UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STOP THIS INSANITY INC
EMPLOYEE LEADERSHIP FUND et. al.

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION
999 E STREET, NW
WASHINGTON, DC 20463,

Defendant.

Civil Case No. 1:12-cv-01140

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move for a preliminary injunction pursuant to Fed. R. Civ. P. 65. Plaintiffs file their Verified Complaint for Declaratory and Injunctive Relief and Memorandum in Support of Preliminary Injunction Memo concurrently.

As described in the Verified Complaint and Memorandum, Plaintiffs complain against the unconstitutionality of contribution limits at 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3), source prohibitions at 2 U.S.C. § 441b(a) and solicitation restrictions at 2 U.S.C. § 441b(b)(4)(A)(i) as applied to contributions solicited by and given to the Employee Leadership Fund and as applied to independent expenditures created by the Employee Leadership Fund, including those described in the Verified Complaint.

Plaintiffs have established probable success on the merits, demonstrating that they will be irreparably harmed, that an injunction will not substantially harm the Defendant, the Federal Election Commission, that an injunction serves the public interest, and there is no adequate remedy at law. Because a preliminary injunction sets forth no monetary risk to the FEC, Plaintiffs request that any bond requirement should be waived.

In accord with Local Rule of Civil Procedure 65.1(c), Plaintiffs have filed a Verified Complaint contemporaneously with this request for injunctive relief. Verified Complaints are the legal equivalent of an affidavit. *See Neal v. Kelly*, 963 F.2d 453 (D.C. Cir. 1992); *Mallick v. Int'l Broth. of Elec. Workers*, 814 F.2d 674, 680 (D.C. Cir. 1987).

As detailed in the accompanying Memorandum, Plaintiffs request that this court grant its preliminary injunction motion and preliminarily enjoin the FEC from enforcing 2 U.S.C. §§ 441a(a)(1)(C), 441a(a)(3), 441b(a) and 441b(b)(4)(A)(i) as applied to contributions solicited by and given to the Employee Leadership Fund's Non-Contribution Account and as applied to independent expenditures created by the Employee Leadership Fund, until a final hearing on the merits of this matter.

Respectfully submitted,

Stephen M. Hoersting*

__/s/_*Dan Backer*_____

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*Motion for *Pro Hac Vice* to be filed.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Respectfully submitted,

Stephen M. Hoersting*

/s/ Dan Backer

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INTRODUCTION

This case is a constitutional challenge to laws that, as interpreted and applied by the Federal Election Commission ("FEC" or "Commission"), abridge the freedom of speech and association guaranteed under the First Amendment. These challenges are brought as-applied against the contributions limits of 2 U.S.C. §§ 441a(a)(1)(C), 441a(a)(3), the source prohibitions at 2 U.S.C. § 441b(a) and the solicitation restrictions of 2 U.S.C. § 441b(b)(A)(i). The Employee Leadership Fund ("ELF") is a "connected committee" or "separate segregated fund," defined at 2 U.S.C. § 431(4)(B), of the corporation Stop This Insanity, Inc. (hereinafter "STI"). ELF, STI, and its would-be contributors' First Amendment rights are infringed by laws enforced and interpreted by the FEC that prohibit ELF from opening a non-contribution account (a.k.a. "*Carey* account," *see Carey v. FEC*, 791 F. Supp. 2d 121 (D. D.C. 2011) to solicit and accept contributions not subject to the solicitation restrictions of § 441b(b)(4)(A)(i), the limitations of §§ 441a(a)(1)(C) and 441a(a)(3) and the source prohibitions at § 441b(a) (a.k.a. "*Carey* contributions") to finance independent expenditures. These citizens include individuals and corporations in the general public, STI's restricted class, STI's employees (solicited no more than twice per calendar year subject to certain federal restrictions, *see* 2 U.S.C. § 441b(b)(4)(B)), other political committees, and labor organizations. Such contributions and expenditures from ELF's *Carey* account are subject to the reporting requirements at 2 U.S.C. §434(a), 11 C.F.R. 100.19 and 11 C.F.R. 104.4 and should be subject to the Commission's recent guidance on *Carey* Accounts and *Carey* Contributions in its October 5, 2011 press release. Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that maintain a Non-Contribution Account (October 5, 2011) (available at http://www.fec.gov/press/Press2011/20111006postcarey.shmtl).

In *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the U.S. Supreme Court recognized the right of corporations, and all associations of American citizens, to speak out about candidates and elections as protected under the First Amendment. Subsequent to *Citizens United, SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), *EMILY's List*, 581 F.3d 1 (D.C. Cir. 2009), and *Carey v. FEC*, 791 F. Supp. 2d 121 (D. D.C. 2011), STI and its restricted class members are each constitutionally entitled to spend unlimited sums on independent expenditures themselves, to do so in conjunction with others, and to make *Carey* Contributions to the *Carey* Accounts of other PACs. Because they may each engage in any and all of these activities themselves, or in concert with others, there is neither a compelling government interest nor a rational basis to deny ELF and its restricted class members the speech and associational right to do so through a *Carey* account within ELF, the SSF of STI.

STI is a 501(c)(4) social welfare organization that has no interest in spending a primary amount of its time engaging political activity when it has a fully reporting political committee, ELF, willing to do so. ELF has a very small restricted class and can only speak out by associating with persons outside the restricted class.

According to the landmark opinion in *Citizens United*, independent expenditures do not create apparent, or actual, *quid pro quo* corruption. *Citizens United v. FEC,* 130 S. Ct. 876, 910 (2010). And according to the *SpeechNow.org* court, regulations burdening independent expenditures are outside the scope of government's legitimate interest in preventing corruption. *SpeechNow.org v. FEC,* 599 F.3d 686, 692 (D.C. Cir 2010) (en banc). Likewise, the Preliminary Injunction issued against the FEC just one year ago in *Carey* held that political action committees ("PACs") are constitutionally entitled to both solicit and accept amount- and source-restricted contributions to finance contributions to candidates, and unlimited contributions to a

Carey account to finance independent expenditures. *Carey v. FEC*, 791 F. Supp. 2d 121, 135 (D.D.C. 2011). There is no compelling government interest in discriminating between the independent expenditure activities of non-connected PACs and the independent expenditure activity of connected PACs (a.k.a "SSFs") such as ELF, its restricted class and persons in the general public who may lawfully engage in such activity themselves. To do so would discriminate against speakers based on how they choose to associate, in derogation of *Citizens United*, without preventing *quid pro quo* corruption or its appearance. The First Amendment protections guaranteed to the non-connected committee National Defense PAC, *see Carey supra*, and EMILY's List, *see EMILY's List, supra v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009), should be extended to include SSFs.

Likewise, there is no reason SSFs like ELF may not solicit members of the general public for contributions to a *Carey* account. When the Supreme Court upheld the solicitation restrictions at § 441b(b)(4)(A)(i) in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), they did so only to further a complete ban on political participation financed with corporate or union treasury funds. *Id.; see also Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990); *rev'd Citizens United v. FEC,* 130 S. Ct. 876 (2010). Now that the corporate political participation ban has been lifted with regard to the funding of independent expenditures in *Citizens United* and other federal cases, there is no constitutional reason to prevent any domestic non-profit organization from raising the funds it needs for independent expenditures from any group of citizens choosing to associate with it. The only possible, relevant exception to that maxim, which Plaintiffs do not challenge in this case, is the prohibition on soliciting employees of the SSF not in the restricted class more than twice annually subject to certain restrictions. *See* 2 U.S.C. § 441b(b)(4)(B). Neither ELF nor STI will solicit 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.[1] VC ¶ 9. A corporation or its SSF may solicit contributions to the SSF from the corporation's executive or administrative personnel and their families, and where applicable, stockholders or members. 2 U.S.C. §§ 441b(b)(4)(A)(i). After *Citizens United*, *EMILY's List*, *SpeechNow.org* and *Carey*, there is no constitutional justification for prohibiting an SSF from soliciting a member of its restricted class—but not the non-restricted-class employees of the corporation—to make unlimited contributions to the *Carey* account of the SSF for the purpose of making independent expenditures.

As a matter of statutory grace, an SSF may accept from the corporation or labor organization that serves as its connected organization, payments for the SSF's establishment, administration or solicitation costs. 2 U.S.C § 441b(b)(2)(C). Non-connected committees, on the other hand, do not enjoy the statutory exemption and must tailor an appropriate share of the funds they raise from individuals in amounts less than $5,000 per year to administer contributions to candidates. *See Carey*, 791 F. Supp. 2d at 125-26; *EMILY's List*, 581 F.3d at 38 (quoting *CalMed*, 453 U.S. at 203). Such payments are not "contributions" under the Act and are not prohibited, whether those funds help administer contributions to candidates. *Id.* Nonetheless, ELF will not solicit STI for funds to its *Carey* account to finance independent expenditures, but will accept funds from STI only to pay its administrative expenses and solicitation costs pursuant to the statute. VC ¶ 11.

To date, and over the objection of three of its Commissioners, the Commission has failed to grant an affirmative response to plaintiffs' advisory opinion; affirming ELF's right to establish a non-contribution account to make independent expenditures. Because of this, ELF is presently

[1] 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.

stymied in it ability to accept contributions and speak about candidates for office in 2012 and candidates in future elections. By failing to extend the rights enumerated in *Carey*, *Citizens United*, *SpeechNow.org*, *and EMILY's List* to SSFs, the Commission as a whole has infringed upon the constitutionally protected rights of the plaintiffs, causing injury by forcing each to seek judicial relief to associate and speak freely. VC ¶ 13.

Specifically, ELF plans to distribute banner advertisements over various websites during the 2012 election cycle in the districts of congressional candidates that either expressly advocate the election or defeat of candidates or hyperlink to pages that expressly advocate the election or defeat of these candidates. ELF and Todd Cefaratti 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, specifically their incorrect interpretation by the FEC, 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. Plaintiffs are entitled to a preliminary injunction that prevents the FEC from enforcing those laws against the Plaintiffs.

STATEMENT OF FACTS

Plaintiff Employee Leadership Fund ("ELF") is a political committee known under the Act as a "separate segregated fund" ("SSF" or "connected PAC"), 2 U.S.C. § 431(4)(B), of its "connected organization," Stop the Insanity, Inc. ("STI"). ELF registered with the Federal Election Commission ("FEC" or "Commission") on January 4, 2012. Its principal mailing

address is in Washington, DC. Plaintiff Stop This Insanity, Inc. ("STI") is a not-for-profit social welfare organization, incorporated in Arizona, and exempt from taxation under §501(c)(4) of the Internal Revenue Code whose status has been pending the past two years. STI is the connected organization of ELF.

ELF wants to make contributions to federal candidates in the 2012 election cycle subject to the limits, source restrictions and reporting requirements of the Act. VC ¶ 22. It is also interested in making independent expenditures with funds unlimited as to amount and unrestricted as to source. *See id*. for ELF's advertising plans.

To engage in this activity, ELF needs to pool resources with like-minded citizens. Plaintiff Todd Cefaratti is a resident of the State of Arizona, the President of STI, and a member of the restricted class of ELF. VC ¶ 18. Cefaratti wants to contribute $10,000 of his personal funds to the *Carey* account located within ELF to finance independent expenditures in 2012. VC ¶ 25. Plaintiff Glengary LLC is a limited liability corporation located in the State of Arizona and interested in contributing $10,000 to a *Carey* account located within ELF to finance independent expenditures in 2012. VC ¶¶ 19, 24. Glengary LLC is not a member of the restricted class of STI. VC ¶ 77. Plaintiff Ladd Ehlinger is a resident of Georgia and a political consultant who is neither an employee of STI nor a member of STI's restricted class. VC ¶¶ 20, 26. Ehlinger is best described, *vis-a-vis* ELF and STI, as a member of the general public. Mr. Ehlinger has generally expressed an interest in seeing independent expenditures made against the candidates to be targeted by ELF. VC ¶ 26. ELF wants to solicit Mr. Ehlinger to make a $1,500 contribution to a *Carey* account to be located within ELF to finance independent expenditures. ELF will not solicit national banks, federal contractors or foreign nationals. 2 U.S.C. §§ 441b(a), 441c(a)(2)

and 441e. *Id.* ELF's administrative expenses may be paid by its connected organization, Stop the Insanity, Inc. ("STI"), but ELF will not solicit or accept funds from STI to its *Carey* account.

In the wake of what most campaign-finance experts have deemed a sea change in election law through *Carey v FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir 2010), *Citizens United v. FEC*, 130 S.Ct. 876 (2010), and *EMILY's List v. Federal Election Commission*, 581 F.3d 1 (D.C. Cir. 2009), plaintiffs hope to secure and make full use of their First Amendment rights. ELF, which already maintains direct contribution account subject to the limitations, prohibitions, and reporting requirements of the Act, seeks to establish a separate bank account within ELF—a *Carey* account—to finance independent expenditures. VC ¶ 27. ELF would solicit and disclose unlimited contributions from individuals, corporations, and unions into this *Carey* account. The independent expenditure campaigns that ELF seeks to engage in advocate the election or defeat of clearly identified candidates for federal office. *See* 2 U.S.C. § 431(17). Part and parcel of ELF's ability to engage in this speech is in its ability to raise funds to make independent expenditures and meet the costs of producing and distributing banner advertising, and perhaps in the future, other media. Thus, ELF seeks to be freed of limits on contributions given to it for independent expenditures and to be freed of solicitation restrictions no longer permissible after *Citizens United*. While the *Carey, SpeechNow.org, EMILY's List* and *Citizens United* courts could not have been clearer in protecting these rights, the Commission today refuses to find the necessary four votes to extend these rights to SSFs such as ELF.

I. The Advisory Opinion Request

On January, 4 2012, the Employee Leadership Fund ("ELF") submitted an advisory opinion request ("AOR"), attached as EXHIBIT A, to the Commission pursuant to 2 U.S.C. § 437f. ELF's AOR asked:

a. May a connected PAC establish a non-contribution account (*Carey* account) to solicit and accept contributions from the general public, corporations and unions (*Carey* contributions) not subject to the restrictions of 2 U.S.C. § 441b(b)(4)(A)(i) and 2 U.S.C. § 441b(b)(4)(B)? and

b. How must ELF report the administrative and operating expenses paid by STI, if any, in connection with ELF's *Carey* account, particularly where such expenses may not be readily determinable?

The Commission accepted the AOR for review, pursuant to 11 C.F.R. § 112.1, assigned it AOR number 2012-01 and posted it on the Commission's website for public commentary. VC ¶ 30. On February 17, 2012, the Commission's general counsel issued a draft advisory opinion in response to ELF's AOR. VC ¶ 31. The draft advisory opinion, Draft A, concluded that the Commission is compelled by judicial decisions to hold that entities be permitted to establish non-contribution accounts or *Carey* accounts to finance independent expenditures. Thus, Draft A concluded that ELF may establish a separate, *Carey* account into which it may receive unlimited contributions for the purpose of financing its independent expenditure activity. This "Draft A" advisory opinion is included as EXHIBIT B. An alternate draft, Draft B, was issued on February 17, 2012 and concluded that the Act and Commission regulations prohibit ELF from establishing a *Carey* account that would receive unlimited contributions solicited from members of ELF's restricted class or the general public for the purpose of financing independent expenditures. VC ¶ 32. The alternative "Draft B" advisory opinion is included as EXHIBIT C.

On March 1, 2012, at an open meeting of the Commission, the Commission failed by a vote of 3-3 to approve Draft A and also failed by a vote of 3-3 to approve Draft B. Pursuant to 11

C.F.R. § 112.4(a), the Commission certified on March 2, 2012 that it was unable to approve ELF's AOR because it lacked the necessary four votes to approve the AOR. *See* EXHIBIT D. The Commission's failure to affirmatively provide a four-vote, binding advisory opinion in response to ELF's request subjects ELF to civil or criminal penalties under 2 U.S.C. § 437g merely for speaking about candidates and engaging in political association, because it deprives plaintiffs of a legal reliance defense they could otherwise receive under 2 U.S.C. § 437f(c). The failed vote completes the advisory opinion process in this matter and deprives plaintiffs of a legal right—to engage freely in constitutionally protected speech and association. *See Unity 08 v. Federal Election Commission*, 596 F.3d 861 (D.C. Cir. 2010) ("parties are commonly not required to violate an agency's legal position and risk an enforcement proceeding before they may seek judicial review"); *see also Democratic Senatorial Campaign Committee v. Federal Election Commission*, 918 F. Supp. 1 (D.D.C. 1994).

II. Ensuing Harm to Plaintiffs

At the time of filing the advisory opinion request, several primary elections were less than 60 days away. VC ¶ 34. ELF filed its request as promptly as possible to ensure that its planned speech and association would be deemed lawful under the Act and related regulations. VC ¶ 36. More than 40 days later, the Commission had not issued an advisory opinion. Given that the Commission could not issue a definitive statement concerning the legality of any portion of ELF's planned actions, even in light of *Carey v. FEC*, ELF was required to mute itself and curtail its activities during the 2012 primary election cycle.

During the 2012 primary election cycle, ELF plans to deploy independent expenditure communications targeting candidates to federal office. VC ¶ 37. The contribution limits at §441a(a), the source restrictions at §441b(a) and the solicitation restrictions at § 441b(b)(A)(i)

limit the pool of contributors from whom ELF may solicit and the size of their contributions. Because the Commission will not recognize ELF's right to accept unlimited contributions for independent expenditures, ELF is unable to gather the resources necessary to be heard during the 2012 primary election cycle.

III. Ongoing Harm to Plaintiffs

As soon as possible, and certainly before the 2012 general election, ELF would like to make independent expenditures from a Carey account, *see* VC ¶ 38, EXHIBIT E, and to make additional independent expenditures in the months leading up to the 2012 general election. VC ¶ 39. Without an immediate ruling from this court, ELF will not have the necessary time to fundraise and generate monetary support for its message from likeminded persons.

ELF would like to solicit contributions for its independent expenditures in amounts greater than $5,000.00 per calendar year. VC ¶ 40. ELF has contacted persons donors willing to contribute more than $5,000 to fund independent expenditures out of a separate bank located within ELF (a *Carey* account), but has not solicited or accepted such amounts due to the contribution limits improperly applied at §§ 441a(a)(1)(C) and 441a(a)(3), the source prohibitions at § 441b(a), and the solicitation restrictions at § 441b(b)(4)(A)(i). VC ¶ 40.

ELF would like to make contributions to candidates for federal office subject to source and amount limits found at 2 U.S.C. §§ 441a(a)(1)(C) and (2)(C). Because it plans to make unlimited independent expenditures while receiving unlimited contributions for them, the Commission's interpretation of the law prohibits ELF from soliciting and making source-restricted and amount-limited contributions to candidates out of a separate bank account at the same time. VC ¶ 43.

IV. ELF and STI's Structure and Operations

ELF and STI operate independently of political candidates, committees, and political parties. VC ¶ 44. These organizations do not coordinate any activities with candidates or national, state, district or local political party committees or their agents as defined in 2 U.S.C. §§ 441a(a)(7)(B) and (C); 11 C.F.R. 109.21 *et seq.* VC ¶ 44. In addition, ELF and STI do not and will not coordinate its activities with other political committees. *Id.*

ELF's expenditures for advertisements will be "independent expenditures" under 2 U.S.C. § 431(17) because they will be expenditures by a person "expressly advocating the election or defeat of a clearly identified candidate" that are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized [campaign] committee, or their agents, or a political party committee or its agents." VC ¶ 45.

ELF has not yet solicited or accepted any contributions in excess of the $5,000 limit, or from individuals beyond the restricted class, because the Commission's incorrect interpretation of the Act's contribution limits, source prohibitions and solicitation restrictions as-applied to ELF's *Carey* account would subject ELF to civil and criminal penalties. VC ¶ 46. These limits, prohibitions and restrictions prevent ELF from accepting a $10,000 contribution to ELF's *Carey* account from Todd Cefaratti, a member of the restricted class. The limits, prohibitions and restrictions prevent ELF from soliciting and accepting a $10,000 contribution to its *Carey* account from Glengary LLC. And the solicitation restrictions prevent ELF from soliciting a $1,500 contribution to its *Carey* account from Ladd Ehlinger, a citizen in the general public and not a member of ELF's restricted class. VC ¶ 42. Even if ELF could somehow raise enough money in increments of $5,000 or less per donor per calendar year to pay for its advertisements, the contribution limits and source prohibitions would, by making it harder to gather funds, limit

the type and number of times it could run advertisements. VC ¶ 49. The limits, prohibitions and restrictions would also diminish ELF's ability to run additional advertisements concerning candidates in other races. This is precisely the muting effect the law has had on ELF's operations during the 2012 primary cycle as described above. This constitutes a direct impediment on ELF's rights to association and speech.

ELF will face a credible threat of prosecution if it solicits or accepts contributions in excess of the limits contained in §§ 441a(a)(1)(C) and 441a(a)(3), the source prohibitions at § 441a(b) or solicits beyond its restricted class to fund independent expenditures—other than to solicit employees of STI not in STI's restricted class, a provision Plaintiffs do not challenge, *see* 2 U.S.C. § 441b(b)(B)(4). VC ¶ 50-51.

V. Activities of Cefaratti, Ehlinger and Glengary LLC

The contribution limits contained in §§ 441a(a)(1)(C) and 441a(a)(3) as improperly interpreted by the Commission prevent plaintiff Todd Cefaratti, a member of STI's restricted class, from making the contributions he wants to make to ELF's *Carey* account and associating with other like-minded persons. VC ¶ 59. Similarly, the contribution limits found at §§ 441a(a)(1)(C) and 441a(a)(3), the source prohibitions at § 441b(a), and the solicitation restrictions at § 441b(b)(4)(A)(i) prevent Plaintiff Glengary LLC from being asked to contribute more than $5,000 to a *Carey* account within ELF to finance independent expenditures in contravention of *SpeechNow.org* and *Citizens United.* VC ¶ 1.

ELF will face a credible threat of prosecution if it solicits a $1,500 contribution to its *Carey* account from Plaintiff Ladd Ehlinger, who is not a member of ELF's restricted class. VC ¶ 42. And Plaintiffs Ehlinger and Cefaratti should not have their contributions to a *Carey* account located within ELF count against the amount of money they may contribute to federal candidates

in any biennium, *see* 2 U.S.C. § 441a(a)(3). Furthermore, ELF and its agents will face a credible threat of prosecution if they solicit contributions to ELF's *Carey* account in excess of the limits, in violation of the source prohibitions or to members outside ELF's restricted class. VC ¶ 50.

ARGUMENT

Less than one year ago, the United States District Court for the District of Columbia issued a Preliminary Injunction holding that Political Action Committees are constitutionally entitled to a) solicit and accept amount- and source-restricted contributions for use in direct candidate support, as well as b) solicit and accept unlimited contributions (*Carey* Contributions) to a non-contribution account (*Carey* Account) to finance independent expenditures. *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011); *see also* Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011) (available: http://www.fec.gov/press/Press2011/20111006postcarey.shtml). The Preliminary Injunction in *Carey* followed the reasoning of a long line of cases issued in the past few years, including two from the United States Court of Appeals for the District of Columbia Circuit: non-connected political action committees that receive dollar-limited and source-restricted contributions to in turn make contributions to candidates also have the *First Amendment* right to receive unlimited funds for independent expenditures. *EMILY's List v. Federal Election Commission,* 581 F.3d 1, 12 (D.C. Cir. 2009). A non-connected committee that "makes independent 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." *Id.* Recent federal decisions, based upon Supreme Court precedent, have clearly established that "neither contribution nor expenditure limitations involving independent expenditure activities are

constitutional under the First Amendment." *Carey v. FEC*, 791 F. Supp. 2d 121, 135 (D.D.C. 2011). *See also SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010), *Citizens United v. FEC,* 130 S. Ct. 876 (2010), *EMILY's List v. FEC,* 581 F.3d 1 (D.C. Cir. 2009), *Buckley v. Valeo,* 424 U.S. 1 (1976). Given the paramount importance of these First Amendment rights, the Commission should have found four votes to recognize the same First Amendment protections as-applied to SSFs, such as ELF, that have been afforded to non-connected committees such as EMILY's List.

It is well-settled that corporations like STI, including the members of its restricted class of employees, may lawfully make unlimited independent expenditures, and may lawfully make unlimited contributions to the *Carey* accounts of other organizations as well. There is no added corruption that arises from STI engaging in this activity through a vehicle of its choosing—the *Carey* account of ELF, STI's SSF. There is no compelling government interest in discriminating between the independent expenditure activities of non-connected committees, which may solicit funds from the general public to finance independent expenditures, and the independent expenditure activity of SSFs and their restricted class employees and others in the general public who may lawfully engage in such activity themselves (except non-member employees twice per year)—to do so would in effect discriminate against speakers based on how they choose to associate. Further, there is nothing inherent in the structure or operation of an SSF that suggests that there is an enhanced threat of actual or apparent *quid pro quo* corruption when compared to the independent expenditures made by non-connected PACs. This is evidenced by a recent Commission rulemaking that amended regulations that apply with equal force to non-connected committees and SSFs, alike, following the D.C. Circuit Court's opinion in *EMILY's List*. *See* Explanation and Justification for Final Rules on Funds Received in Response to Solicitations;

Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees, 75 FR 13223, 13224 (Mar. 19 2010). ("The Commission agrees…that the [*EMILY's List*] court's holding applies to SSFs as well as to nonconnected committees.").

Despite the decisions in *Carey*, *EMILY's List*, *Citizens United*, *SpeechNow.org*, and *Buckley*, the Federal Election Commission failed to find four votes to guide ELF in its advisory opinion request. *See* Certification of FEC Recording Secretary Shawn Woodhead Werth, AO 2012-01 (date) (hereinafter "Certification") VC, EXHIBIT D. Three of the Commission's six members rightly understood that they were bound by the reasoning of *Carey*, *EMILY's List*, *Citizens United*, *Buckley*, and *SpeechNow.org*. *See* FEC Agenda Document No. 12-13, VC at EXHIBIT B.] Three commissioners voted otherwise. *See* Certification, VC at EXHIBIT C. The Commission's failure to follow *Carey and EMILY's List*, and the Supreme Court precedents that comprise them, leaves plaintiffs with the unmistakable conclusion that they will be liable if they establish a non-contribution account (*Carey* account), not subject to the solicitation restrictions of § 441b(b)(4)(A)(i), to solicit and accept funds for independent expenditures in excess of the $5,000 contribution limit at §§ 441a(a)(1)(C) and 441a(a)(3) and the source prohibitions at § 441b(a). *See* 2 U.S.C. § 437f.

Plaintiffs seek to preliminarily enjoin contribution limits, source prohibitions and solicitation restrictions that, if applied exclusively to ELF's independent expenditure activities, will prevent plaintiffs from exercising their rights to speech and association during the time those rights are most effective—the election season. To warrant preliminary injunctive relief, the moving party must show (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by

the injunction. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). As demonstrated below, each of these factors weighs in plaintiffs' favor.

I. Plaintiffs Are Substantially Likely Succeed on the Merits

The burden of proof at the preliminary injunction stage tracks the burden of proof at trial. Where First Amendment rights are at stake, the FEC must demonstrate the likelihood that the law will be upheld. *See Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal*, 546 U.S. 418, 429 (2006); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). The FEC must demonstrate that the contribution limits, source prohibitions and solicitation restrictions further either a compelling or substantial governmental interest as applied to plaintiffs. Whether the standard of review for limits or source prohibitions on contributions to ELF's independent-expenditure account is tested under the strict scrutiny applicable to restrictions on expenditures, *see FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480 (1985)*("NCPAC")*, the exacting scrutiny discussed in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), or the "less rigorous review" applicable to limits on contributions to candidates, *see Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the FEC cannot meet its burden.

A. The Very Structure of the Federal Election Campaign Act Illustrates That Contribution Limits Applied Against Separate Segregated Funds Cannot Be Upheld

The FEC cannot meet its burden here for the primary reason that independent expenditures made from a separate account do not present any threat of corruption or its appearance that would justify limiting the contributions ELF solicits and accepts for independent expenditures. *Carey*, 791 F. 2d at 126 ("limits on soft money contributions used for independent expenditures are unconstitutional because such a limitation violates a contributor's First Amendment rights.") *See also EMILY's List*, 581 F.3d at 7 (Supreme Court "has consistently

dismissed the notion that expenditures implicate the anti-corruption interest."). ELF has stated it will establish a separate account to make its independent expenditures and will ensure that the costs of administering the funds from which it makes candidate contributions are paid from that candidate contribution account. VC ¶¶ 27, 60.

ELF is a separate segregated fund of STI, a not-for-profit social welfare organization. *Id.* at ¶ 17. It claims a major purpose of campaign activity. *Id.* Yet, ELF's major purpose cannot be the basis for prohibiting it from establishing a separate account to make independent expenditures from unlimited funds. In *SpeechNow.org v. FEC,* the organization claimed a major purpose of campaign activity and the *SpeechNow.org* opinion permits the organization to make independent expenditures from unlimited funds. *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010) (en banc). The FEC's reasoning then—to the extent a split decision admits of reasoning—must be based upon a need to combat some potential corruption. That potential for corruption would have to be based upon ELF's connection to candidates in some way. *See Buckley v. Valeo,* 424 U.S. 1 (1976). The lack of any corruption here is illustrated by reviewing the rights of other political organizations.

Organizations comprised of or controlled by candidates can pose a threat of corruption, as in the case of national party committees. *See McConnell v. FEC,* 540 U.S. 93 (2003). It is worth noting that, despite the unique form of corruption posed by the party committee, the *McConnell* Court did not uphold a provision of the Bipartisan Campaign Reform Act of 2002, Pub. Law, 107-155 (March 27, 2002), that required parties to choose between making independent expenditures on behalf of candidates and making in-kind contributions to candidates. *See McConnell v. FEC,* 540 U.S. 93, 213-18 (2003).

But ELF is not a party committee, and the *Carey* and *EMILY's List* opinions hold that non-profits do not pose the threat of corruption posed by party committees. *See EMILY's List v. FEC*, 581 F.3d 1, 13 (2009) ("*[M]cConnell* does not support such regulation of non-profits"). *See also Carey*, 791 F. Supp. 2d at 131. The non-profit reviewed in EMILY's List technically administered a non-connected political committee, not an SSF committee connected to a non-profit corporation. But the distinction is irrelevant under constitutional law.

Even after the landmark opinion in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), it remains a crime for corporations and labor unions to make contributions to candidates from treasury funds. *See* 2 U.S.C. 441b. Nonetheless, corporations, such as STI, and labor unions are permitted by statute to use treasury funds (soft money) to pay the expenses of administering a separate segregated fund ("SSF") such as ELF to make contributions to candidates from hard money. 2 U.S.C. § 441b. It is the prophylactic effect of separate accounts that allows the SSF to make contributions to candidates with hard money while paying the SSF's administrative expenses with soft money. This same prophylactic will allow STI to pay the administrative expenses of the *Carey* account: another account inside ELF for independent expenditures will address the anti-corruption interest without curtailing independent speech.

Corporations and labor unions may make unlimited independent expenditures from treasury funds while using SSFs to make contributions to candidates. *Citizens United,* 130 S. Ct. 876 (2010). Indeed, the Citizens United organization operated an SSF for a decade and made candidate contributions. This did not prevent the Court from *overruling Austin v. Michigan Chamber of Commerce* on its behalf and recognizing its right to make unrestricted independent expenditures. *Citizens United*, 130 S. Ct. at 913. Justice Stevens noted the fact of Citizens United's PAC in his dissenting opinion.

> In the case at hand, all Citizens United needed to do to broadcast *Hillary* right before the primary was to 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," Citizens United Political Victory Fund, http://www.cupvf.org/. [40]
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> 40. Citizens United has administered this PAC for over a decade. [citation omitted]. Citizens United also operates multiple "527" organizations that engage in partisan political activity. *See* Defendant FEC's Statement of Material Facts as to Which There Is No Genuine Dispute in No. 07-2240 (DC), PP 22-24.

Citizens United, 130 S. Ct . 876, 944 n.40 (2010), (Stevens, J., dissenting).

The Supreme Court recognized Citizens United's right to make independent expenditures with unrestricted funds while fully aware that the organization maintained a separate segregated fund for making contributions to candidates. *Id.* An SSF political committee also must be permitted to make independent expenditures with unlimited funds. Maintaining separate accounts cures any potential corruption of candidates.

The FEC may rely upon two more arguments to deny Plaintiffs their rights to make independent expenditures with unlimited funds. It may argue that the *Citizens United* opinion is not instructive because the Citizens United organization and the Citizens United Voter Fund are separate legal entities. It may also attempt to rely on the *California Medical Association* opinion to conclude that SSF committees cannot make independent expenditures with unlimited funds because doing so will corrupt candidates. Both arguments fail.

1. *CalMed* Does Not Support The Conclusion That A Separate Segregated Fund's Independent Expenditures Corrupt Candidates

While the Supreme Court has never directly addressed whether the government has a compelling interest in limiting contributions to an SSF making independent expenditures, its decision in *California Medical Association v. FEC,* 453 U.S. 182 (1981) [hereinafter *CalMed*],

provides guidance on the proper analysis of the issue in this case. *CalMed* involved a challenge by a multi-candidate committee—defined as a political committee that makes contributions to five or more federal candidates—to the $5,000 annual contribution limit under § 441a(a)(1)(C). *Id.* at 194. Concluding that contributions to the multi-candidate committee amounted merely to "speech by proxy" of the PAC's contributors—which was entitled to lesser protections under the First Amendment—a plurality of the Court upheld the limit on the ground that it served the government's interest in preventing circumvention of the limits on contributions made directly to candidates. *Id.* at 196-98. The multi-candidate committee made contributions directly to candidates. Thus, according to the plurality, contributors seeking to avoid the (at the time) $1,000 annual candidate contribution limits could make larger contributions to multi-candidate committees, which could then be funneled to candidates. *Id.* at 197-98.

Justice Blackmun separately concurred and concluded that the plurality's anti-circumvention rationale applied only because the committee at issue was a multi-candidate committee that made direct contributions to candidates. *Id.* at 203. Justice Blackmun rejected the plurality's conclusion that contributions to the multi-candidate committee were not entitled to full First Amendment protection, i*d.* at 201-02, and concurred in the plurality's judgment, however, because he recognized that, as applied to multi-candidate committees, the annual contribution limit was a narrow means of preventing circumvention of the limits that applied to direct contributions to candidates. *Id.* at 203.

Justice Blackmun made clear that the same analysis would not apply to limits on contributions to committees "established for the purpose of making independent expenditures." *Id.* In sharp contrast to multi-candidate committees—which are "conduits for contributions to

candidates" and thus raise concerns about corruption—"contributions to a committee that makes only independent expenditures pose no such threat." *Id.* As Justice Blackmun explained,

> [t]he Court repeatedly has recognized that effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association…. By pooling their resources, adherents of an association amplify their voices…; the association is but the medium through which its individual members seek to make more effective the expression of their own views.

Id. (internal quotation marks and citations omitted). Because Justice Blackmun's decision is the narrower one, his is the controlling decision in the case. *See Marks v. United States,* 430 U.S. 188, 193 (1977) (stating that when the Court issues a fragmented decision, the position of the narrowest concurrence controls).

Two principles emerge from *CalMed.* First and foremost, under Justice Blackmun's controlling opinion, the government may limit contributions to groups only where they implicate the interest in preventing corruption or its appearance. 453 U.S. at 203. While contributions to multi-candidate committees that in turn fund contributions to candidates can raise such concerns, contributions for independent expenditures cannot. *Id.* at 203-04; *see also Citizens United v. FEC,* 130 S. Ct 876, 909 (2010) (independent expenditures do not create quid pro quo corruption or its appearance).

Second, even the plurality's conclusions apply only to multi-candidate committees that make contributions directly to candidates. *See EMILY's List,* 581 F.3d 1, 9 n.8 (discussing *CalMed)*; 12 n.10 ("The *CalMed* Court never stated that non-profits could be required to use hard money for advertisements."). This point is not only implicit in the plurality's analysis; it is also stated expressly in the opinion. In a footnote, the plurality noted that the ACLU in an *amicus* brief claimed that the contribution limit at issue "would violate the First Amendment if construed to limit the amount individuals could jointly expend to express their political views." *Id.* at 197

n.17. This concern was not at issue in the case, however, because it involved only a multi-candidate committee that made contributions directly to candidates. *Id.* As the plurality explained, "[c]ontributions to such committees are therefore distinguishable from expenditures made jointly by groups of individuals in order to express common political views." *Id. See also Cal. Med. Ass'n. v. FEC*, 641 F.2d 619, 625 (9th Cir. 1980) (Kennedy, J.) (multi-candidate committee is "natural conduit for candidate contributions… and the essential purpose of the provision here in question is to limit those contributions, *not* to limit expenditures for any other type of political advocacy) (emphasis added). In short, ELF's case is distinguishable from the fact pattern in *CalMed*—ELF asks to make independent expenditures, the California Medical Association did not—and falls squarely within the reasoning of Justice Blackmun's controlling concurrence.

2. A Connected Organization And Its SSF May Be Separate Legal Entities, But That Does Not Mean Separate Accounts Do Not Stem Corruption In SSFs.

The FEC may attempt to distinguish the rights of non-connected committees like the National Defense PAC, (discussed in *Carey v. FEC*, supra) and EMILY's List from the rights of connected committees, a.k.a. SSFs. It may point out that a corporation or labor union (the "connected organization") and its separate segregated fund are legally separate entities. *See CalMed*, 453 U.S. at 183; *Citizens United,* 130 S. Ct. at 903. It is this separation, the FEC might argue, that permits a non-profit like California Medical Association to accept unlimited contributions for independent expenditures but prevents a non-connected committee that makes candidate contributions, like CALPAC, from doing the same. The FEC may argue that the *Citizens United* opinion really means the Citizens United organization is permitted to use unrestricted funds for its independent expenditures, but the Citizens United Political Voter Fund, a separate legal entity, may not. Any argument of this kind would have to be based on the belief

that separating the accounts for soft-money independent expenditures and hard-money candidate contributions is an insufficient prophylactic against any potential corruption to candidates.

But this argument is undermined and invalidated by the FEC's longstanding policy of recognizing the right of political committees to maintain one hard-money account to make contributions to federal candidates while maintaining a soft money account to make non-federal disbursements and donations. *See* 11 CFR 102.5. For years, the FEC's regulations have required each organization "that finances political activity in connection with *both* Federal and non-Federal elections and that qualifies as a political committee under 11 CFR 100.5," which includes SSFs and non-connected committees alike, to either pay for all non-federal activity with federal dollars or establish two accounts: one federal, the other non-federal (or soft money). 11 CFR 102.5

The federal account "shall be treated as a separate Federal political committee that must comply with the requirements of the Act including the registration and reporting requirements of 11 CFR parts 102 and 104. Only funds subject to the prohibitions and limitations of the Act [a.k.a. "hard money" or "Federal funds"] shall be deposited in such separate Federal account." *Id.* What safeguard ensures that federal candidates are not corrupted by non-federal funds housed inside the SSF? The same requirement that ELF would follow in financing its proposed independent expenditures with unrestricted funds: the restrictions of 11 CFR 102.5. "No transfers may be made to such Federal account from any other account(s) maintained by such organization for the purpose of financing activity in connection with non-Federal elections." *Id.*

If separate accounts are the trusted method of ensuring that a political committee's non-federal funds for non-federal activity do not corrupt federal candidates, then separate accounts must serve the same anti-corruption interests here. That is, separate accounts and a prohibition on

transfers between accounts will ensure that non-federal funds for independent expenditures will not corrupt federal candidates. It is beyond dispute that separate accounts are the method by which corporate and labor treasury funds have been permitted to pay the administrative expenses of political committees that make contributions to candidates, without corrupting candidates, over the past thirty years. And separate accounts have the virtue of being a narrowly drawn remedy to further any interest in protecting against quid pro quo corruption while recognizing Plaintiffs' rights to speak effectively. *EMILY's List v. FEC*, 581 F.3d at 184. After all, that is exactly what the *EMILY's List* court decided as a matter of binding precedent.

B. As a Matter of *Stare Decisis,* ELF's Rights Have Already Been Upheld

Finally, this question has already been squarely decided by the D.C. Circuit Court of Appeals in *EMILY's List v. FEC*, 581 F.3d 1 (2009).

> What about a non-profit entity that falls into both categories -- in other words, a non-profit that makes expenditures *and* makes contributions to candidates or parties? EMILY's List is a good example of such a hybrid non-profit: It makes expenditures for advertisements, get-out-the-vote efforts, and voter registration drives; it also makes direct contributions to candidates and parties.
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> The constitutional principles that govern such a hybrid non-profit entity follow ineluctably from the well-established principles governing the other two categories of non-profits. To prevent circumvention of contribution limits by individual donors, non-profit entities may be required to make their own contributions to federal candidates and parties out of a hard-money account -- that is, an account subject to source and amount limitations ($ 5000 annually per contributor). Similarly, non-profits also may be compelled to use their hard-money accounts to pay an appropriately tailored share of administrative expenses associated with their contributions. *See Cal. Med, 453 U.S. at 198-99 n.19* (opinion of Marshall, J.). But 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. Stated another way: 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.

EMILY's List, 581 F.3d at 12.

The constitutional principles espoused in *EMILY's List* must apply not just to the independent expenditures of non-connected committees but also to the independent expenditures of SSFs. And the *EMILY's List* opinion is no outlier. It is firmly grounded in the Supreme Court's campaign finance jurisprudence. The Supreme Court has held that independent expenditures, whether by individuals, committees, corporations or labor unions, cannot constitutionally be limited, because they are, by definition, separate from candidates and thus cannot raise any concerns about corruption. *See Citizens United v. FEC,* 130 S. Ct. 876 (2010); *FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) [hereinafter *NCPAC*]; *Buckley v. Valeo,* 424 U.S. 1 (1976). The Court has also held that limits on contributions to groups that make independent expenditures are necessarily restrictions on their expenditures. *See Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 299-300 (1981); *EMILY's List v. FEC,* 581 F.3d 1 (D.C. Cir. 2009). Combined, these principles make clear that the contribution limits that apply to the funding of candidate contributions cannot constitutionally be applied to the independent expenditures of ELF.

C. The FEC Cannot Demonstrate a Compelling, Substantial or Legitimate Interest in Limiting Contributions to ELF.

As the Supreme Court has repeatedly stated, a fundamental purpose of the First Amendment was to protect the discussion of candidates, in order to "ensure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley,* 424 U.S. at 14. Thus, the First Amendment protects vigorous advocacy intended to influence the outcome of elections no less than the discussion of ideas. *See First Nat'l Bank of*

Boston v. Bellotti, 435 U.S. 765, 790 (1978). It also protects the right of individuals to associate with one another because "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). By associating with others, "individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control*, 454 U.S. at 294. *See also Buckley*, 424 U.S. at 22 (stating that the purpose of the right of association is to allow individuals to amplify their voices by associating with others). All this rests at the very heart of what ELF hopes to accomplish.

The Supreme Court has held that "[i]ndependent expenditures constitute expression 'at the core of our electoral process and of the First Amendment freedoms.'" *MCFL*, 479 U.S. at 254 (quoting *Buckley*, 424 U.S. at 39). *See also, NCPAC*, 470 U.S. at 493 (stating that independent expenditures "produce speech at the core of the First Amendment"). As a result, limits on what committees can spend independently of candidates and party committees are subject to the highest constitutional protection. As the Court stated in *NCPAC*, "[a] restriction on the amount of money a person or group can spend on political communications during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.* at 493-94 (quoting *Buckley*, 424 U.S. at 19).

While the limit at issue in *NCPAC* operated directly on expenditures by the group, rather than contributions to it, limits on contributions for independent expenditures automatically operate to limit the group's expenditures. *EMILY's List*, 581 F.3d at 14, n.13 ("Limits on donations to non-profit entities are analytically akin to limits on expenditures by the donors.").

The conclusion necessarily follows from the Supreme Court's decision in *Citizens Against Rent Control*. That case involved a $250 limit on contributions to support or oppose a ballot measure. 454 U.S. at 292. Concluding that the limit prevented individuals from pooling their funds in order to finance their collective advocacy, the Court applied exacting scrutiny and struck it down. *See id.* at 294-95, 300. In arriving at that conclusion, the Court recognized that the limit on contributions necessarily limited the funds that the group could spend on its own speech. *See id.* at 299. As the Court explained, while an individual may make unlimited expenditures under the law, she may not "contribute beyond the $250 limit when joining with others to advocate common views. The contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression…." *Id. See also id.* ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.").

The same is true here. To produce and distribute just the initial ads for which ELF has a production quote and outline for will cost upwards of $10,000 to produce and distribute. *See* EXHIBIT E. Without contributions from Plaintiffs Glengary, Cefaratti, and Ehlinger, ELF will be unable to produce and distribute these ads. VC ¶ 39, EXHIBIT E. Even assuming that ELF could raise sufficient funds in increments of less than $5,000 to pay for these ads, the contribution limits would still significantly limit the number of times it could run those ads and limit its ability to run additional ads concerning other federal candidates in other races. *Id.* at ¶ 49.

As in *NCPAC*, 470 U.S. at 495; *Citizens Against Rent Control*, 454 U.S. at 296; *EMILY's List, SpeechNow.org* and *Carey*, the contribution limits that apply to ELF restrict plaintiffs' rights to pool their funds in order to amplify their voices beyond what any of them would be able to achieve on their own. *Citizens Against Rent Control*, 454 U.S. at 299-300 (stating that the

rights of speech and association "blend and overlap" and are both implicated by contribution limits imposed on groups that support or oppose ballot issues). The contribution limits restrict not only ELF's right to free speech by limiting the funds it has available to spend on its advertisements, the limits also restrict its supporters' rights to free speech by preventing them from pooling their funds and speaking collectively through ELF. *See NCPAC,* 470 U.S. at 495.

As applied to ELF's independent expenditures, the contribution limits contained in §§ 441a(a)(1)(C) and the source prohibitions of 441b operate very differently from the contribution limits in the circumstances in which the Supreme Court upheld them in *Buckley.* There, the Court addressed limits that applied to contributions made directly to candidates or their committees. 424 U.S. at 23-38. Finding that contributions to candidates served as only a "general expression of support for the candidate and his views but does not communicate the underlying basis for the support" and that the contributors' expression "rests solely on the undifferentiated symbolic act of giving," the Court concluded that the speech element in contributions to candidates was minimal. *See id.* at 21. Support for ELF's independent expenditures conveys much more than the "undifferentiated, symbolic act of giving." *Buckley,* 424 U.S. at 21. It conveys agreement with ELF's message. As the Court stated in rejecting the "speech by proxy" argument in *NCPAC*, "the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise, they would not part with their money." 470 U.S. at 95.

In its recent landmark decision, the *Citizens United* Court again identified the sole interest sufficiently compelling to limit contributions to political organizations: that of preventing the actual or apparent quid pro quo corruption of candidates. 130 S. Ct. at 908-909. As the Court has stated, "preventing corruption or the appearance of corruption are the only

legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC,* 470 U.S. at 496-97; *Randall v. Sorrell,* 548 U.S. 230, 246-248 (2006) (recognizing corruption as the only interest that can support contribution limits and striking down limits as broader than necessary to achieve that interest); *Citizens Against Rent Control,* 434 U.S. at 437-38 ("*Buckley* identified only a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate.*") (emphasis in original).

D. As Applied to ELF and its Supporters, the Contribution Limits and Source Prohibitions Are Not Narrowly Tailored

"Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 265 (1986) (*"MCFL").* The "problem" for which Congress passed FECA's contribution limits and source prohibitions was the appearance of or actual corruption of candidates. *See Buckley,* 424 U.S. at 23-38. Regulating "only to the degree necessary" to address that problem would mean applying contribution limits only to those groups that raise concerns about corruption. Here the FEC wields far too blunt an instrument to cure any form of recognized quid pro quo corruption. ELF's establishment of an independent expenditure account cannot raise such concerns and cannot be used to circumvent the limits on contributions to candidates. As a result, applying contribution limits to ELF and its supporters is not narrowly tailored. *See, e.g., NCPAC,* 470 U.S. at 498; *CalMed,* 453 U.S. at 203-04 (Blackmun, J. concurring). It is no answer to say that ELF could speak adequately with less money. As the Supreme Court made clear in *WRTL,* cheaper alternatives are not reasonable alternatives in terms of "impact and effectiveness." 551 U.S. 449, 477 n.9. Even under "less rigorous review," limits are permissible

only if they are "closely drawn" to serve a "sufficiently important governmental interest." *Randall,* 548 U.S. at 247 (quoting *Buckley,* 424 U.S. at 25). This is not a cursory review, and, to date, the Supreme Court has identified only the interest in combating corruption of candidates as important enough to justify contribution limits. *See, e.g., NCPAC,* 470 U.S. at 496-97; *Buckley*, 424 U.S. at 25, 28. The establishment of ELF's *Carey* account cannot raise any concerns about corruption or its appearance and cannot be used to circumvent the limits on contributions to candidates. Thus, even if this court concludes that strict scrutiny does not apply, Plaintiffs have still demonstrated a substantial likelihood of success on the merits to justify a preliminary injunction. *See Carey*, 791 F. Supp. 2d at 128*, see also N.C. Right to Life, Inc. v. Leake,* 482 F. Supp. 2d 686, 698-99 (W.D. N.C. 2007) (holding contribution limit unconstitutional as applied to independent expenditure committee even under the lesser scrutiny that applies to limits on contributions to candidates).

ELF's independent expenditures pose no threat of corruption. Its willingness to maintain a separate account for its candidate contributions will pose no threat of corruption to candidates. The government's interest is furthered by the narrowly tailored requirement that ELF not make transfers between accounts. The FEC's failure to respond to ELF's request, to recognize the relation between the government's interest and the remedy of separate accounts, and its failure to provide Plaintiffs with a defense to prosecution, place Plaintiffs in harm that can only be cured with an injunction.

An SSF may accept from the corporation or labor organization that serves as its connected organization, payments for the SSF's establishment, administration or solicitation costs. 2 U.S.C § 441b(b)(2)(C). Such payments are not "contributions" under the Act and are not prohibited. *Id.* At the time this statutory dispensation was provided to corporations and labor

unions, corporate and labor participation in federal elections—both contributions and independent expenditures—was strictly prohibited. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 690 (1995); *rev'd* in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). Regulators and practitioners are unaccustomed to applying the dispensation to corporate administration of SSFs now that corporations may finance independent expenditures. But the dispensation only ever included funds to establish an SSF, administer its operating expenses and pay for its solicitations. *See* 2 U.S.C. § 441b(b)(2)(C). Payments "made for the purpose of influencing an election," 2 U.S.C. § 431(8), that is, "contributions" to finance independent expenditures were never included in the dispensation and are not included today. Corporate contributions to an SSF to finance independent political speech—well beyond mere administration—would be considered a "contribution" to the SSF, fully reportable to the public by the SSF under 2 U.S.C. §434(a) (political committee reporting). This is made plain by another provision in the Act. Exempt from the definition of "contribution" is "any payment" by a corporation which, "under section 441b(b) of this title, would *not* constitute an expenditure by such corporation." 2 U.S.C. § 431(8)(B)(vi)(emphasis added). Funds to make independent expenditures plainly would constitute an "expenditure" under the Act. Payments by STI to ELF to make independent expenditures would plainly constitute a "contribution," fully reportable by ELF. Nonetheless, STI has no interest in financing independent expenditures, and ELF will not solicit STI for funds to ELF's *Carey* account to finance independent expenditures. VC ¶ 11. ELF will accept funds from STI only to pay the administrative expenses and solicitation costs of its *Carey* account.

E. Section 441b(b)(B)(A)(i)'s Restrictions On Solicitations Upheld In *National Right To Work* No Longer Apply To ELF After *Citizens United*

The FEC may point to *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) ("*NRWC*"), to support a prohibition on soliciting contributions to ELF's *Carey* account beyond the restricted class. 2 U.S.C. § 441b(b)(4). Any reliance on *NRWC* here drops the relevant context. In *Citizens United v. FEC*, 130 S. Ct. 876 (2010) the Supreme Court rejected the premise on which *NRWC* upheld the solicitation prohibition—namely, a now-rejected ban on political participation by corporate entities.

NRWC involved a challenge to § 441b(b)(4)(A)(i)'s prohibition on a SSFs soliciting beyond the membership of its restricted class. *NRWC*, 459 U.S. at 198. *NRWC* upheld this restriction based upon an anti-distortion rationale. Specifically, the *NRWC* Court worried that "[s]ubstantial aggregations of wealth amassed by the special advantages which go with the corporate form [would] be converted into political war chests" if corporate treasury funds were not kept from financing independent political speech. *National Right to Work Committee*, 459 U.S. at 208.

Citizens United rejected the anti-distortion interest at the heart of the *NRWC* opinion and held that, "Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 130 S. Ct. at 909 (2010). The *Citizens United* Court specifically addressed and limited *NRWC*'s holding to restrictions on solicitations for funds that would finance direct contributions to candidates. *See id.* at 909 (*NRWC* was "no more than . . . a restriction on a corporation's ability to solicit funds for its segregated PAC, which made direct contributions to candidates"). ELF's proposed solicitation of funds into a *Carey* account to finance independent expenditures will not finance candidate contributions. Given *Citizens United*

broad approval of corporate political participation and its narrowing of *NRWC*, the FEC can no longer rely on *NRWC* as authority for § 441b(b)(4)(A)(i)'s prohibition on solicitations beyond the restricted class to finance independent expenditures—with the exception of solicitations to employees not in the restricted class more than twice annually, a provision not challenged by Plaintiffs.

The *EMILY's List* court held that solicitations to finance independent expenditures cannot be prohibited under constitutional law. 581 F.3d at 18 (D.C. Cir. 2009). Although contribution restrictions for SSFs were not technically before the court in *EMILY's List*, *Citizens United* eliminates the rationale on which *NRWC* relies for restricting PAC solicitations: the anti-distortion rationale that justified a ban on independent corporate political participation. The *Citizens United* Court also held that the PAC structure, with its $5,000 limit on contributions to be received solely from individuals, is an insufficient alternative for corporate speakers. 130 S. Ct. at 897 ("PACs [do] not alleviate the First Amendment problems with §441b"). The anti-distortion rationale explained in *NRWC* in 1982 and rejected in *Citizens United* in 2010 cannot be reified to restrict the independent speech of SSFs. Any reliance on *NRWC* to restrict solicitations for independent expenditures to a *Carey* account must fail.

II. Plaintiffs Will Suffer Irreparable Harm Without an Injunction

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Under the contribution limits of 2 U.S.C. §§ 441a(a)(1)(C) and 441b, ELF cannot solicit and accept unlimited contributions in order to conduct independent expenditures. Due to these limits, ELF cannot distribute the ads for which it currently has scripts. Plaintiffs are ready, willing, and able to contribute the necessary funds, and ELF will distribute those ads if it is legally permitted to

accept those funds. VC ¶¶ 56-57. The only thing standing between ELF and its ability to speak are the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and the solicitation restrictions of § 441b(a). Plaintiffs' rights are being impaired now and there is nothing speculative about their claims. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (stating that "[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed"). That harm is ongoing and increases as time passes. Any money that ELF cannot collect now deletes the amount of speech it can plan on making in the 2012 general election.

III. An Injunction Will Not Substantially Injure Others

The Supreme Court has made clear that in any conflict between First Amendment rights and regulation, courts "must give the benefit of any doubt to protecting rather stifling speech," and that "the tie goes to the speaker, not the censor." *WRTL*, 551 U.S. at 469, 474. Thus, while the FEC can be said to have an interest in enforcing the campaign finance laws, under the Supreme Court's approach to First Amendment rights in *WRTL*, the FEC's interest simply cannot trump the First Amendment rights of Plaintiffs. An injunction will not harm the FEC.

IV. An Injunction Will Further the Public Interest

The Supreme Court "has long viewed the First Amendment as protecting a marketplace for the clash of differing views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted." *Citizens Against Rent Control*, 454 U.S. at 295. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a

campaign for political office." *Citizens United v. FEC* at 898 (U.S. 2010) (citations and quotations omitted). Plaintiffs wish to participate in the marketplace of ideas by attempting to convince citizens to support candidates who share their views and to oppose candidates who do not.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs … includ[ing] discussion of candidates." *Mills v. Alabama,* 384 U.S. 214, 218 (1966). Thus "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo,* 424 U.S. 1, 14 (U.S. 1976).

The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan,* 376 U.S. 254, 270 (1964). In short, Plaintiffs' activities are at the core of the First Amendment. ELF, and all other SSFs, must be permitted to make independent expenditures out of unlimited corporate, union or individual funds, even though it maintains a separate bank account that contributes to candidates from amount- and source-restricted funds. *Citizens United v. FEC,* 130 S. Ct. 876, 909 (2010) ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."); *see also Carey v. FEC*, 791 F. Supp. 2d. 121 (D.D.C. 2011). And such recognition by this court will remedy the injury to plaintiffs' First Amendment interests.

V. Plaintiffs Have Standing to Seek the Injunction

To establish standing, plaintiffs must demonstrate three elements: (1) an injury in fact, (2) a causal connection between the injury and the defendant's conduct, and (3) a likelihood that the injury will be redressed by a decision favorable to the plaintiff. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact is satisfied when plaintiffs make a showing of an "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id*. at 560. (internal quotation marks and citations omitted). Plaintiffs have established an injury in fact capable of relief issued by this court. Moreover, there exists a causal connection between the FEC's failure to issue an affirmative advisory opinion and the Plaintiffs' injuries, and a decision issued by this court will redress those injuries.

Within the context of the First Amendment, the Supreme Court has announced relaxed standing requirements for pre-enforcement challenges. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965) (detailing expanded standing principles for pre-enforcement First Amendment challenges); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (self-censorship is a harm that can be alleged without actual prosecution); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 ("A party has standing to challenge, pre-enforcement, even the constitutionality of a statute if First Amendment rights are arguably chilled, so long as there is a credible threat of prosecution"). Would-be speakers bringing pre-enforcement challenges must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest," and illustrate that there exists a "credible threat of prosecution" under the law in question. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). In this special arena, where a statute on its face "restricts a party from engaging in expressive activity, there is a

presumption of a credible threat of prosecution." *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 388 (4th Cir. 2001).

ELF has alleged an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed" by law. *Babbitt*, 442 U.S. at 298. Specifically, ELF has prepared independent expenditure advertisements for the upcoming 2012 electoral cycle, but cannot solicit and accept contributions to fund them due to the reach of §§ 441a(a)(1)(C) and 441b(b)(4). ELF would like to establish a non-contribution account (*Carey* account) in order to fundraise and accept contributions for additional independent expenditure campaigns in the 2012 electoral cycle, but its actions are prohibited just the same.

ELF must hinder its speech and association until a definitive ruling is issued by this court protecting the constitutional rights of ELF, its donors, and STI's restricted class employees. Because federal elections occur every two years, its injuries are ongoing. *See Virginia Soc'y*, 263 F.3d at 389 (First Amendment injury is ongoing where it relates to proscribed speech concerning federal elections).

ELF has established concrete plans to engage in constitutionally protected conduct that is subject to the reach of the challenged laws. Its speech and association are chilled by fear of prosecution by the FEC. The Commission's refusal to issue an advisory opinion deprives ELF of a legal reliance defense which it could otherwise receive under 2 U.S.C. § 437f(c). *See FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001) (noting that "advisory opinions have binding legal effect on the Commission"). As recognized by the D.C. Circuit Court of Appeals in *Unity '08 v. FEC*, this failure to issue an advisory opinion "denies a right with consequences sufficient to warrant review." 596 F.3d 861, 865 (D.C. Cir. 2010) (internal quotations omitted).

ELF's only other course of action is to risk enforcement penalties—a jeopardy never permitted by the First Amendment.

VI. The Court Should Waive the Bond Requirement Under F.R.C.P. 65(c).

Federal Rule of Civil Procedure 65(c) provides that no preliminary injunction shall issue without the giving of security by the applicant in an amount determined by the court. However, "[i]t is within the Court's discretion to waive Rule 65(c)'s security requirement where it finds such a waiver to be appropriate in the circumstances." *Cobell v. Norton*, 225 F.R.D. 41, 50 n.4 (D.D.C. 2004). In non-commercial cases, courts often waive the bond requirement where the likelihood of harm to the non-moving party is slight and the bond requirements would impose a significant burden on the moving party. *See, e.g., Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991); *Comm. on Jobs Candidate Advocacy Fund v. Herrera*, 2007 U.S. Dist. LEXIS 73736, at *17-*18. Cases raising constitutional issues are particularly appropriate for a waiver of the bond requirement. *See Odgen v. Marendt*, 264 F. Supp. 2d 785, 795 (S.D. Ind. 2003); *Smith v. Bd. of Election Comm'rs*, 591 F. Supp. 70, 71 (N.D. Ill. 1984). Accordingly, Plaintiffs respectfully request that the court waive the bond requirement in the event that it grants Plaintiffs' motion for preliminary injunction.

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), the source prohibitions at § 441b(a) and the solicitation restrictions at § 441b(b)(4)(A)(i) and applicable regulatory requirements as they apply to Plaintiffs. The Court should also waive the bond requirement under the Federal Rules of Civil Procedure 65(c).

Dated: July 10, 2012

Respectfully submitted,

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*Motion for *Pro Hac Vice* to be filed.