ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STOP THIS INSANITY, INC., et al.,
Appellants,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Order of January 8, 2013, and D.C. Cir. R. 28(a)(1), appellee Federal Election Commission submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici***. Stop This Insanity Inc. Employee Leadership Fund; Stop This Insanity, Inc.; Glengary, LLC; Todd Cefaratti; and Ladd Ehlinger were the plaintiffs in the district court and are the appellants in this Court. The Commission was the defendant in the district court and is the appellee in this Court. No parties participated as amici curiae in the district court, and no parties have requested to participate as amici curiae before this Court.

(B) ***Rulings Under Review***. Appellants appeal the November 5, 2012, final order of the United States District Court for the District of Columbia denying their motion for a preliminary injunction and granting the Commission's motion to dismiss for failure to state a claim on which relief can be granted. The district court's opinion has not yet been published in the *Federal Supplement* but is available at *Stop This Insanity Inc. Employee Leadership Fund v. FEC*, 2012 WL 5383581 (D.D.C. Nov. 5, 2012) (Howell, J.).

(C) ***Related Cases***. The Commission knows of no "related cases" as that phrase is defined in D.C. Cir. R. 28(a)(1)(C).

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GLOSSARY

FEC	=	Federal Election Commission
FECA	=	Federal Election Campaign Act
J.A.	=	Joint Appendix
SSF	=	Separate Segregated Fund
STI	=	Stop This Insanity, Inc.
STI Fund	=	Stop This Insanity, Inc. Employee Leadership Fund

COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction over this action under 28 U.S.C. § 1331 and entered judgment granting the Federal Election Commission's motion to dismiss on November 6, 2012. Appellants' notice of appeal was timely filed on January 2, 2012. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether appellant Stop This Insanity, Inc. — a corporation that has an undisputed right to finance unlimited electoral advocacy *directly* and subject to disclosure requirements — also has a constitutional right to finance such electoral advocacy *indirectly* through an accounting device that enables it to conceal the sources of some political spending from the public and to make undisclosed solicitations to the general public for unlimited contributions to fund such electoral advocacy.

STATUTES AND REGULATIONS

The relevant statutes are set forth in the addendum to appellants' brief and supplemented herein in the attached supplemental addendum.

COUNTERSTATEMENT OF THE CASE

This appeal presents an as-applied challenge to the provisions of the Federal Election Campaign Act ("FECA" or "Act"), 2 U.S.C. §§ 431-457, that govern

separate segregated funds ("SSF"), a special type of political committee "to be utilized for political purposes by a corporation, labor organization," and certain other organizations. 2 U.S.C. § 441b(b)(2)(C). Stop This Insanity, Inc. ("STI"), together with its president, Todd Cefaratti; its SSF, Stop This Insanity, Inc. Employee Leadership Fund ("STI Fund"); and two unaffiliated, would-be contributors to STI Fund, Ladd Ehlinger and Glengary, LLC, challenge FECA's limits on contributions to SSFs. They also attack the statutory restrictions on solicitations by corporations for contributions to the SSFs. STI wishes to establish for STI Fund a separate account — called a non-contribution account — and solicit unlimited contributions from the general public for it. STI would then use funds from STI Fund's non-contribution account to pay for independent election expenditures.

Seeking approval to open such a non-contribution account and fund it in this manner, STI Fund requested an advisory opinion from the Commission in early 2012. The Commission considered two draft responses to the request. Neither draft garnered four or more affirmative votes, however, and the Commission was thus unable to render an opinion. Plaintiffs filed suit in July. In November 2012, the district court denied plaintiffs' motion for a preliminary injunction and granted the Commission's motion to dismiss. The court held that the First Amendment did

not require that plaintiffs be allowed to establish a non-contribution account for an SSF and fund it with unlimited contributions solicited from the general public.

COUNTERSTATEMENT OF THE FACTS

I. Statutory and Regulatory Background

A. Separate Segregated Funds

The Federal Election Campaign Act prohibits a corporation such as STI from contributing its general treasury funds to any federal candidate, political party, or political committee. *See* 2 U.S.C. § 441b(a); *see generally FEC v. Beaumont*, 539 U.S. 146 (2003) (upholding constitutionality of section 441b(a)). This prohibition encompasses not only direct monetary contributions, but also a corporation's giving of any "indirect payment . . . , any services, or anything of value." *See* 2 U.S.C. § 441b(b)(2).

In addition, until the Supreme Court issued its decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), FECA prohibited corporations from using their general treasury funds to finance any political expenditure. 2 U.S.C. § 441b(a). As codified, this prohibition encompassed "independent expenditures," which are communications that expressly advocate the election or defeat of a federal candidate and are not made in coordination with a candidate or political party. *See* 2 U.S.C. § 431(17). It also included "electioneering communications," which are "broadcast, cable, or satellite communication[s]" that (a) refer to a clearly

identified federal candidate, and (b) are broadcast in the area where the candidate is seeking election within 60 days before the general election or 30 days before a primary election or convention. 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A)(i).

FECA, however, permits a corporation to establish and administer a separate political account, defined as a "separate segregated fund to be utilized for political purposes by [the] corporation." 2 U.S.C. §§ 431(4)(B), 441b(b)(2)(C).[1] A corporation can solicit contributions to its SSF, *see* 2 U.S.C. § 441b(b)(4); 11 C.F.R. § 114.5(g), and the corporation can make contributions to candidates and political parties with the funds the SSF receives in response to such solicitations. *See* 11 C.F.R. § 114.5(f).[2]

Before the Supreme Court's decision in *Citizens United*, SSFs provided the only mechanism through which corporations could make "expenditures" such as electioneering communications and independent expenditures for communications that expressly advocate for or against federal candidates. *See* 2 U.S.C. § 441b(b)(2); *FEC v. Nat'l Right to Work Comm.* ("*NRWC*"), 459 U.S. 197, 201

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[1] Separate segregated funds, *inter alia*, are referred to colloquially as "political action committees" or "PACs." *Citizens United v. FEC*, 558 U.S. at 321.

[2] The FECA provisions and FEC regulations relating to corporate election activity also generally apply to labor unions. For example, like corporations, labor unions may not make direct contributions, 2 U.S.C. § 441b(a), but may establish SSFs, 2 U.S.C. § 441b(b)(2)(C). Because no labor union is a party to this case, the Commission's brief focuses almost exclusively on corporations and corporate SSFs. But the arguments advanced here would apply equally to union-sponsored SSFs.

(1982) (explaining that SSFs were created to enable limited participation of unions and corporations in federal elections); District Court Opinion at 11 (J.A. 223) (same).

In *Citizens United*, the Court struck down FECA's prohibition on corporation-funded independent campaign advocacy as a violation of the First Amendment. 558 U.S. at 365-66. The Court held that the governmental interest in preventing corruption and its appearance is inapplicable to independent advocacy of candidates. *Id*. at 356-61. Thus, the Court held that corporations have a constitutional right to spend their general treasury funds on independent expenditures for or against candidates. *Id*. at 365-66. At the same time, however, the Court noted that the government has an important interest in preventing corruption and that banning direct corporate contributions to candidates reduces the opportunity for actual and apparent corruption. *See id*. at 345.

As the district court recognized, although "SSFs continue to be a mechanism through which the beneficial owners and employees of a corporation can band together to make direct contributions to candidates and political parties, which corporations are still prohibited from doing directly under the FECA and First Amendment jurisprudence[,] . . . corporations no longer need SSFs to engage in unlimited independent expenditures with general treasury funds." (District Court Opinion at 11-12, J.A. 223-24 (citations omitted).) "The Supreme Court

eliminated this dependency in *Citizens United* by allowing corporations themselves (rather than just their constituent members, officers, employees, etc.) to engage in unlimited independent political expenditures." (*Id.* at 12, J.A. 224.)

B. Regulation of SSFs and Nonconnected PACs

FECA regulates SSFs in many of the same ways it regulates independent political committees that are not established by a corporation ("nonconnected PACs"). For example, both SSFs and nonconnected PACs must register with the FEC and periodically file public disclosure reports. 2 U.S.C. § 434(a); 11 C.F.R. § 114.5(e)(3). In these reports, both SSFs and nonconnected PACs must provide certain information regarding each of their "contributions" and "expenditures," *i.e.*, the funds they receive and spend. 2 U.S.C. § 434(b). And FECA limits contributions to both SSFs and nonconnected PACs to $5,000 per contributor per year. 2 U.S.C. § 441a(a)(1)(C); 11 C.F.R. § 114.5(f).

Because SSFs were contemplated by FECA specifically to "permit[] some participation of unions and corporations in the federal electoral process," *NRWC*, 459 U.S. at 201, there are two significant differences between the statutory provisions governing SSFs and those governing nonconnected PACs. First, as an exception to the ban on corporate contributions (and to the former ban on corporate expenditures), an SSF may have the entire costs of its "establishment, administration, and solicitation" paid directly by the SSF's sponsoring corporation.

2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.5(b). These corporate payments are statutorily excluded from FECA's definitions of "contribution" and "expenditure," so SSFs need not identify such payments in their reports to the Commission or otherwise disclose them to the public. *See* 2 U.S.C. §§ 431(8)(B)(vi), (9)(B)(v), 434(b); 11 C.F.R. § 114.5(e)(1). Nonconnected PACs, by contrast, have no sponsoring corporation, so they publicly disclose all contributions they receive and disbursements for their administrative and solicitation costs above the statutory thresholds. *See* 2 U.S.C. § 434(b)(3), (5).

Second, to address Congress's concerns about the inherently coercive nature of employee solicitations and limit the ability of corporations to pressure employees to contribute to their SSFs, FECA places greater restrictions on solicitations for contributions to SSFs than on solicitations by nonconnected PACs. *See* 122 Cong. Rec. H2612 (daily ed. Mar. 31, 1976) (statement of Rep. Thompson) (J.A. 91) (explaining anti-coercion purpose of SSF solicitation restrictions); Pls.' Prelim. Inj. Mem. at 4 n.1, J.A. 91 (same). FECA's legislative history reflects Congress's concern that employee solicitations, "no matter for what purpose, and no matter how well-intentioned, are psychologically coercive . . . because the entity soliciting the funds is, for all practical purposes, the same as, or closely related to the one which also gives the salary raises and promotions." 122 Cong. Rec. H2612 (daily ed. Mar. 31, 1976) (statement of Rep. Thompson); *see*

also 122 Cong. Rec. S3700 (daily ed. Mar. 17, 1976) (statement of Sen. Bumpers) (Even when there is not "overt pressure to either give or you will not have a job next week . . . the pressure will be there, and that troubles me.").

In addition, while nonconnected PACs can solicit contributions from virtually any individual or organization, *but see* infra n.3, SSFs generally may solicit contributions only from a "restricted class" of corporate employees, *i.e.*, their connected corporations' owners and salaried executives (and those owners' and executives' families). *See* 2 U.S.C. § 441b(b)(4)(A)(i); 11 C.F.R. §§ 114.1(j), 114.5(g)(1). There is a limited exception allowing an SSF to solicit from its connected corporation's non-executive employees, but such solicitations may be conducted only twice per year, and only pursuant to detailed statutory and regulatory provisions that limit the coercive effect of a corporation asking its employees to give it money. *See* 2 U.S.C. § 441b(b)(4)(B) (providing that solicitation can be made "only by mail addressed to . . . employees at their residence and . . . so designed that the corporation . . . cannot determine who makes a contribution of $50 or less . . . and who does not make such a contribution"); 2 U.S.C. § 441b(b)(3)(B)-(C) (requiring solicitations of employees to inform each employee "of the political purposes of such fund at the time of such solicitation" and "of his right to refuse to so contribute without any reprisal"); 11 C.F.R. § 114.6. An SSF cannot solicit contributions from the general public,

i.e., anyone other than the sponsoring corporation's owners, executives, and employees. *See* 2 U.S.C. § 441b(b)(4)(A)(i); 11 C.F.R. § 114.5(g)(1). "The effect of this [provision] is to limit solicitation by . . . corporations to those persons attached in some way to it by its corporate structure." *NRWC*, 459 U.S. at 202.

C. "Super PACs," "Non-Contribution Accounts," and Disclosure

Although *Citizens United* struck down the prohibition on corporate financing of independent speech, the Court upheld FECA's requirement that all corporation-funded electioneering must be *disclosed* to the Commission and the public. The Court upheld the FECA provision mandating disclosure of funds used to finance any communication broadcast in the relevant jurisdiction that mentions a federal candidate in the period leading up to an election. *See Citizens United*, 558 U.S. at 366-71.

Eight Justices agreed that disclosure is "less restrictive" than a limit on spending, *id*. at 369, and is a constitutionally permissible method of furthering the public's important interest in knowing who is responsible for pre-election communications about candidates, *see id*. at 368-71. As the Court explained, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id*. at 371.

Following *Citizens United*, this Court held that FECA's $5,000 limit on contributions to PACs was unconstitutional as applied to a nonconnected PAC that spent its funds only on independent advocacy and was funded only by individual contributions. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). The Court found that such nonconnected PACs present no more risk of corrupting officeholders through independent expenditures than do corporations; thus, FECA's $5,000 contribution limit was not supported by a sufficiently important governmental interest. *See id*. at 693-95.

To "be clear," the Court noted, the constitutional questions were decided *only* "as applied to contributions to SpeechNow, an independent expenditure-only group." *Id*. at 696. And, consistent with *Citizens United*, this Court affirmed the constitutionality of mandatory disclosure of political spending "based on a governmental interest in 'provid[ing] the electorate with information'" about the sources of election-related funds. *Id*. at 696 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). The Court therefore held that the 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." *Id*. at 698. After *Citizens United* and *SpeechNow*, therefore, the state of the law is that corporations are permitted to spend unlimited funds to

finance independent campaign advocacy, and individuals are permitted to make unlimited contributions to nonconnected PACs that make only independent expenditures — with all such unlimited spending and giving subject to disclosure requirements.

The Commission subsequently issued an advisory opinion determining that these cases, when read in tandem, necessarily meant that both corporations and individuals have a constitutional right to pool their money together to finance independent expenditures. *See* FEC Advisory Op. 2010-11 (Commonsense Ten), 2010 WL 3184269 (July 22, 2010). The Commission therefore found that a nonconnected PAC that makes only independent expenditures — not contributions to candidates — can accept unlimited contributions from both corporations and individuals. *Id*. at *1-*2. These PACs have come to be known as "super PACs."

The Commission similarly found, in a separate advisory opinion issued the same day, that corporations have the right to establish and administer super PACs. *See* FEC Advisory Op. 2010-09 (Club for Growth), 2010 WL 3184267, at *3 (July 22, 2010) ("Club for Growth Advisory Opinion"). Such corporation-established super PACs are not SSFs, *id*. at *4, so they are not prohibited from soliciting the general public for contributions to SSFs, *id*. at *3-*4, and do not enjoy the SSF exemption from disclosing the sponsoring corporation's payments for the "establishment, administration, and solicitation" of the super PAC. *See* 2 U.S.C.

§ 441b(b)(2)(C); 11 C.F.R. § 114.5(b); Club for Growth Advisory Opinion, 2010 WL 3184267, at *4.

Following the Commission's issuance of these advisory opinions, a district court considered the question of whether a nonconnected PAC that makes both contributions and independent expenditures has a constitutional right to establish two bank accounts: one for accepting limited individual contributions for making contributions to candidates, and one for accepting unlimited contributions to finance the PAC's independent expenditures and certain other independent election activity. *See Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). Ultimately, the Commission entered into a consent judgment and then adopted a policy permitting nonconnected PACs that make contributions to candidates to maintain a separate bank account containing unlimited individual and corporate contributions for financing independent expenditures. *See* FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account, http://www.fec.gov/press/Press2011/20111006postcarey.shtml (Oct. 5, 2011). Such unlimited accounts are known as "non-contribution accounts" because nonconnected PACs cannot make contributions from them. *See id*.

In sum, a *nonconnected PAC* now can (1) make contributions to candidates using funds contributed by individuals within FECA's contribution limits, and (2) finance independent expenditures from a separate non-contribution account that

is generally exempt from contribution restrictions.[3] Similarly, a corporation can (1) make contributions to candidates from its SSF, which can accept only individual contributions subject to FECA's contribution limits, and (2) finance unlimited independent expenditures directly or through a super PAC, which is not subject to FECA's contribution limits but which is subject to the Act's disclosure requirements.

II. Factual Background and Procedural History

A. The Parties

The Federal Election Commission is the independent agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA, 2 U.S.C. §§ 431-457, and other federal campaign-finance provisions. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. §§ 437d(a)(8), 438(a)(8),(d); and to issue written advisory opinions, 2 U.S.C. §§ 437d(a)(7), 437f.

Appellant Stop This Insanity, Inc. is a non-profit corporation incorporated in Arizona that has sought formal recognition of its status as a "social welfare" organization. Compl. ¶ 18, J.A. 10; *see* 26 U.S.C. § 501(c)(4). Earlier, in March

[3] Foreign nationals, government contractors, national banks and corporations organized by authority of any law of Congress cannot contribute to such separate accounts. 2 U.S.C. §§ 441b, 441c, 441e.

2010, STI had registered with the Commission as a nonconnected PAC.[4] From March through September of that year, STI raised over $470,000 in contributions and spent approximately $215,000.[5] On October 20, 2010, STI rescinded its registration as a political committee and ceased filing financial disclosure reports with the Commission.[6] STI alleges that it "has no interest in financing independent expenditures." (Compl. ¶ 12, J.A. 9.)

Appellant Stop This Insanity Inc. Employee Leadership Fund is STI's separate segregated fund. (Compl. ¶ 17, J.A. 10.) STI Fund registered with the Commission as an SSF in January 2012, but as of December 31, 2012, the date of STI Fund's latest report to the Commission, it had received no contributions and had an account balance of $0.[7] STI wishes to make contributions to candidates through STI Fund (Compl. ¶ 23, J.A. 11), and to establish a non-contribution account within STI Fund that would accept unlimited individual and corporate contributions, including from the public, to finance independent expenditures (*id*.

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[4] STI, FEC Form 1, http://query.nictusa.com/pdf/131/10030264131/10030264131.pdf (March 9, 2010). All of STI's FEC filings can be viewed at http://query.nictusa.com/cgi-bin/fecimg/?C00478024.

[5] STI, FEC Form 3X, http://query.nictusa.com/pdf/001/10931540001/10931540001.pdf (Oct. 16, 2010).

[6] Letter from Dan Backer, Esq., to FEC Office of General Counsel, http://query.nictusa.com/pdf/390/10030482390/10030482390.pdf (Oct. 20, 2010).

[7] STI Fund, FEC Form 3X, http://images.nictusa.com/pdf/723/13960375723/13960375723.pdf (Dec. 31, 2012).

¶ 28, J.A. 12-13). Appellants allege that STI Fund would like to solicit contributions of unlimited amounts from STI's executives and from individuals and corporations unaffiliated with STI. (*Id.*) They further allege that STI Fund would like to solicit contributions from STI's non-executive employees "as provided under 2 U.S.C. § 441b(b)(4)(B)." (Compl. ¶ 77, J.A. 23; *see also id.* ¶ 9, J.A. 7-8; *id.* Prayer for Relief ¶ 3, J.A. 24.) STI intends to pay directly for all or some of STI Fund's administrative and solicitation expenses. (*See* Compl. ¶¶ 12, 23; J.A. 9, 11.)

Appellant Todd Cefaratti is the president of STI. (Compl. ¶ 19; J.A. 10.) He would like to contribute $10,000 to STI Fund to finance its independent expenditures. (*Id.* ¶ 26, J.A. 12.) Appellant Ladd Ehlinger is not formally affiliated with STI but would like to "support" its independent expenditures, and STI would like to solicit him for contributions to STI Fund. (*Id.* ¶ 27, J.A. 11-12.) Appellant Glengary, LLC is a corporation incorporated in Arizona that would like to contribute $10,000 to STI Fund to finance independent expenditures. (*Id.* ¶¶ 20, 25, J.A. 11.)

B. The Advisory Opinion Request

On January 4, 2012, STI Fund requested an advisory opinion from the Commission. (Compl. Exh. A., J.A. 30-34.) This request sought approval of the proposed solicitation and acceptance of unlimited contributions into a non-

contribution account without being subject to the restrictions on SSF solicitations in 2 U.S.C. § 441b(b)(4)(A)(i) and (b)(4)(B). (*Id*. at 4, J.A. 34.)

The Commission considered two draft responses to STI Fund's request. Draft A (J.A. 41-57) would have approved the request and permitted the solicitation of contributions from the general public to a non-contribution account of STI Fund. (*Id*. at 48, 53-55.) The draft, however, also would have maintained the statutory restrictions on SSF solicitations to STI's non-executive employees because those restrictions serve an important governmental interest — preventing employee coercion — that no judicial opinion has called into question. (*Id*. at 50-51.)

Draft B would have concluded that neither the holdings nor the rationales of this Court's decisions in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009) and *SpeechNow*, 599 F.3d 686, or the district court's preliminary-injunction ruling in *Carey*, 791 F. Supp. 2d 121 — all of which addressed nonconnected PACs — mandated allowing SSFs to operate non-contribution accounts. (*See* J.A. 59-71.) This draft noted that the statutory disclosure exemption for corporate payments covering STI Fund's solicitation expenses, when combined with its intention to solicit funds from the general public, would mean that significant corporate political spending would go undisclosed if the SSF could operate a non-contribution account. (*See id*. at 65, 69.)

On March 1, 2012, three FEC Commissioners voted to adopt Draft A and three voted to adopt Draft B. (J.A. 73.) Because the affirmative vote of four Commissioners is required for the Commission to render an advisory opinion, 2 U.S.C. §§ 437c(c), 437d(a)(7), the Commission was unable to render an opinion on the request. (J.A. 73.)

C. District Court Proceedings

STI and the other appellants filed this suit on July 10, 2012. (J.A. 4-25.) They claim a constitutional right to finance unlimited electoral advocacy indirectly through STI Fund in a manner that would conceal from the public STI's payments to facilitate such political spending and also enable STI to finance undisclosed solicitations to the general public for unlimited contributions to fund such electoral advocacy. They filed their motion for a preliminary injunction on July 18, 2012. (J.A. 79-81.)

First, appellants challenged the constitutionality of the contribution limits in 2 U.S.C. § 441a(a)(1)(C) as applied to SSFs that make both direct contributions and express advocacy communications. (J.A. 18-22.) Second, they challenged the constitutionality of the Act's restrictions on solicitations in U.S.C. § 441b(b)(4) as applied to SSFs that make both direct contributions and express advocacy communications. (J.A. 23.) As explained *supra* at pp. 7-9, the solicitation provision generally prohibits SSFs from soliciting contributions from persons other

than the connected organization's stockholders and its executive or administrative personnel, with limited exceptions for non-executive employees. The complaint sought declaratory relief regarding the as-applied constitutionality of the contribution limits in sections 441a(a)(1)(C), 441a(a)(3) and the solicitation restrictions in section 441b(b)(4)(A)(i) (*see* J.A. 23-24), and preliminary and permanent injunctions enjoining the Commission's enforcement of those provisions against appellants (*see* J.A. 24).

On September 25, 2012, the Commission filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court granted that motion and denied appellants' motion for a preliminary injunction in an opinion issued on November 5, 2012. (J.A. 213-53.)

D. District Court Opinion

In the district court's November 5 opinion, the court held that *Citizens United* and its progeny did not compel the relief plaintiffs sought: for corporate SSFs to be permitted to maintain accounts not subject to FECA's source and amount limitations or solicitation restrictions for SSFs, nor subject to the disclosure requirements for payments of administrative and solicitation expenses. (J.A. 221.) The district court emphasized as "critical" the fact that "this is a case about regulating the solicitation and fundraising activities of '*connected*' *SSFs* —

PACs that are established, administered, and subsidized by corporations," and that "have unique characteristics." (J.A. 221 (emphasis added).)

The court pointed out that the requested relief "is completely unnecessary to allow the plaintiffs to engage in unlimited independent expenditures, individually or together. Rather, this case narrowly touches upon the particular accounting mechanism through which the plaintiffs may make those expenditures." (J.A. 224.) The court discussed the statutory exemptions for disclosure of a sponsoring corporation's financing of its SSF's establishment, administration, and solicitation costs, and found that the relief sought by the plaintiffs-appellants, if granted, "would create such a large loophole in political committee disclosure requirements that those requirements would be meaningless." (J.A. 223.)

The court also analyzed FECA's restriction of "the universe of people the SSF may solicit" (J.A. 222), and concluded that the solicitation restrictions applicable to SSFs are narrowly drawn to further the government's important interest in protecting the First Amendment rights of corporate employees: "The danger that rank-and-file employees would be exposed to repeated public solicitations from their employer's PAC . . . and would thereby feel coerced to contribute or adopt a particular political viewpoint at work[] represents an unacceptable risk of infringing those employees' First Amendment rights." (*Id*. at 248-49 (footnote omitted).)

The court concluded that the challenged statutory requirements for SSFs are constitutional and, after considering the remaining preliminary-injunction factors, denied the plaintiffs' motion for preliminary injunction and granted the Commission's motion to dismiss.[8] (*Id*. at 253.)

SUMMARY OF ARGUMENT

STI seeks to have the Court assume a legislative role and establish a new form of political committee that would be subject to a novel regulatory scheme never contemplated or intended by Congress. Specifically, STI seeks to finance independent expenditures and solicitations for such expenditures through a purported SSF that would maintain a non-contribution account not subject to FECA's provisions regulating contributions to and solicitations by a corporation's SSF. The prospective entity would also not be compliant with FECA's disclosure requirements for contributions to and solicitations by every other type of political committee, including nonconnected committees that finance independent expenditures. The district court correctly held that the First Amendment conveys no such right.

None of the challenged statutory provisions imposes any burden on STI's right to engage in unlimited political advocacy. Indeed, the only burdens at issue in the case are those that STI seeks to impose on itself. STI seeks to eschew the

[8] The district court's opinion is available at *Stop This Insanity, Inc. Employee Leadership Fund v. FEC*, 2012 WL 5383581 (D.D.C. Nov. 5, 2012), J.A. 213-53.

direct means of financing corporate political advocacy approved by the Supreme Court in *Citizens United* in favor of an even more complicated version of the SSF mechanism that the *Citizens United* Court deemed a "burdensome alternative[]" means of "mak[ing] [the corporation's] views known regarding candidates and issues in a [political] campaign." 558 U.S. at 337-39. But STI has no constitutional right to repurpose its SSF in a manner wholly inconsistent with the function and purpose for which Congress created such funds. Nor does STI have a constitutional right to evade the disclosure requirements applicable to other political committees. All of the cases upon which appellants purport to rely involve nonconnected PACs, which are materially different from SSFs. The district court thus correctly found that *Citizens United* and its progeny did not compel the relief that plaintiffs sought. (J.A. 221.)

STI seeks to evade provisions of the Act that further the important governmental interests of disclosing the funding of campaign speech under the applicable intermediate-scrutiny standard. If granted the requested relief, STI would be able to conceal all of its payments to STI Fund to finance the SSF's administrative and solicitation expenses. And there is no limit on how much STI may spend in making those undisclosed payments. In other words, STI could spend limitless sums to communicate STI Fund's fundraising message to any individual or corporation without disclosing that STI paid for those solicitations or

how much it spent doing so. Funding such communications through a super PAC rather than an SSF as STI demands would not permit such concealment. STI's proposed disclosure-avoidance mechanism contravenes the government's important interest in disclosure of electoral advocacy, which this Court and the Supreme Court have recognized permits the public to know the sources and financing of the electoral messages to which they are subjected.

The proposed non-contribution account would also undo FECA's solicitation restrictions, which further the governmental interest in preventing corporations from coercing their employees and others into making unlimited political contributions. Such provisions, which prohibit SSFs from soliciting contributions from the general public and restrict the nature and scope of solicitations to the connected corporation's employees, address the inherently coercive nature of a corporation asking its employees to give money. As with the disclosure provisions, the Commission and the courts are bound to give the anti-coercion provisions regarding solicitations full effect.

Finally, the district court's dismissal of this case rendered moot appellants' preliminary-injunction motion. But even if the Court nevertheless considers that motion in the context of this appeal, the district court properly denied the request for preliminary injunctive relief and certainly did not abuse its discretion in doing so. The district court correctly held that appellants had failed to meet any of the

preliminary injunction factors. Not only do their claims lack merit, appellants suffered no cognizable harm, let alone irreparable harm, during the pendency of this case. STI has always been and remains free to finance independent expenditures directly or through a super PAC.

Moreover, the district court correctly held that the balance of equities and public interest weighed against enjoining enforcement of the challenged provisions. The presumption of constitutionality that adheres to Congressional acts — especially those already upheld by the Supreme Court — counseled against issuance of a preliminary injunction. So did the public interest, which favored the continuing enforcement of the provisions at issue, provisions that form a critical part of the Act's regulation of separate segregated funds.

STANDARD OF REVIEW

This Court reviews a district court's order granting a motion to dismiss de novo. *Carter v. Washington Metro. Area Transit Auth.*, 503 F.3d 143, 145 (D.C. Cir. 2007). A complaint is properly dismissed under Rule 12(b)(6) if it fails to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Factual allegations, although assumed to be true, must still 'be enough to raise a right to relief above the speculative level.'" *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The court, however, "need not accept inferences drawn

by plaintiff if those inferences are not supported by the facts set out in the complaint, nor must the court accept legal conclusions cast as factual allegations." *Id.*

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT REQUIRE THE GOVERNMENT TO PERMIT THE MECHANISM APPELLANTS SEEK TO USE TO FINANCE INDEPENDENT CAMPAIGN ADVOCACY

Separate segregated funds are a statutorily created exception to FECA's corporate-contribution ban, which is not challenged here (and to the Act's unenforceable prohibition of corporate political expenditures financed with a corporation's general treasury funds). Unlike nonconnected PACs, which are independent, SSFs serve the unique function of "mak[ing] [their connected corporation's] views known regarding candidates and issues in a [political] campaign," where such views are (or were) otherwise not permitted to be expressed directly. *Citizens United*, 558 U.S. at 339.

The challenged provisions regulating contributions to and solicitations for SSFs serve important governmental interests, particularly in light of the special role that SSFs play in facilitating the political activities of their connected corporations. Connected corporations may pay for their SSFs' administrative and solicitation costs, and such payments need not be publicly disclosed. But those undisclosed payments necessarily relate only to internal matters because,

consistent with their distinctive function of expressing the political views of their connected corporations, SSFs are not permitted to solicit the general public. Similarly, in view of the inherently coercive nature of a corporation soliciting political contributions from its employees, FECA restricts the nature and scope of solicitations for contributions from employees to SSFs.

Today, SSFs still serve an important role in facilitating otherwise prohibited corporate contributions to federal candidates. But in the context of independent expenditures, which corporations now can finance directly with unlimited amounts of general treasury funds, or indirectly through unlimited contributions to nonconnected super PACs, "SSFs have become vestiges of a bygone world of campaign finance" law. (J.A. 223.)

Appellant STI thus has the right to spend unlimited sums of its general treasury funds to finance independent expenditures and solicitations for such expenditures directly. STI also has an unrestricted right to spend unlimited sums to pay for, *inter alia*, the administrative and solicitation costs of a nonconnected super PAC that, in turn, could solicit and spend unlimited sums on independent expenditures. All such spending for administration and solicitation for a super PAC must, however, be disclosed.

Through this lawsuit, STI conceives a *new* form of political committee that would be subject to a novel regulatory scheme never contemplated or intended by

Congress. Specifically, STI seeks to finance independent expenditures and solicitations for such expenditures through a purported SSF non-contribution account. That account would not be subject to FECA's provisions regulating contributions to and solicitations by a corporation's SSF, nor compliant with FECA's disclosure requirements for contributions to and solicitations by political committees, including those that finance independent expenditures. The district court correctly held that the First Amendment conveys no such right.

A. Appellants Have No Constitutional Right to Repurpose STI Fund in a Manner that Fundamentally Contravenes the Role SSFs Actually Play in FECA's Regulatory Scheme

This entire lawsuit is premised on a fundamental misunderstanding of the function and purpose of separate segregated funds. Contrary to appellants' assertion, SSFs are *not* indistinguishable from nonconnected PACs; they are not "simply collections of individuals grouping together to engage in political speech" (Brief of Appellants ("Br.") at 19), and an SSF cannot "choose[] to organize itself" (*id.* at 18). Instead, SSFs are established by corporations, and they are a statutory exception to FECA's corporate-contribution ban and its former prohibition on financing corporate political expenditures with general treasury funds.

The Act explicitly authorizes the establishment of SSFs "*to be utilized for political purposes by a corporation.*" 2 U.S.C. § 441b(b)(2)(C) (emphasis added). Unlike other political committees, SSFs are — as the district court correctly

explained (J.A. 250) — statutory creatures of connected organizations that directly or indirectly establish, administer, or financially support the SSF. 2 U.S.C. § 431(7) ("'connected organization' means any organization [not a political committee] which directly or indirectly establishes, administers, or financially supports a political committee"); *id.* § 441b(b)(4)(A)(i) (referring to "a separate segregated fund *established by* a corporation") (emphasis added). The SSF mechanism permits *the sponsoring corporation* to solicit individual contributions to its SSF, so that *the sponsoring corporation* can use its SSF to contribute to candidates and political committees. Thus, as its name makes clear, the purpose of an SSF is to serve as a "fund" of "segregated" money for the sponsoring corporation to finance what would otherwise be prohibited corporate political contributions. The Supreme Court recognized as much in *Citizens United*, observing that SSFs then served as the only mechanism by which a corporation could "make *its* views known regarding candidates and issues in a [political] campaign." 558 U.S. at 339 (emphasis added).

By definition, no SSF can ever exist apart from the corporation's desire to engage in such spending, and the corporation can exercise complete control over how its SSF's funds are spent. In contrast with nonconnected committees,

> [t]he separate segregated fund may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates' contributions to the fund will be spent to assist. The 'fund must be separate from the sponsoring union [or

> corporation] only in the sense that there must be a strict segregation of its monies' from the corporation's other assets.

NRWC, 459 U.S. at 200 n.4 (citing *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 414-417, (1972) and *Buckley v. Valeo*, 424 U.S. 1, 28 n.31 (1976)).

In sum, SSFs "operate differently than non-connected committees" (Appellants' Br. at 8), and thus they are materially different from the nonconnected committees at issue in every case relied upon by appellants. Though STI may have chosen to establish STI Fund as a separate legal entity, STI Fund is literally just that — a "fund" administered and controlled by STI. *See Pipefitters*, 407 U.S. at 414 ("[A] fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments."). Indeed, STI's very presence in this lawsuit belies appellants' characterization of this case: If it were true that all that is at issue here is STI Fund's independent activity, unrelated to STI's activity, STI would seem to lack any injury-in-fact that could be redressed here, *i.e.*, it would have no Article III standing to bring this suit. *Am. For Safe Access v. DEA*, 706 F.3d 438, 453 (D.C. Cir. 2013) ("Article III standing has three elements: '(1) injury-in-fact, (2) causation, and (3) redressability.'"); *cf. Schenley Distillers Corp. v. United States*, 326 U.S. 432, 435 (1946) (holding that parent corporation had no standing to challenge agency order denying wholly owned subsidiary's application for a

permit and explaining that "parent is adequately represented . . . by the subsidiary whose conduct of the litigation it controls").

Appellants are thus wrong in arguing that "[t]he district court improperly distinguished SSFs from other political committees." (Br. at 30.) FECA and various court decisions leave no doubt as to the fundamental distinctions between SSFs and nonconnected PACs, and it is appellants who improperly seek to *conflate* the two.

B. The Challenged Statutory Provisions Impose No Burden on STI's Ability to Engage in Unlimited Independent Political Advocacy

In *Citizens United*, the Supreme Court held that financing corporate expenditures through an SSF was a "burdensome alternative[]" means of "mak[ing] [the corporation's] views known regarding candidates and issues in a [political] campaign." 558 U.S. at 337-39. The Court thus struck the ban on direct corporate financing of political expenditures. *Id.* at 338. As a result, corporations like STI are no longer required to finance their political expenditures through their SSFs.

In light of this reality, appellants' characterization of this case as a constitutional challenge regarding the rights to solicit and spend unlimited individual and corporate contributions is misleading. STI already can, consistent with existing law, do exactly that — solicit funds from individuals in the general public, political committees, corporations, and labor organizations in order to

directly finance its independent expenditures. *See Citizens United*, 558 U.S. at 364-66; *supra* pp. 5-6. In other words, and as the district court correctly explained, "the relief sought by the plaintiffs in the instant action is completely unnecessary to allow the plaintiffs to engage in unlimited independent expenditures." (J.A. 224.)

Contrary to appellants' hyperbole, the available means of financing STI's political speech are not unconstitutionally burdensome. The only burdens on political expenditures at issue in this case are those that *STI seeks to impose on itself* by financing its advocacy indirectly through an accounting mechanism that is *more onerous* than the direct means that is already available for financing such advocacy but which requires public disclosure that STI apparently wishes to avoid.[9] In other words, here it is appellants, not the Commission, that seek "[t]he availability of avenues 'more burdensome'" (Br. at 24) than those already available.

[9] Equally erroneous is Appellants' argument that limiting STI Fund's solicitations to STI's "tiny" restricted class presents a constitutionally significant "burden" on STI Fund's ability to "raise sufficient funds." (Br. at 9-10, 42.) That argument is noncognizable on its face, for the Supreme Court has explicitly rejected consideration of the "'ancillary interest in equalizing . . . relative financial resources'" in political campaigns. *Davis v. FEC*, 554 U.S. 724, 738 (2008) (quoting *Buckley*, 424 U.S. at 54). Neither the Commission nor the Court is empowered to bend the rules to help small groups compete with larger ones.

In light of STI's undisputed right to finance independent expenditures itself, the issue here is not *whether* STI can obtain the funds to finance its activities but only *how*. STI may prefer to repurpose its SSF in a disclosure-avoiding and coercion-enhancing manner that contravenes the legislative purpose for which Congress created such funds. *See supra* pp. 26-29. But it has no constitutional right to do so. To the contrary, the First Amendment issues implicated by this case are the governmental and public interest in disclosure of the sources and financing of political messages to which the public is subjected. *See, e.g.*, *Citizens United*, 558 U.S. at 368 ("At the very least, . . . disclaimers avoid confusion by making clear that [communications] are not funded by a candidate or political party."); *Buckley*, 424 U.S. at 82 (holding that disclosure "further[s] First Amendment values by opening the basic processes of our federal election system to public view"); *Survival Education Fund* ("*SEF*") *v. FEC*, 65 F.3d 285, 296 (2d Cir. 1995) (quoting *Buckley*, 424 U.S. at 82, and explaining that disclaimer requirements for solicitations "serve[] important First Amendment values" and that such requirements for solicitations are "a reasonable and minimally restrictive method of ensuring open electoral competition that does not unduly trench upon [individuals'] First Amendment rights") (internal quotation marks omitted). The district court also correctly found that this case implicates the First Amendment

rights of STI's employees not to be coerced into contributing to STI Fund. (J.A. 247-48.)

Moreover, to the extent STI wishes to solicit and accept unlimited contributions to finance political expenditures indirectly, rather than directly with its treasury funds, it may legally do this as well, by directing unlimited contributions to a super PAC under its control.[10] *See supra* p. 10-12. Whether it finances political expenditures and solicitations directly with treasury funds or through a super PAC, however, STI's financing of solicitations and other PAC expenses must be disclosed.

Appellants' arguments regarding the purported burdens of operating a super PAC are undermined by STI's own experience. Appellants broadly argue (Br. at 25) that the "[d]etailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records" may create a disincentive to speak and impose onerous administrative costs. But this is an as-applied challenge, and STI has already proven that it is eminently capable of doing all of

[10] Appellants purport to object to a "[r]equir[ement] [that] the Leadership Fund . . . clone itself to make independent expenditures" (Br. at 24), but the Commission has never suggested that STI Fund or any other SSF should — or could — create a second entity or account to finance independent expenditures. To the contrary, that is appellants' argument. To the extent STI seeks to avoid financing such expenditures directly, the Commission's advisory opinions would permit *STI* to create a second entity to do so and to pay its administrative costs, and there is no allegation here that STI lacks the funds to pay such costs. *See* Club For Growth Advisory Opinion, 2010 WL 3184267, at *3; *supra* p. 14 (noting that STI raised more than $470,000 in just seven months between March and September of 2010).

that. From March through September of 2010, while registered as a nonconnected PAC, STI raised over $470,000 in contributions and spent approximately $215,000 — all of which STI duly reported to the Commission. (*See supra* p. 14 & n.5.) Moreover, since rescinding its registration as a political committee, STI created STI Fund and appointed a treasurer and custodian of records for the Fund. (*See* J.A. 35-38.) A super PAC established by STI would have the same organizational and disclosure requirements with which STI has already complied in the context of STI Fund. STI has thus demonstrated that it would be able to operate a super PAC, undermining its allegations regarding the purported burdens associated with establishing and operating such a political committee. *See SpeechNow*, 599 F.3d at 697 (rejecting as "a specious interpretation of the facts" SpeechNow's claimed burden to organize and report as a super PAC where record reflected SpeechNow's ability to comply with most of challenged requirements). Because STI has demonstrated no burden, its challenge should be rejected.

C. The Challenged Provisions Are Subject to Intermediate Scrutiny

If appellants had articulated some burden, the relevant standard for a constitutional challenge would be intermediate scrutiny. The provisions regulating contributions to and solicitations for SSFs at issue are not, as appellants argue (Br. at 31, 40-43), subject to strict scrutiny.

In *Buckley v. Valeo*, 424 U.S. 1 (1976) — which appellants nowhere cite in their discussion of the applicable standard — the Supreme Court imposed a "lower" level of scrutiny on contribution limits than on expenditure restrictions. The Court held that it was appropriate to apply a lesser standard to contribution limits because such limits primarily implicate First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways. *Id*. at 20-25. Numerous decisions since *Buckley* have confirmed and applied that standard.[11]

Appellants nonetheless assert (Br. at 32) that the limits on contributions to SSFs that make independent expenditures are, in effect, restrictions on SSFs' expenditures and should thus be subject to strict scrutiny. Courts have already found this line of argument devoid of merit. First, in *McConnell*, appellants asserted that because the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), banned national party committees from raising or spending "soft-money" contributions above FECA's "hard-money" contribution limits in 2 U.S.C. § 441a, the statute's soft-money ban essentially functioned as an

[11] *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 247, 253 (2006) (plurality opinion) (examining "whether . . . contribution limits are 'closely drawn' to match the State's interests"); *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (holding that contribution limit is constitutional if "closely drawn to match a sufficiently important interest") (internal quotation marks omitted); *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (same); *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C.) (three-judge court) (citing *McConnell*, *Beaumont*, and *Buckley*), *aff'd*, 130 S. Ct. 3544 (2010).

expenditure restriction for constitutional purposes. *See McConnell*, 540 U.S. at 138 (construing 2 U.S.C. § 441i(a)). The Court unambiguously rejected that argument, noting that contribution limits do not "in any way limit[ ] the total amount of money parties can spend. Rather, they simply limit the source and individual amount of donations." *Id.* at 138-39.

This argument was again raised before a three-judge court in *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) (three-judge court), *aff'd mem.*, 130 S. Ct. 3544 (2010). The court rejected that attempt:

> To be sure, every limit on contributions logically reduces the total amount that the recipient of the contributions otherwise could spend. But the [Supreme] Court has stated that this truism does not mean limits on contributions are simultaneously considered limits on expenditures that therefore receive strict scrutiny. . . . Plaintiffs contend that [soft-money] contribution limits will function as expenditure limits when applied to their proposed conduct. But that argument flies in the face of *McConnell*, which squarely held that the level of scrutiny for regulations of contributions to candidates and parties does not turn on how the candidate or party chooses to spend the money or to structure its finances.

Id. at 156.

Moreover, nothing in *Citizens United*, 558 U.S. 310, or any case since, has suggested that contribution limits are subject to anything more demanding than intermediate scrutiny. In *Citizens United*, the Court repeatedly and explicitly distinguished the government's interest in limiting contributions, which were not at

issue in that case, from independent political expenditures, which were. *See, e.g.*, *id.* at 359 ("[C]ontribution limits . . . unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption."), 360-61 ("The BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to election officials. This case, however, is about independent expenditures, not soft money.").

Intermediate scrutiny is also the proper standard for reviewing the challenged solicitation rules. The Supreme Court in *McConnell v. FEC* held that soft-money solicitation restrictions "have only a marginal impact on political speech" and the Court accordingly upheld such restrictions after reviewing them under the "less rigorous scrutiny applicable to contribution limits." 540 U.S. 93, 137-42 (2003).[12] In addition, as the Supreme Court in *Citizens United* recently reiterated, the Court's earlier decision in *NRWC* held "that a restriction on a corporation's ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment." 558 U.S. at 358 (citing *NRWC*, 459 U.S. at 206). That holding controls the outcome here.

Although the court below ultimately declined to decide the level of scrutiny applicable to the challenged solicitation rules (J.A. 245), it correctly relied on the

[12] Before *McConnell*, this Court had expressed uncertainty regarding the applicable level of scrutiny of a solicitation rule. *See Blount v. SEC*, 61 F.3d 938, 942-43, 947-48 (D.C. Cir. 1995) (declining to determine level of scrutiny because challenged solicitation rule satisfied even strict scrutiny).

Supreme Court's decision upholding the constitutionality of such requirements in *NRWC* (J.A. 247), and cited the Court's recognition in *McConnell* that a standard "less than strict scrutiny" applies to solicitation restrictions, which "'in no way alter[] or impair[] the political message 'intertwined' with the solicitation.'" (J.A. 244 (quoting *McConnell*, 540 U.S. at 138-39).) The district court also correctly concluded that "the solicitation restrictions [at issue here] appear to be content neutral because they are 'justified without reference to the content of the regulated speech,'" (J.A. 244-45), *i.e.* to further the government's compelling and important interests in disclosure and preventing coercion of corporate employees. *See supra* p. 19.

Appellants invoke various inapposite cases to summarize (Br. at 41-42) a continuum of constitutional scrutiny for issues ranging from solicitations to engage in unlawful behavior to commercial solicitations and false advertising claims under the Lanham Act. But none of appellants' purported authorities regarding the proper standard of scrutiny for solicitations even mentions the regulation of SSF solicitations.[13] Nor do any of those cases address, let alone cast doubt on,

[13] In *Village of Schaumburg v. Citizens for a Better Environment*, the Court appropriately recognized that solicitations may include "persuasive speech seeking support for . . . particular views on political . . . issues," 444 U.S. 620, 632 (1980), but it did not review a solicitation requirement under strict scrutiny — *i.e.*, whether the provision was narrowly tailored to serve a compelling interest. Although the *Schaumburg* Court did not categorize the level of constitutional scrutiny it was applying, its analysis was consistent with intermediate scrutiny.

Congress's interest in preventing the coercion of employees by corporations or labor organizations soliciting political funds.

Finally, *Citizens United* makes clear that appellants' attempt to evade disclosure requirements is likewise subject to intermediate scrutiny: Whether there is "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66). This is similar to the "lesser demand" that applies in constitutional challenges to contribution limits. *Beaumont*, 539 U.S. at 162; *see also Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C.) (three-judge court), *aff'd mem.*, 130 S. Ct. 3544 (2010).

Appellants erroneously argue that their challenge involves expenditure limits that would implicate strict scrutiny. *See Citizens United*, 558 U.S. at 364-66 (striking down corporate expenditure limit). Clearly it does not.

II. THE CHALLENGED STATUTORY PROVISIONS FURTHER THE IMPORTANT GOVERNMENTAL INTEREST OF DISCLOSING THE FUNDING OF CAMPAIGN SPEECH

In a single, oblique reference buried in the middle of their appellate brief, STI Fund admits that it is seeking to "organiz[e] in a way that allows them to receive operating expenses from another organization without disclosing the

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See id. at 636-39 (discussing the "substantial governmental interests" and "legitimate interests" at issue, and determining whether they were "sufficiently served," were "narrowly drawn," and bore a "substantial relationship" to the regulation).

amount of operating expenses they receive." (Br. at 26.) Appellants ignore the additional disclosure-evasion STI would accomplish by financing solicitations on behalf of STI Fund without disclosing itself as the financial source of such communications. *See infra* pp. 41-43. There is no constitutional right to conceal such political spending. To the contrary, *Citizens United*, *SpeechNow*, and other recent campaign-finance decisions could not have made clearer the constitutionality of mandatory disclosure requirements in the context of political spending and advocacy. *See, e.g.*, *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010) (upholding — in the context of ballot initiatives — disclosure requirements, which "promote[] transparency and accountability in the electoral process to an extent other measures cannot"); *Citizens United*, 558 U.S. at 369 (holding that government's "informational interest alone is sufficient" to justify mandatory disclosure for campaign-related speech); *SpeechNow*, 599 F.3d at 698 (upholding disclosure requirements for super PACs "no matter whether the [funds] were [given] towards administrative expenses or independent expenditures").

Far from violating the First Amendment, campaign-finance disclosure requirements *further* the important governmental interest of disclosing the funding of campaign speech and protect the related First Amendment rights of the public to know the identity of those who seek to influence their vote. *Citizens United*, 558 U.S. at 369-71 ("[D]isclosure permits citizens and shareholders to react to

[political] speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."); *SEF*, 65 F.3d at 296 (explaining that solicitation disclaimer requirements "serve[] important First Amendment values" and are a constitutional method of "ensuring open electoral competition that does not unduly trench upon [individuals'] First Amendment rights").

A. Appellants' Proposed Relief Would Enable Corporations to Conceal Campaign-Related Spending

As conceived by FECA, the disclosure exemption for corporate payments of an SSF's costs is narrow. An SSF need not report payments for its "establishment, administration and solicitation" paid directly by its sponsoring corporation, in this case STI. 11 C.F.R. § 114.5(b), (e)(1). Before *Citizens United*, a corporation could lawfully engage in electoral spending only through its SSF, and the SSF could solicit funds only from its sponsoring corporations' executives, stockholders, and employees. Thus, the permissible corporate spending covered by FECA's exemption for administration and solicitation expenses involved only internal matters, *i.e.*, the SSF's solicitations from already-affiliated individuals, plus its overhead. None of that undisclosed spending paid for communications sent to the public.

This lawsuit, however, seeks to have the statutory disclosure exemption swallow the rule, which it would do in two distinct ways.

First, under the SSF non-contribution account mechanism proposed here, STI could communicate its fundraising message to — and seek unlimited political contributions from — nearly any individual or organization in America on behalf of STI Fund without disclosing that STI paid for those solicitations or how much money it spent doing so. The distribution of such undisclosed solicitations is manifestly irreconcilable with the narrow scope of the statutory SSF exemption, which applies only to internal communications, and with FECA's disclosure provisions, which require PACs to disclose every dollar they spend and the source of those dollars. 2 U.S.C. § 434(b)(4).

Appellants omit the fact that their requested relief will result in STI paying for undisclosed *solicitations* of the general public — communications that can themselves support or oppose federal candidates — or the damage that could result. Under STI's theory, the corporation could have solicited hundreds of thousands of people to contribute to STI Fund during the months leading up to the November 2012 election by urging them to donate unlimited funds to STI Fund as a way to (in the words of STI's website) "stand up to Obama" because "[u]nder Obama . . . a perjuring felon 'allegedly' is leading the DOJ." (FEC Opp'n to Prelim. Inj., J.A. 148) (quoting STI's website, http://act.theteaparty.net/5507/stand-

up-to-obama/; http://act.theteaparty.net/5273/prosecute-eric-holder/).)[14] The financing mechanism that plaintiffs seek would render a solicitation containing language like this (and others) entirely exempt from the disclosure rules applicable to every other PAC engaging in similar electoral advocacy.

In contrast, if STI were to finance such solicitations directly, or to do so through a super PAC — as it is currently permitted to do (*see supra* pp. 11-12 (discussing Club for Growth Advisory Opinion)) — appellants could conduct all of their desired activities, and there would be no disclosure evasion. STI could spend as much as it wishes for its super PAC's administrative and solicitation expenses, and the super PAC could solicit the general public for unlimited individual and corporate contributions to finance independent expenditures — *i.e.*, it could do everything appellants claim they want to do through the proposed SSF non-contribution account. The only difference would be that STI's payments in support of the super PAC would be disclosed to the public.

Citizens United squarely contradicts any notion of a constitutional right to finance campaign advocacy in the proposed indirect and disclosure-evading manner. Eight Justices agreed in that case that mandatory disclosure of election-related funding is a constitutionally permissible method of furthering the public's

[14] There is, of course, no doubt that STI has the constitutional right to make statements such as these in the context of soliciting contributions; the only question is whether STI can do so in a way that avoids disclosing who paid for the solicitation.

important interest in knowing who is financing campaign speech. 558 U.S. at 368-71. The Court therefore upheld FECA's disclosure requirements even as applied to political communications that contained no candidate advocacy but rather "only pertain[ed] to a commercial transaction," *i.e.*, soliciting the public to buy a DVD that criticized a candidate. *Id*. As the Court explained, the government's "informational interest alone is sufficient," to justify mandatory disclosure for such campaign-related speech because "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id*. at 369, 371. *Citizens United* thus puts to rest any argument that STI has a constitutional right to avoid disclosing its payments for political solicitations: If the government can constitutionally mandate disclosure of who paid to advertise a DVD critiquing a candidate, the government can *a fortiori* mandate disclosure of payments to solicit funds for the purpose of advocating the election or defeat of a candidate.

Second, as appellants admit (Br. at 26), their plan would enable STI to avoid triggering the broad disclosure requirements applicable to political committees. Under FECA, a group whose major purpose is electing or defeating federal candidates must register with the Commission as a political committee and report all of its income and expenses once it makes $1,000 in expenditures or receives

$1,000 in contributions. *See* 2 U.S.C. § 431(4)(A); *Buckley*, 424 U.S. at 79. STI apparently seeks to avoid these registration and disclosure requirements by spending its political funds on its SSF, such that STI's spending would not constitute a contribution or an expenditure that would trigger the $1,000 threshold for political committee status.

STI's proposed avoidance is irreconcilable with *SpeechNow*'s upholding of FECA's disclosure requirements as applied to independent-expenditure-only PACs. In *SpeechNow*, the en banc D.C. Circuit relied upon *Citizens United* in unanimously affirming the constitutionality of requiring so-called "super PACs" to disclose all of their income and expenses. *See* 599 F.3d at 696-98. The court held that these requirements further "the public . . . interest in knowing who is speaking about a candidate and who is funding that speech," and that PAC disclosure "deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals." *Id*. at 698. Accordingly, these governmental interests "are sufficiently important . . . to justify requiring [an independent-expenditure-only committee] to organize and report to the FEC as a political committee." *Id*; *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 58-59 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012) (upholding PAC disclosure in light of government's "interest in the dissemination of information regarding the financing of political speech").

In light of *SpeechNow's* conclusive and binding determination, there is no merit to appellants' claim that the First Amendment requires the government to recognize an unnecessary and more burdensome method of financing political advocacy that would facilitate STI's evasion of disclosure obligations applicable to all other PACs.[15]

B. There Is No Legal Basis for Permitting STI to Evade FECA's Disclosure Provisions

Appellants fail to identify a single court decision requiring the outcome they seek. Nor can they. As the district court and both of the draft advisory opinions considered by the Commission recognized, "none of the recent judicial decisions issued in the realm of campaign finance and the First Amendment directly address whether FECA's contribution limits and solicitation restrictions are constitutional as applied to an SSF."[16] (J.A. 217 (citing Compl. Exh. B at 7; *id.* Exh. C at 6-7).)

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[15] The fact that the Supreme Court in *Citizens United* and this Court in *SpeechNow* upheld disclosure requirements as, *inter alia*, furthering the public's interest in knowing who is financing campaign speech belies appellants' sweeping claim (Br. at 13) that after *Citizens United* campaign finance regulations related to disclosure must prevent apparent or actual quid pro quo corruption.

[16] Appellants contend that the district court's decision was "grounded in a dissent" and inaccurately argue that it "[t]hus . . . should be reversed." (Br. at 4.) To the contrary, regardless of the views expressed in the district court's dicta (*see id.* (citing J.A. 235)), the lower court explicitly recognized that "[i]t is of course not the Court's prerogative to question the authority of [*Citizens United*, *SpeechNow*, or *EMILY's List*]," and its dismissal of the complaint in this case was grounded in the court's analysis of those decisions and the conclusion that "the implications of *Citizens United* and its progeny do not compel the relief the plaintiffs seek." (J.A. 221.) Appellants are plainly wrong to suggest that the

Indeed, none of the cases upon which appellants rely even discusses the rights of corporations to finance independent expenditures through an SSF non-contribution account, let alone considers the purported right to raise unlimited funds in a manner that would result in evasion of the disclosure provisions upheld in *Citizens United* and *SpeechNow*.

Citizens United held that corporations could pay for independent expenditures with general treasury funds. While the Court also held that SSFs were not an adequate substitute for the *corporation's* own speech, 558 U.S. at 337, it never suggested that SSFs are a constitutionally required alternative to such direct corporate speech. And contrary to Appellants' unsupported claim that *Citizens United* "eliminated distinctions between . . . 'non-connected' and 'connected'" PACs (Br. at 21), the Court in fact said *nothing* about such distinctions.

Indeed, the *Citizens United* Court's limited discussion of SSFs supports the Commission's arguments, not appellants'. The Court distinguished — without rejecting or even criticizing — its own earlier holding in *NRWC* "that a restriction on a corporation's ability to solicit funds for its segregated PAC, which made direct contributions to candidates, *did not violate the First Amendment*." 558 U.S.

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district court's citation to a nonbinding authority, such as an opinion of four Supreme Court justices, in the course of explaining its analysis is a basis for reversal.

at 358 (citing *NRWC*, 459 U.S. at 206; emphasis added). That holding controls the outcome here.

The district court also correctly distinguished this Court's decisions in *SpeechNow* and *EMILY's List* and properly found that those decisions "do not control the outcome of the instant case." (J.A. 237.) *SpeechNow* involved a nonconnected PAC that spent its funds only on independent advocacy and was funded only by individual contributions. 599 F.3d at 689, 696 (holding statutory limits on contributions to PACs unconstitutional only "as applied to individuals' contributions to SpeechNow" and explicitly "decid[ing] these questions [only] as applied to contributions to SpeechNow, an independent expenditure-only group"). In that case, this Court made no mention of connected PACs or SSFs.

EMILY's List similarly involved only nonconnected committees. Indeed, as the court below noted (J.A. 237 n.21), this Court in *EMILY's List* repeatedly emphasized that its "constitutional analysis of non-profits applies only to *non-connected* non-profits," 581 F.3d at 22 n.21 (emphasis in original); *see also id.* at 8; 16 n.15 (same), while explicitly disclaiming to address the constitutionality of FECA as applied to SSFs. *Id*. at 8 n.7 (excluding "a committee established by a corporation" from category of entities addressed in opinion). Appellants' assertion (Br. at 20) that the district court's distinguishing of *EMILY's List* "based on the fact that EMILY's List was a non-connected organization . . . was error" is itself

erroneous. Indeed, Appellants themselves concede (Br. at 14), as they must, that "the holding [in *Emily's List*] did not address connected committees."[17]

Each of these cases was "decided in [a] significantly different context" and none of them resolves the distinct issue presented here. *Lyng v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 485 U.S. 360, 369 n.7 (1988) (internal quotation marks omitted); *see Haw. Gov't Emp. Ass'n Local 152 v. Martoche*, 915 F.2d 718, 726 (D.C. Cir. 1990) ("We are satisfied that [the case relied upon by plaintiffs] is not controlling here. The facts of that case differ in critical respects.").

Nor should any of the cases upon which appellants rely be extended here to nullify disclosure requirements whose constitutionality has been separately affirmed by higher courts.[18] Appellants' attempt to extend *EMILY's List* and

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[17] Also erroneous is appellants' baseless assumption that the Court in *EMILY's List* confined its decision to *non*connected committees "because it was issued prior to *Citizens United*." (Br. at 14.) Given that *Citizens United* was pending, *EMILY's List* explicitly addressed the effect on its holding would be if the ban on corporate independent expenditures were overturned, and made no reference to SSFs. 581 F.3d at 12 n.11. Moreover, neither *Citizens United* nor any other decision from the Supreme Court or this Court purports to extend the analysis in *EMILY's List* to the context presented here, and appellants' unsupported declaration that such an extension is "natural and necessary" fails in light of the differences between nonconnected PACs and SSFs, as discussed above, *supra* pp. 26-29.

[18] *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("'[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.

SpeechNow beyond the context of nonconnected PACs fails to account for FECA's key provisions governing disclosure and coercion by SSFs — provisions that categorically differentiate SSFs from nonconnected PACs. For all the reasons discussed above, *EMILY's List*, which did not address disclosure at all, 581 F.3d at 19 n.16 ("This case does not involve reporting and disclosure obligations."), cannot be extended without vitiating these provisions.

Court decisions such as *Citizens United* and *SpeechNow* have given rise to a category of corporate electioneering that was not contemplated by Congress when it enacted FECA's disclosure provisions. But this does not mean that the Commission or the Court can disregard or fail to give full effect to those provisions. FECA's statutory disclosure exemption for a corporation's spending in support of its SSF's solicitation costs is unambiguously limited to solicitations of the owners, executives, and employees of the corporation because those are the only kind of solicitations that SSFs can engage in.

Citizens United and *SpeechNow* have changed the rules governing corporate independent spending and limits on contributions to super PACs, but those decisions did not address the solicitation rules for SSFs. Thus, even if appellants believe that Congress might have enacted a broader disclosure exemption if it had

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S. 477, 484 (1989)); *see also United States v. Danielczyk*, 683 F.3d 611, 615-16 (4th Cir. 2012), *cert. denied*, 1335 S. Ct. 1459 (2013) (applying *Agostini* principle and reversing district court that had extended *Citizens United* to strike down FECA provisions Supreme Court had previously held constitutional).

contemplated the legal regime post-*Citizens United*, such speculation cannot trump the actual text of the existing statute, which Congress has not amended in response to recent developments. Accordingly, there is no statutory basis for concluding that spending for solicitations to the general public should be exempt from disclosure; but that would be the effect if STI were to prevail on its request to create a non-contribution account within its SSF without being bound by the solicitation restrictions applicable to SSFs.

III. FECA's SOLICITATION RESTRICTIONS FOR SSFs FURTHER THE GOVERNMENTAL INTEREST OF PREVENTING CORPORATIONS FROM COERCING THEIR EMPLOYEES AND OTHERS INTO MAKING UNLIMITED POLITICAL CONTRIBUTIONS

In addition to evading disclosure, Appellants' plan would contravene the FECA provisions that protect corporate employees from the potentially coercive effect of being solicited by their employers — provisions whose constitutionality is not in question. FECA prohibits SSFs from soliciting contributions from the general public, and it places significant restrictions on solicitations directed towards the non-executive employees of the SSF's sponsoring corporation. *See supra* pp. 8-9. For example, an SSF can solicit employees only (1) by mail, (2) not at their workplace, and (3) in such a manner that the corporation "cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution." 2 U.S.C. § 441b(b)(4)(B). FECA also limits

SSFs to $5,000 per contributor per year. 2 U.S.C. § 441a(a)(1)(C); 11 C.F.R. § 114.5(f).

All agree that FECA's employee-solicitation restrictions serve to prevent a corporation from levering its inherent power over its employees to coerce them into contributing to the corporation's SSF. (*See* Pls.' Prelim. Inj. Mem. at 4 n.1, J.A. 91 (citing 122 Cong. Rec. H2612 (daily ed. Mar. 31, 1976) (statement of Rep. Thompson)).)[19] As Congressman Thompson explained:

> [I]t is simply a fact that solicitations by an employer, no matter for what purpose, and no matter how well-intentioned, are psychologically coercive. The employee is going to be intimidated and coerced, because the entity soliciting the funds is, for all practical purposes, the same as, or closely related to the one which also gives the salary raises and promotions.

Id.; *see also* 122 CONG. REC. S3700 (daily ed. Mar. 17, 1976) (statement of Sen. Bumpers) (Even when there is not "overt pressure to either give or you will not have a job next week . . . the pressure will be there, and that troubles me."). These restrictions exist to protect "rank and file" employees from solicitations that, in the judgment of Congress, are inherently coercive. *See Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 413-14

[19] The three FEC Commissioners who would have otherwise granted STI Fund's advisory opinion request also recognized that these provisions serve an anti-coercion purpose and accordingly conditioned their approval of the advisory opinion request upon STI Fund's compliance with "the parameters set forth at 2 U.S.C. § 441b(b)(4)(B) and Commission regulations." (J.A. 51.)

(1972) (finding that solicitation of political funds from union members is "inherently coercive").

In its advisory opinion request, STI Fund sought to solicit funds "*not* subject to the restrictions of . . . 2 U.S.C. § 441b(b)(4)(B)." (J.A. 34 (emphasis added).) None of the Commissioners voted to approve that aspect of the advisory opinion request. (*See* J.A. 50-51 (Draft A); J.A. 62 (Draft B).)

Now, however, appellants claim that there is no risk of coercion because STI Fund will simply "create general advertisements and directly solicit members of the general public who are *not* members of the restricted class." (Br. at 47.) Appellants have no legal or factual support for their assurance that "[*o*]*f course*, an employee would not be coerced by hearing a radio advertisement, seeing an internet advertisement, or otherwise running across general advertising" because, in appellants' view, "[i]f the employee does not want to see or hear the message, the employee may stop watching or listening to it." (Br. at 47 (emphasis added).) To the contrary, this argument amounts to a concession that STI's employees inevitably *will* be among those who receive STI Fund's political messages, no matter appellants' intentions, and Congress has determined that such messages are inherently coercive.

Moreover, there are at least three additional ways in which the proposed financing mechanism would abrogate FECA's employee-protection provisions.

First, FECA limits an SSF to soliciting non-executive employees twice per year. 2 U.S.C. § 441b(b)(4)(B). Appellants, however, appear to seek the ability to solicit STI's employees for funds for contributions to STI Fund's non-contribution account, while also maintaining a contribution account for which STI can solicit twice per year. (*See* Compl. ¶ 23, J.A. 11.)[20] Thus, the inherently coercive pressure of a corporation asking its employees to give money would, in appellants' scenario, necessarily be more than that which Congress has deemed maximally permissible.

Second, and more significantly, FECA limits SSFs to $5,000 per contributor per year, so $5,000 is currently the most a corporation can ask an employee to give. Appellants, however, claim a constitutional right for STI and its SSF to ask for *unlimited* contributions in any solicitations to STI employees, as there are no limits on contributions to independent expenditure-only committees. Whatever coercive effect might result from asking an employee to give a legally limited amount, asking her to give all she can afford places a greater quantitative burden — well beyond the level Congress has approved.

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[20] Although Appellants' brief here states that STI Fund "seeks only to solicit third parties and the general public" and that "[i]t does not seek to skirt the limitations on solicitations of members of the restricted class," their complaint is not so limited. (*Compare* Br. at 15, *with* Compl. ¶ 23, J.A. 11 (excluding as recipients of proposed solicitations foreign nationals, national banks, and federal contractors).)

Third, FECA contains two anti-coercion provisions in addition to section 441b(b)(4)(B): A corporation must inform each employee it solicits "of the political purposes of [the SSF]" and "of his right to refuse to so contribute without any reprisal." 2 U.S.C. § 441b(b)(3)(B)-(C). STI and STI Fund have nowhere pledged to abide by these restrictions when soliciting for their proposed non-contribution account and so it is unclear whether they would consider themselves free to disregard these provisions when engaging in their otherwise unlimited and unrestricted employee solicitations.

Furthermore, appellants' planned solicitations would run afoul of FECA's SSF provisions even outside the context of employees. For example, freeing SSFs to solicit from the general public would allow a corporation to solicit its suppliers to give to the corporation's SSF. Enormous numbers of companies and individuals in the United States owe their livelihoods to major corporate buyers. *See, e.g.*, Tom Van Riper, *The Wal-Mart Squeeze*, Forbes (Apr. 24, 2007), http://www.forbes.com/2007/04/23/walmart-suppliers-margins-lead-cx_tvr_0423walmart.html. If a corporation were to solicit its suppliers for political contributions, the financial coercion inherent in such solicitations would be qualitatively and quantitatively equivalent to solicitations of employees (who are similarly financially dependent on the soliciting corporation). The primary statutory provision that prevents such coercion is section 441b(b)(4)(A)(i) — the

very provision that plaintiffs seek to have voided as applied to STI Fund. (Compl. Prayer for Relief ¶ 3, J.A. 24.)

FECA's employee-protection provisions are unambiguous, and there is no case law of which the Commission is aware that suggests that the provisions are in any context constitutionally infirm. Appellants are wrong in suggesting that *Emily's List* provides support for their argument (Br. at 46-47) that the solicitation restrictions are unconstitutional. *Emily's List* did not involve solicitations by connected organizations, let alone solicitations directed to a corporation's employees that implicated the anti-coercion concerns vindicated by the challenged restrictions. There is no basis in law for plaintiffs' claims that STI Fund has a First Amendment right to disregard FECA's solicitation provisions.[21]

[21] Appellants' contention (Br. at 46) that the Act's solicitation restrictions are superfluous or otherwise infirm because the Act also prohibits SSFs from using funds secured by physical force, job discrimination, financial reprisals, or any threats of the same, 2 U.S.C. § 441b(b)(3)(A), also fails. In *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976), the Supreme Court dismissed an argument similar to appellants'. The Court rejected the suggestion that FECA's contribution limits were unconstitutional because the government's interest in preventing corruption was adequately addressed by bribery and disclosure laws: "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption . . . ." *Id.* Regarding the solicitation provisions at issue here, Congress was surely entitled to similarly conclude that restrictions on the manner of employee solicitations were necessary to prevent coercion, notwithstanding that the Act elsewhere forbid SSFs from spending funds gathered through threats and intimidation.

Appellants' plan to solicit employees for STI Fund's non-contribution account is a thinly disguised end-run around the solicitation restrictions. That evasion must fail because the validity of FECA's anti-coercion provisions has never been called into question.[22]

IV. APPELLANTS' REQUEST FOR A PRELIMINARY INJUNCTION IS MOOT

Appellants ask this Court to remand this case to the district court with instructions to preliminarily enjoin the Commission from enforcing the provisions of the Act at issue here. (Br. at 16.) But the district court's dismissal of plaintiffs' claims renders their appeal of the lower court's denial of their motion for a preliminary injunction moot. No meaningful preliminary relief can be provided because a decision on the merits necessarily renders a preliminary injunction

[22] Appellants also challenge the district court's conclusion that they waived any claim regarding section 441b(a), which prohibits SSFs from accepting, *inter alia*, contributions from corporations. (Br. at 51.) As the district court found, the complaint in this case does not clearly articulate the nature of any challenge to that provision: "the plaintiffs do not cite that provision anywhere in their three causes of action, and they do not say that they seek declaratory or injunctive relief from that provision in their prayer for relief." (J.A. 213 n.2.) But even if appellants were correct that they did not waive their section 441b(a) claim, any such claim is encompassed within their broader request to finance unlimited independent expenditures through an SSF non-contribution account, which appellants chose to call a "*Carey* account." (Br. at 52-53 (asserting that appellants' section 441b(a) claim "is related to all of the other" challenges and arguing that the provision is unconstitutional "for the same reasons" asserted as to those other challenges).) Thus, the district court's conclusion that "*Citizens United* and its progeny do not compel the relief the plaintiffs seek" fully addresses any challenge to section 441b(a).

superfluous and the district court's contemporaneous ruling on the preliminary injunction is not properly before this Court.

The law is well settled in this circuit and elsewhere that a district court's ruling on the merits of an underlying claim renders moot the appeal from the denial of the preliminary injunction. *Am. Postal Workers Union v. U.S. Postal Serv.*, 764 F.2d 858, 860 n.3 (D.C. Cir. 1985) (explaining that appeal from denial of preliminary injunction was rendered moot by issuance of decision on the merits); *see also, e.g.*, *Terry v. Leblanc*, 475 Fed. Appx. 514, at *1 (5th Cir. 2012) (unpublished opinion) (dismissing appeal of order denying preliminary injunction because while appeal was pending "the district court entered a final judgment dismissing [plaintiff's] suit" and district court's "entry of a final judgment regarding permanent injunctive relief moots any order regarding temporary injunctive relief"); *Hankins v. Temple Univ. Health Sciences Ctr.*, 829 F.2d 437, 438 n.1 (3rd Cir. 1987) (holding that "interlocutory appeal from the denial of [plaintiff's] motion for a preliminary injunction was rendered moot by the issuance of the district court's final order on the merits").

Nonetheless, even if this Court were to find that an appeal of the preliminary-injunction ruling is not moot, the district court correctly held that

appellants had failed to satisfy any of the preliminary-injunction factors.[23] That decision must be affirmed unless this court finds that the district court abused its discretion. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

A. The District Court Correctly Held that Appellants Suffered No Cognizable Harm During the Pendency of This Case

In addition to showing probable success on the merits of their case, a plaintiff seeking a preliminary injunction also must demonstrate a likelihood — not merely a possibility — that she will suffer irreparable harm without injunctive relief. *Winter*, 555 U.S. at 22. "[T]he injury must be . . . actual and not theoretical . . . [and] of such *imminence* that there is a 'clear and present' need for equitable relief . . . ." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Appellants wrongly claim that all a litigant need do is allege a constitutional violation and "irreparable harm is established." (Br. at 54-55.) But in order to meet the irreparable harm requirement, "[a] litigant must do more than merely *allege* the violation of First Amendment rights." *Wagner v. Taylor*, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (emphasis in original) (discussing *Elrod v. Burns*, 427 U.S. 347 (1976)); *NTEU v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991)

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[23] For the same reasons the district court properly decided the merits in favor of the Commission and correctly granted the Commission's motion to dismiss, *see generally supra* Parts I-III, the court did not abuse its discretion in concluding that plaintiffs had failed to demonstrate a likelihood of success on the merits of their as-applied challenges.

("A preliminary injunction is not appropriate . . . 'unless the party seeking it can demonstrate that First Amendment interests are either threatened or in fact being impaired at the time relief is sought.'") (quoting *Wagner*, alterations omitted). If plaintiffs make "no showing of irreparable injury, 'that alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." *Hicks v. Bush*, 397 F. Supp. 2d 36, 40 (D.D.C. 2005) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)).

STI and STI Fund allege that they are being harmed because they would like to solicit and receive unlimited contributions to finance independent expenditures. (*See* Pls.' Mem. at 33-34; J.A. 120-21.) But as discussed *supra* pp. 5-6, 10-12, STI can do these things *right now* and in a manner less burdensome and less coercive than the one it has sued for the right to employ. *Supra* pp. 7-10, 50-54. Or, if STI for whatever reason wishes to conduct its advocacy indirectly, it can establish and operate a super PAC to engage in exactly the same activity. Appellants fail to explain why these options are in any way deficient in comparison to their preferred disclosure-evasion mechanism. And even if plaintiffs were to plead such a deficiency, it would not constitute *irreparable harm*, for nothing plaintiffs might conjure would change the fact that STI could have solicited and paid for its 2012 election advertising without limit.

Furthermore, plaintiffs' purported need for urgent relief before the district court was belied by their delay in bringing this action. The Commission deadlocked on STI Fund's advisory opinion request on March 1, 2012 — approximately 250 days before the general election. This suit was not filed until July 10, more than four months after it became ripe, and less than 120 days before the election. Plaintiffs' unexplained delay in filing suit casts serious doubt on the genuineness of their belated (and self-created) urgency. *See Tenacre Found. v. INS*, 78 F.3d 693, 695 n.2 (D.C. Cir. 1996) (finding that seven-month delay before filing suit "undermines any assertions that [plaintiff] will suffer irreparable harm if the Court does not grant preliminary injunctive relief"); *cf. Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) ("[Plaintiff's] cries of urgency are sharply undercut by its own rather leisurely approach to the question of preliminary injunctive relief.").

B. The District Court Correctly Held that the Balance of Equities and the Public Interest Weighed Against Enjoining Enforcement of FECA's Disclosure and Anti-Coercion Provisions

The balance of equities and the public interest also weighed heavily in favor of preserving the status quo and denying appellants' request for extraordinary injunctive relief. In evaluating any request to enjoin the enforcement of a federal statute, "[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the

merits, but an equity to be considered in favor of [the government] in balancing hardships." *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) (internal quotation marks omitted); *cf. United States v. Oakland Cannabis Buyer's Co-op.*, 532 U.S. 483, 497 (2001) (holding that "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute" by enjoining its enforcement). That presumption is at its apex here because the Supreme Court has already determined that the disclosure requirements that plaintiffs seek to evade are constitutional. *See Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 90 (D.D.C. 2006) (three-judge court) ("To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court . . . , the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.") (internal quotation marks omitted).[24]

Given the four-month delay in bringing this case, the balance of equities weighs even further against an injunction. *See Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) ("[Plaintiffs'] delay is . . .

[24] Appellants' invocation (Br. at 55-56) of the observation in *Wisconsin Right to Life v. FEC* that "[w]here the First Amendment is implicated, the tie goes to speaker, not the censor," 551 U.S. 449, 474 (2007), assumes that which appellants have failed to prove, that they have suffered a deprivation of speech rights. Since STI's purported First Amendment burdens are all self-imposed, *see supra* pp. 29-33, there is no "tie" for this Court to resolve in appellants' favor.

quite relevant to balancing the parties' potential harms. Since an application for preliminary injunction is based upon an urgent need for the protection of a Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required.") (internal quotation marks and brackets omitted).

Finally, as discussed above, the disclosure and anti-coercion provisions are critical pieces of FECA's SSF- and PAC-regulation regime; enabling their evasion would therefore substantially injure the public interest. *See Christian Civic League*, 433 F. Supp. 2d at 90; *see also Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 352 (4th Cir. 2009) (upholding denial of pre-election preliminary injunction), *vacated on other grounds*, 130 S. Ct. 2371 (2010).

Accordingly, the district court plainly did not abuse its discretion in denying the motion for a preliminary injunction.

CONCLUSION

STI can lawfully solicit unlimited corporate and individual contributions to finance campaign advertising and it can lawfully spend unlimited sums of its general treasury funds to finance the administrative and solicitation costs related to such advertising, or even to finance such advertising itself. And STI may do all of those things *now*, in a manner that is more direct and transparent and less burdensome and coercive than the non-contribution SSF accounting mechanism it proposes. Thus, FECA does not prevent STI's political spending or solicitations; it

merely requires that such activity be fully disclosed to the public and conducted without placing unduly coercive pressure on vulnerable employees. Nothing in *Citizens United*, *SpeechNow*, *EMILY's List*, or any other case appellants cite casts doubt on the validity of these requirements. For these and all of the foregoing reasons, the Court should affirm the decision below.

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May 23, 2013

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,810 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May 2013, I caused the Federal Election Commission's brief in *Stop This Insanity Inc., Employee Leadership Fund v. FEC*, No. 13-5008, to be filed with the Clerk of the Court by the electronic CM/ECF System, thereby effectuating service on the following:

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May 23, 2013

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SUPPLEMENTAL ADDENDUM

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2 U.S.C. § 431(8)(B)(vi). The term "contribution" does not include —

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization; . . . .

2 U.S.C. § 431(9)(B)(v). The term "expenditure" does not include —

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization; . . . .

2 U.S.C. § 441b(b)(2)(C). For purposes of this section and section 791(h) of Title 15, the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include . . .

(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)(3)(B)-(C). It shall be unlawful . . .

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.