent expenditures because STI is a relatively young organization whose status as a social welfare organization is pending before the Internal Revenue Service. STI does not want to tilt its "primary purpose" by making political contributions. The FEC concedes this is a real possibility. Opp'n at 17, n.11 (If STI, rather than ELF, engages in political activity it "might result in STI meeting the criteria to become a PAC.")

[7] 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 will abide by this restriction and do not challenge it here.

Despite the FEC's unwarranted suggestion, STI will not be "pressur[ing] its employees." Opp'n at 1. 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." *Cf.* Opp'n at 23; *see also* 2 U.S.C. § 441b(b)(3)(B)-(C).

ARGUMENT

I. The FEC Cannot Choose Another Association To Exercise ELF's Speech Rights

The FEC mischaracterizes the issue in this case from the outset by pretending the question is one of disclosure, not the right to speak, and acting as if Plaintiffs sue chiefly to vindicate *STI's* speech rights, not ELF's. Opp'n at 1 ("[T]his case is *not* about a corporation's First Amendment right to finance independent campaign activity. That right is undisputed. Rather the question presented here is [one of disclosure]"). 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.

It is well established that the "[SSF] is a separate association from the corporation." *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010). The fact that the plaintiffs may form "a separate committee or PAC, as suggested by the Commission in its opposition[,] 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).

The FEC still takes the position, contra *Carey* and *EMILY's List*, that ELF may not establish a *Carey* account to make independent expenditures. Opp'n at 1. ("The Act currently prohibits [ELF] from opening such an account"). But the D.C. Circuit Court of Appeals has

held, as a matter of constitutional law[8], 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 says this challenge cannot involve an expenditure limit, Opp'n. at 17, n.12, but the *EMILY's List* court made clear that subjecting a non-profit association to contribution limits for its independent expenditures fails the highest scrutiny. 581 F.3d at 8.

The FEC believes that those who would associate through ELF must disband and form new association or forego the right to solicit the general public for the unlimited and unrestricted contributions ELF will need to fund its independent expenditures. Opp'n. at 1. 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

[8] 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.

quid pro quo corruption or the appearance of corruption. *Buckley*, 424 U.S. at 44-45. 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 884; *see also, American Tradition Partnership, Inc. v. Bullock*, 11-1179, slip op., (June 25, 2012) (per curiam).

The FEC's confusion on this issue, and its insistence that ELF disband and create an "independent-expenditure-only political committee" to speak, derives in part from an advisory opinion it issued when the D.C. Circuit's opinion in *SpeechNow.org v. FEC* was fresh, and unfamiliar to the way campaign law had been interpreted until that time. 599 F.3d 686 (D.C. Cir. 2010) (en banc). In Advisory Opinion 2010-09 (Club for Growth), the Club for Growth, "an incorporated social welfare membership organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code," asked the FEC whether it may establish a political committee to solicit the general public. *See* Request of Club for Growth, in FEC Advisory Op. 2010-09, http://saos.nictusa.com/aodocs/AO%202010-09.pdf (July 22, 2010). The Club, through its counsel, was aware that any political committee tied to a corporation would be characterized as a "separate segregated fund" under the Act, but that the Act (still) prohibited an SSF from soliciting the general public. Club request at 5. Rather than risk the delay that would have attended addressing this constitutional infirmity head on, the Club took a different tack. It argued in its advisory opinion request that the *SpeechNow.org* opinion should be read as permitting the incorporated Club to create a political committee that was *not* really a "separate segregated fund," despite the plain language of 2 U.S.C. § 431(4)(B).[9] Rather, the Club argued that the new *SpeechNow.org* opinion permitted a corporation to create a new animal, what the Club would

[9] The FEC restates this error in its Opp'n Memo at 7: "Such corporation-established super PACs are not SSFs, [citing Advisory Op. 2010-09, p.5] so they are not bound by FECA's prohibition on soliciting the general public for contributions to SSFs."

call an "independent expenditure only political committee," or "IEOPC." Club Request at 5 ("The Club's IEOPC would not be a separate segregated fund and the funds raised would not be contributions as understood in the Act apart from the registration and reporting provisions"). The Club next argued that the funds the new IEOPC would take in are not really "contributions" under the Act—again understanding that a quick and favorable ruling on that point would cure the Club's inability to solicit the general public for the funds the Club would need to finance its independent expenditures. *Cf.* 2 U.S.C. § 441b(b)(4)(A)(i).

With due respect to the Club, and to the Commission that ratified its argument, this is nonsense. Of course funds contributed for independent expenditures after *SpeechNow.org* are "contributions."[10] They are something "of value" given "for the purpose of influencing a federal election."[11] 2 U.S.C. § 431(8)(A) (definition of contribution). What the court in *SpeechNow.org*—and in *EMILY's List* and *Carey*—actually held is that it is unconstitutional to apply the Act's contribution *limits* to those contributions. It is equally true, despite arguments from the Club in Advisory Opinion 2010-09 and ratified by the Commission, that a political committee registered by a corporation is a "separate segregated fund." This comes directly from the Act in section 431(4)(B) and by operation of section 441b(b)(2)(C). Corporations "may establish" a "separate segregated fund," which is a kind of political committee. The Act does not contemplate corporations creating other types of political committees. *Id.* What the Club should have challenged was the Act's prohibition on soliciting beyond the restricted class as-applied to the contributions the Club would need to finance an SSF's independent expenditures. ELF makes

[10] Counsel to SpeechNow.org had the opportunity to refer to the funds in question in that case as "donations" not "contributions" but did not take it. The D.C. Circuit also chose not to refer to the funds in question as "donations." The funds were "contributions," whether under the limits that constitutionally could not apply, *see* 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3), or the reporting requirements that did. *See* 2 U.S.C. §§ 434(a) and (c).

[11] Indeed, the definition of independent expenditure at 2 U.S.C. § 431(17) includes the terms "expressly advocates" and express advocacy is the interpretation the *Buckley* Court employed to save the phrase "for the purpose of influencing an election" from overbreadth and vagueness. 424 U.S. at 80-81.

that challenge here, as it is well settled that the "First Amendment protects [plaintiffs'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

II. The Granting Of A Legislative Benefit or Exemption Cannot Be Conditioned On The Surrender Of First Amendment Rights

In the days before *Citizens United v. FEC*, 130 S. Ct. 876 (2012), when labor unions and corporations could not speak to the public about politics *at all*, Congress permitted unions and corporations to speak to their members and members of their restricted class, respectively. *See* 2 U.S.C. § 441b(b)(2)(A) & (C); *see generally, Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *rev'd on other grounds, Citizens United v. FEC*, 130 S. Ct 876 (2010). The easiest way to achieve that result was to remove those communications from the definition of "contribution or expenditure" in section 441b. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475, 490-92 (1976). Congress also allowed corporations to pay the administrative and solicitation expenses of their SSFs by removing from the definition of "contribution or expenditure" 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." 2 U.S.C. § 441b(b)(2)(C). It may be that Congress has thus far failed to curtail the dispensation in the form of exemptions it gave to corporations 36 years ago, and that dispensation may rightly be viewed as a special advantage Congress continues to give corporations and unions today. But it is elemental that the government cannot exact as the price of a special advantage the forfeiture of First Amendment rights. *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).

And Congress may not do indirectly what it is prohibited from doing directly. Congress may not leave in place an exemption whose enforcement can allow 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").

The FEC makes much of the fact that the Act's disclosure provisions were upheld in *SpeechNow.org*. Opp'n at 18. What the FEC does not mention is that the question there was whether the plaintiffs in that case had to follow one statutory disclosure scheme or another; either section 434(a) for political committees or section 434(c) for organizations other than political committees. 599 F.3d at 696. There is no applicable disclosure exemption in the Act that would have applied to SpeechNow.org. SpeechNow.org is an unincorporated association that could not have formed an SSF subject to the exemptions Congress provided in 1976. The *SpeechNow.org* court held that SpeechNow.org could be held to the disclosure scheme delineated by the statute. 599 F.3d at 696-98. It did not hold, as FEC seems to suggest, that SpeechNow.org could be made to disclose or surrender its speech rights *despite* the existence of disclosure provisions in the applicable statute, or despite an exemption had one been available.

III. 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" from which to make contributions to candidates 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.

The FEC suggests that Plaintiff Todd Ceferatti is qualified to operate two political committees. Opp'n Memo. at 27. Plaintiffs note that seasoned political operative, David Bossie, of the Citizens United organization, is no less qualified. But that fact hardly constitutes a legitimate, let alone compelling, governmental interest. *See 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").

IV. The Narrowly Tailored Option Is For Congress To Curtail Its Disclosure Exemption In Light Of *Citizens United*

The FEC argues that Congress has foreclosed the possibility of SSFs engaging in full-throated independent expenditures because Congress has allowed corporations to solicit on behalf of SSFs without reporting the costs as contributions or expenditures. Opp'n. at 11. But "[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). 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 makes 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. Opp'n 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, Carey,* 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. *Citizens United,* 130 S. Ct. at 916. 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.[12] 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 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 argues that "the holding of *Van Hollen* supports the decision not to grant ELF's advisory opinion request." Opp'n. at 21. The truth is, *Van Hollen* supports plaintiffs' position because the FEC has *Van Hollen's* application to this case completely backward. *Van Hollen v. FEC*, Civ. No. 11-766, 2012 WL 1066717 (D.D.C. Mar. 30, 2012) counsels that even though the disclosure exemptions passed by Congress in 1976 lead to anomalous results with regard to campaign disclosure in a post-*Citizens United* world, the FEC is *not* free to craft advisory opinions or regulatory interpretations that create a disclosure regime Congress "would have wanted." Like it or not, the disclosure exemption for corporations is unambiguous and remains until Congress ends it.[13]

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[12] 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, 909 (2010). (rejecting the antidistortion rationale). *See* Plaintiffs' Memorandum of Law in Support of Preliminary Injunction at 34.

[13] "For purposes of this section. . . the term "contribution or expenditure". . . shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families. . . (B) nonpartisan

Indeed, it is remarkable how much the FEC's explanation of *Van Hollen* at pp. 20-21 of their Opposition Memorandum actually makes Plaintiffs' case when a) the regulations discussed in *Van Hollen* that the Commission crafted in response to *Wisconsin Right to Life*, 551 U.S. 449 (2007), are substituted with the advisory opinions the FEC crafted in response to *Citizens United* and *SpeechNow.org*, and b) the provisions Congress enacted pre-*WRTL* to disclose spending on electioneering communications are replaced in the FEC's text with the disclosure exemption Congress passed (in 1976) pre-*Citizens United* and pre-*SpeechNow.org*. Read again the FEC's argument at pages 20-21, this time with those substitutions in place:

> At issue there w[ere advisory opinions] the Commission had promulgated in response to [*Citizens United v. FEC*, 130 S. Ct. 876 (2010) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc)]. [*Citizens United* and *SpeechNow.org*] had struck down a portion of FECA's corporate electioneering prohibition, [citation omitted]; as a result, certain corporate activity that had not previously been permissible under FECA was rendered lawful. But Congress had not contemplated such corporate activity in enacting FECA's [corporate] disclosure [exemptions in 1976], and the application of the literal text of those [exemptions] to the newly permissible category of corporate electioneering seemed to lead to results that Congress would not have intended. *See Van Hollen*, 2012 WL 1066717, at *10-*11. So the Commission promulgated [advisory opinions] that, the court noted, "w[ere] specifically undertaken to address the changes wrought by [*Citizens United* and *SpeechNow.org*]"—to bridge the gap between the statutory [exemption] and the effects of [*Citizens United* and *SpeechNow.org*] by essentially attempting to determine how Congress would have wanted FECA's disclosure provisions to apply to corporate electioneering. *See id.* at *13. In *Van Hollen*, the Court held that the Commission did not have the authority to promulgate such [advisory opinions]. *Id.* at *15. The Court found that the disclosure [exemptions] enacted by Congress were unambiguous on their face, and the Commission was bound to enforce the unambiguous text, even if intervening court decisions had caused such enforcement to lead to seemingly anomalous results. *Id.* at *11 (citing *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998).

Opp'n. at 21-22.

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registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel 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." 2 U.S.C. § 441b(b)(2)

The FEC has no choice in the matter. The only remedy to this "anomalous result" is for Congress to amend the exemptions it created in 1976. Neither Congress nor the FEC has the power to cure this anomaly by frustrating ELF's rights to speak and associate with fellow speakers. As the FEC repeatedly argues, nothing in the Constitution prevents Congress from requiring corporations that solicit on behalf of SSFs to report those funds as "expenditures," "contributions," or both. Opp'n at 5-6 ("government can constitutionally require all PACs—including those exempt from limits on the contributions they receive—to report all of their income and spending, 'no matter whether the [funds] were [given] towards administrative expenses or independent expenditures.' [*SpeechNow.org*, 599 F.3d] at 698"). Congress, however, has not done so yet. Nonetheless, it is a decision for Congress, and the FEC must respect that "seemingly anomalous result" until Congress acts.[14] *Van Hollen*, 2012 WL 1066717 at *11.

V. FEC's Concerns for Coercion Are Addressed by Plaintiffs' Plan of Action

Contrary to the FEC's assertion, Plaintiffs will not solicit employees that are not part of the restricted class more than twice per year for either its contribution account or its *Carey* account. *Cf.* Opp'n. at 23. And the FEC's argument that the ability to solicit unlimited amounts for independent expenditures twice yearly will "coerce" employees, because soliciting up to $5,000 from employees twice yearly cannot coerce, is nonsense. Opp'n. at 23. The median household income in the United States is currently $46,326. *See* How Much Does the Average American Make?, available at http://www.mybudget360.com/how-much-does-the-average-american-make-breaking-down-the-us-household-income-numbers/ (last visited Aug. 22, 2012). In the year Congress passed these restrictions and exemptions, the year 1976, median household

[14] In the alternative, if this Court decides it must choose between an anomalous exemption that frustrates full disclosure and ELF's speech rights, it must choose ELF's speech rights by ignoring the exemption and requiring ELF to list the cost of any solicitations STI may conduct on behalf of ELF on ELF's reports to the Federal Election Commission.

income was $10,962 in nominal terms. Dave Manual, Median Household Income in the United States, available at http://www.davemanuel.com/median-household-income.php (last visited Aug. 22, 2012). Also in 1976, the nominal contribution limit was nearly half that median household income: $5,000. That means Congress allowed a corporation to solicit a maximum solicitation of 45.6% of median household income, *twice* per year. This goes to show it is not the contribution amounts that prevent coercion, else Congress would have lowered them; it is the restriction on soliciting twice per year that prevents coercion.

The FEC also argues that ELF's plans to engage in independent expenditures, if properly recognized by this court, will allow Wal-Mart to solicit, and thereby to coerce, its distributors. Opp'n. at 24. This is the same FEC that keeps reminding this court that the STI corporation may solicit whomever it wants without restriction. Opp'n at 26. In other words, Wal-Mart may do this now. If Congress wants to stop corporations from soliciting distributors for political speech, let it try. But, after the high court's opinion in *American Tradition Partnership, Inc. v. Bullock,* 11-1179, slip op., (June 25, 2012) (per curiam), Congress may run into difficulty. Under no circumstances, however, can the FEC's concern for business distributors allow it to trample ELF's rights to engage in political speech and association.

VI. Plaintiffs Are Entitled To Immediate Injunctive Relief

"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 demonstrated that high 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 *Carey*, for the FEC to prevent ELF from opening a *Carey* account to fund independent expenditures.

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). Whether or not ELF's motion for preliminary injunction was filed as quickly as humanly possible is beside the point. *Cf.* Opp'n at 26. After all, what justification could possibly preclude ELF from speaking in the 74 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 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 2 U.S.C. § 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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