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Stop This Insanity, Inc., et al., Appellants, v. Federal Election Commission, Appellee: Brief of Appellants

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ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

No. 13-5008

IN THE

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 in Case No. 12-1140 (BAH)

BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The following parties appeared before the district court as plaintiffs and now appear before this court as appellants: Stop This Insanity, Inc., Stop This Insanity, Inc. Employee Leadership Fund, Glengary, LLC, Todd Cefaratti, and Ladd Ehlinger. The following party appeared before the district court as the defendant and now appears before this court as appellee: Federal Election Commission.

1. Stop This Insanity, Inc.

Stop This Insanity, Inc. ("STI") is a 501(c)(4) grassroots membership association pending approval by the Internal Revenue Service. It solicits funds in order to provide every American with access to the technology and means to be engaged and civically responsible citizens and to empower individuals to take action in their communities to restore our founding principles of individual liberty, limited government, and free markets. Stop This Insanity, Inc. has no parent corporation and does not issue any stock.

2. Stop This Insanity, Inc. Employee Leadership Fund

Stop This Insanity, Inc. Employee Leadership Fund ("the Leadership Fund") is a separate segregated fund for Stop This Insanity, Inc. It is organized according to the statutory and regulatory requirements of the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq*. (2006). The Leadership Fund was created to

engage citizens about which political candidates best promote the principles of individual liberty, limited government, and free markets.

3. Glengary, LLC

Glengary, LLC is a limited liability corporation located in the State of Arizona.

4. Todd Cefaratti

Mr. Todd Cefaratti is a Director and Officer (President) of Stop This Insanity, Inc. and within the restricted class of the Leadership Fund.

5. Ladd Ehlinger

Mr. Ladd Ehlinger is not affiliated with Stop This Insanity, Inc. or the Leadership Fund. He is not a Director or Officer of the organization, nor a member of the restricted class.

B. Rulings Under Review

The ruling under review is contained in the Memorandum Opinion on November 5, 2012, by United States District Court Judge Beryl A. Howell.

C. Related Cases

This case was originally before the United States District Court for the District of Columbia as Case No. 1:12-cv-01140. There are no related cases.

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GLOSSARY OF ABBREVIATIONS

ABBREVIATION	DEFINITION
Act	The Federal Election Campaign Act
JA	Joint Appendix
The Leadership Fund	Stop This Insanity, Inc. Employee Leadership Fund
MCFL	*FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)
NRWC	*Nat'l Right to Work Comm.v. FEC,* 459 U.S. 197 (1982)
PAC	Political Action Committee
SSF	Separate Segregated Fund
STI	Stop This Insanity, Inc.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The case arises under the First Amendment, U.S. Const. amend I, the Federal Election Campaign Act (the "Act"), 2 U.S.C. §§ 431 *et seq.* (2006), and the Declaratory Judgment Act, 28 U.S.C. § 2201. The district court dismissed the complaint on November 6, 2012. On January 2, 2013, the Leadership Fund filed a timely notice of appeal. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether a political committee that is connected to a corporation may solicit and accept contributions for independent expenditures from the general public in light of this Court's pre-*Citizens United* ruling that non-connected political committees may do so and its post-*Citizens United* ruling that there is *no* government interest in limiting contributions to a group engaging in independent expenditures.

STATUTES

The relevant statute appears in the Addendum.

INTRODUCTION

With only limited exceptions not at issue here, the government has *no* interest in prohibiting *any* organization, based on its organizational structure, from raising unlimited amounts of money from the general public to engage in

independent expenditures expressing political viewpoints. Any such prohibition is plainly invalid under the First Amendment in light of clear precedent of the Supreme Court and this Court. The government may, as it does here and is unchallenged in this case, provide limited restrictions that ensure that an organization's funds for use in direct campaign contributions be segregated to ensure compliance with laws related to such direct campaign contributions. But that is where the regulatory power ends in the context of restricting political speech.

Stop This Insanity, Inc. Employee Leadership Fund (the "Leadership Fund") is a political organization that is connected to a corporation. It may raise money from certain corporate employees and their family members (the "restricted class"), and it may use that money to fund direct campaign contributions or independent expenditures or other political speech and activities. By statute, the Leadership Fund may only solicit and accept contributions from the restricted class. But the statute is unconstitutional as applied here.

The Leadership Fund, compliant with principles supporting restrictions on direct campaign contributions, intends to open a separate bank account into which it intends to solicit and receive unlimited contributions from the general public, and from which it intends to engage only in independent expenditures and other speech not in the form of campaign contributions ("non-contribution expenditures"). The

Federal Election Commission threatens to use regulations limiting the Leadership Fund's practices with respect to direct campaign contributions in order to *prohibit* it from using this separate bank account for non-contribution expenditures and related activities.

Such a prohibition does not comport with precedent. Indeed, this Court has recognized both that (1) the government cannot prohibit *non*-connected political committees from operating as a "hybrid" organization, in which it engages in both direct contributions—which are subject to certain restrictions—and other expenditures for political speech, provided that the non-profit political committee segregates its restricted funds in a separate bank account, and (2) the only recognized governmental interest in restricting political speech, the anti-corruption interest, still applies to direct contributions after *Citizens United*, but it does not justify restrictions on non-contribution expenditures. The ineluctable conclusion after these rulings and *Citizens United*'s recognition that organizational structure cannot justify political speech restrictions is that a connected committee—which is a distinct legal entity—has just as much right to solicit and receive contributions for independent expenditures as a non-connected committee.

The district court disagreed based on a narrow view of the First Amendment that expressly contravenes binding Supreme Court precedent. The district court prefaced its analysis by stating Justice Stevens' dissent in *Citizens United v. FEC*,

130 S. Ct. 876 (2010), was correct to assert that the majority's holding (that the government may not suppress political speech through independent expenditures on the basis of the speaker's identity as a corporation absent the appearance of or actual quid pro quo corruption) did "not accord with theory or reality of politics." JA235. The court then continued on with analysis that, grounded in a dissent rather than a majority opinion, was legally erroneous and otherwise failed to apply the law as determined by the Supreme Court. Thus, the decision below should be reversed.

STATEMENT OF FACTS

A. The Federal Election Campaign Act And Separate Segregated Funds.

Under the Federal Election Campaign Act (the "Act"), a political committee may register as an organization called a separate segregated fund ("SSF").[1] 2 U.S.C. § 441b(b). SSFs are connected to other organizations, such as corporations or labor unions, and they are limited both in their methods of obtaining funding and in the content and character of their speech. 2 U.S.C. § 441b.

An SSF cannot receive any contribution from any corporation or union that is not its connected organization, 2 U.S.C. § 441b(a).[2] And money that an SFF can

[1] A separate segregated fund is also referred to as a "connected committee."

[2] The connected entity may provide money for expenses, but that also is not considered a "contribution" under applicable law.

receive from individuals is capped by two restrictions: (1) contributions to any single SSF are, as with all PACs limited to $5,000 a year, 2 U.S.C. § 441a(a)(1)(C); and (2) contributions to all SSFs in the aggregate cannot exceed $48,600, as indexed to inflation, per two year period, 2 U.S.C. § 441a(a)(3). The Act also prohibits SSFs from soliciting the general public; it may only solicit the statutory "restricted class" of its organization, a small subset of individuals related to the connected organization, like stockholders, members, and certain categories of employees. *See* 2 U.S.C. §§ 441b(b)(4)(B)-(C).[3]

Other organizations—including non-connected political action committees, unions, and corporations themselves—as well as individuals are not subject to these burdens on funding for non-contribution expenditures. JA46-47, 228.

B. The Leadership Fund, An SSF, Decides to Speak Out On Political Matters.

Stop This Insanity, Inc. Employee Leadership Fund ("the Leadership Fund") is a political committee formed as an SSF. JA36. Its connected organization is Stop This Insanity, Inc. ("STI"), a small social welfare organization that does not make political expenditures or contributions. JA214-15. The Leadership Fund was founded by employees of Stop This Insanity, Inc. to increase civic engagement

[3] Some individuals connected to restricted class members may also be solicited, subject to additional restrictions. For clarity and ease of reference, this brief refers to the "restricted class" as all people who may be solicited for contributions.

and promote American values. It does not coordinate any of its expenditure activities with candidates or political party committees or their agents. JA17.

The Leadership Fund currently maintains a direct contribution bank account subject to the limitations, prohibitions, and reporting requirements of the Act. JA215. It seeks to further political speech on relevant issues by opening a separate non-contribution account and then using funds raised for that account to engage in non-contribution expenditures. JA216. And plaintiffs Glengary LLC and Ladd Ehlinger both seek to make contributions to the Leadership Fund in excess of current statutory limits for the sole purpose of advancing the Leadership Fund's ability to engage in non-contribution expenditures. JA236. Thus, a "non-contribution account" would allow the Leadership Fund to solicit and receive contributions from outside of the restricted class and use those funds for speech such as independent expenditures, issue ads, and get-out-the-vote drives, but not to provide contributions to candidates.[4] JA215-16. The Leadership Fund does not dispute that contributions and expenditures from this account would be subject to the reporting requirements at 2 U.S.C. § 434(a), 11 C.F.R. § 100.19, and 11 C.F.R. § 104.4. The traditional or "direct contribution" bank account would continue to be used for directly contributing to federal candidates. JA216. It also would

[4] The district court referred to non-contribution accounts, also commonly referred-to as "*Carey* accounts," as "independent expenditure-only accounts."

continue to be subject to the existing limits, source restrictions, and reporting requirements. JA215-16.

C. The Commission Splits On Whether The Amount And Source Restrictions And Solicitation Prohibition Apply To The Leadership Fund In Light Of *Citizens United*.

In the wake of the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and this Court's decisions in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), the Leadership Fund believed that its First Amendment rights permit it to operate a "hybrid" PAC—one with a restricted account and a separate non-contribution account. JA11-12. But the Leadership Fund believed that it risked prosecution under the Act if it established a second bank account to solicit contributions from outside the restricted class even if those funds were solely used through a segregated account. JA18. To alleviate its concerns, the Leadership Fund submitted an advisory opinion request to the Federal Election Commission (the "Commission"). JA31-34, 216. The request asked whether "a connected PAC" may establish a non-contribution account "to solicit and accept contributions from the general public, corporations, and unions not subject to the restrictions of 2 U.S.C. § 441b(b)(4)(A)(i) and 2 U.S.C. § 441b(b)(4)(B)." JA41; JA216. The next month, the Commission issued two opposing draft advisory opinions. JA41-71, 217.

Draft Advisory Opinion A ("Draft A"), relying on this Court's decisions in *EMILY's List* and *SpeechNow.org* concluded that the Leadership Fund could "establish a non-contribution account and solicit and accept unlimited contributions from individuals, other political committees, corporations, and labor organizations" in addition to STI and its restricted class, provided that the Leadership Fund continue to adhere to the existing restrictions on soliciting employees. JA42. Draft A also looked to the Commission's recent consent judgment in *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), which stated that the Commission would no longer enforce regulatory provisions that "prohibit non-connected political committees from accepting contributions from corporations and labor organizations" nor "limit the amounts permissible sources may contribute to such accounts." JA46.

That SSFs operate differently than non-connected committees did not matter. Though SSFs can have their administrative costs paid by the connected organization, Draft A stated that the differences between the two structures did not create a different risk of quid pro quo corruption or the appearance of corruption. JA46-47. Accordingly, there was no compelling government interest in restricting the Leadership Fund's ability to organize itself as a "hybrid" political committee that would operate one account to accept direct contribution funds and a second,

separate account to receive unlimited contributions for independent expenditures. JA48.

Draft Advisory Opinion B ("Draft B") claimed that the reasoning in *EMILY's List*, *SpeechNow*, and *Carey* could not be applied to connected committees. JA64-65. Opinion B emphasized the differences between connected and non-connected political committees—in particular, the connected committee's ability to have administrative costs paid by the organization to which it was connected without disclosing such costs. JA65-66. Thus, the contribution restrictions were purportedly constitutionally permissible. JA70. Opinion B found the second issue, the solicitation prohibition, was moot in light of how it resolved the first. JA71.

The Commission later certified that it failed on a vote of 3-3 to approve either of the advisory opinions. JA73. Accordingly, no four-vote, binding advisory opinion was issued, and the Leadership Fund remained at risk for prosecution if it opened a non-contribution account. JA14.

D. The Leadership Fund Silences Itself For Fear of Prosecution And Seeks Declaratory Judgment.

Based on the Commission's failure to issue a binding advisory opinion, the Leadership Fund abstained from speech during the 2012 election season in order to avoid prosecution. *See* JA18. Due to its small restricted class and the Act's

restrictions on its speech and association, the Leadership Fund could not raise sufficient funds to run non-contribution expenditure campaigns. JA18.

In June 2012, the Leadership Fund and other appellants filed a complaint requesting declaratory and injunctive relief to prevent the Commission from enforcing portions of the Act as applied to them. JA4.

The Leadership Fund moved for a preliminary injunction shortly thereafter. JA79. In response, the Commission moved for dismissal as a matter of law, asserting that "Plaintiffs failed to demonstrate a constitutional right to make unrestricted solicitations to STI's employees and the public for STI's SSF because "Plaintiffs fail to demonstrate a constitutional right to finance such communications in a manner that would render them exempt from the disclosure rules applicable to every other PAC engaging in similar engineering." JA187, 188. In support, the Commission cited the portions of the decisions in *Citizens United* and *SpeechNow* upholding as constitutionally permissible certain disclosure requirements that SSFs are, in fact, not subject to. JA186-87. The Leadership Fund responded that it only asserted First Amendment rights consistent with other PACs, and it is Congress's role, not the courts, to impose the same disclosure requirements on SSFs, if it chooses to do so. JA197-99. The Leadership Fund argued that Congress's failure to regulate an activity—particularly one protected

under the First Amendment—does not render the unregulated actions constitutionally unprotected. JA199-203.

On November 6, 2012, the district court disposed of both motions through an order denying the Leadership Fund's motion for a preliminary injunction and granting the Commission's motion to dismiss. JA212. The court recognized it was "not the [c]ourt's prerogative to question the authority of" the Supreme Court and this Court's decisions in *Citizens United*, *EMILY's List*, and *SpeechNow*. JA221. It further acknowledged that this Court, in *EMILY's List*, "endorsed the hybridization of political committees—at least when such political committees are not connected to a candidate, political party, corporation, or labor union." JA229. But relying heavily on Justice Stevens' "piercing dissent" in *Citizens United*, the court went on to rule that "[w]hen a single entity is allowed to make both limited and direct contributions and unlimited independent expenditures, keeping the bank accounts for those two purposes separate is simply insufficient to overcome the appearance that the entity is in cahoots with the candidates and parties that it coordinates with and supports." JA240-41; *see also* JA235. The court pushed further, stating that the reasoning underlying constitutional protection for "'hybrid'" political committees "is naïve and simply out of touch with the American public's clear disillusionment with the massive amounts of private money that have dominated the political system, particularly since *Citizens*

United." JA241. For that reason, it ruled that the contribution and solicitation restrictions do not violate the First Amendment, as applied to the Leadership Fund. JA250.

On January 2, 2013 the Leadership Fund timely filed a notice of appeal.

SUMMARY OF ARGUMENT

The Leadership Fund is a political committee founded to increase civic engagement. It seeks to engage in collective speech through both (1) direct contributions to political candidates and (2) non-contribution expenditures for its own speech. The Leadership Fund is not directly associated with any candidate or political party. Following the Supreme Court's decision in *Citizens United* individuals, corporations, unions, and non-profit political advocacy committees can engage in unlimited non-contribution expenditures. SSFs like the Leadership Fund, however, do not currently have clarity—or guidance from the Commission—regarding their ability to exercise their own First Amendment rights fully due to contribution and solicitation restrictions in the Act.

As applied, the Act regulates the Leadership Fund's ability to engage in political speech and association in two ways pertinent to this appeal: by limiting who may be solicited for contributions, and by regulating the amounts and sources of contributions. The Leadership Fund is subject to these restrictions based solely upon its status as a "connected" political action committee, or SSF, meaning it is

connected to another organization like a corporation or labor union. Other organizations—including non-connected political action committees, unions, and corporations themselves—as well as individuals are not subject to these restrictions. And as a result of these regulations restricting its right to associate, the Leadership fund is unable to finance non-contribution expenditures—speech—that it would otherwise engage in.

Laws that burden political speech and association—as do the restrictions that, as applied to the Leadership Fund, disallow a separate, non-contribution account—are subject to strict scrutiny. The government must demonstrate a compelling government interest for the restrictions and that the regulations are narrowly tailored to achieve that interest. But because the government has no valid interest to justify to the speech restrictions at issue here, they fail any constitutional test. After the Supreme Court's decision in *Citizens United*, the only recognized compelling government interest for restrictions on campaign-related speech and associated financing activity is preventing apparent or actual quid pro quo corruption—the "anti-corruption interest." But as articulated by both the Supreme Court in *Citizens United* and this Court in *EMILY's List* and *SpeechNow*, the risk of a quid pro quo exchange is absent when a speaker engages in non-contribution expenditures. Contributions to a political committee that engages in non-

contribution expenditures and solicitations for such contributions similarly do not implicate the anti-corruption interest.

This Court held in *EMILY's List* that the government cannot prohibit non-connected political committees from creating what amounts to a "hybrid" organization (in which a single political committee engages in both restricted expenditures and expenditures that are not regulated by the FEC) provided that the non-profit political committee maintains its funds in two separate bank accounts. 581 F.3d at 12. This Court found that there was no risk of quid pro quo corruption simply by allowing EMILY's List to also engage in non-contribution expenditures and maintain a bank account for those expenditures. The holding did not address connected committees because it was issued prior to *Citizens United*. After the Supreme Court held that a speaker's organizational structure could not support restrictions on speech in *Citizens United*, applying this Court's reasoning in *EMILY's List* to connected political committees is both natural and necessary.

The district court erred in its analysis on whether the contribution limits met a compelling government interest here. It conflated the legitimate and compelling anti-corruption interest with the rejected equalization and anti-distortion interests. Rather than address whether the restrictions prevented either corruption or the appearance of corruption, the court focused on a statutory exemption that allows the connected entity to pay the administrative costs of an SSF without disclosing

those costs. But that fact is irrelevant to whether the speech restrictions violate the First Amendment. It is not the Judiciary's role to determine whether Congressional policy choices regarding which disclosures to demand give a speaker an unfair advantage justifying a muzzle. Under *Citizens United*, *no* particular organizational form among political speakers justifies a muzzle. The district court's concern that, by having its administrative costs paid by a connected corporation, SSFs have unbalanced speaking power does not involve a government interest against quid pro quo corruption at all. Instead, it solely raises the previously-rejected equalization interest.

For similar reasons, the district court erred in upholding the solicitation restrictions. The power to solicit contributions to fund non-contribution activity is subject to the same protections as the power to provide contributions and the power to use the contributions to speak independently about candidates for office. Thus, the government interest against quid pro quo corruption has no relevance to the solicitation restrictions here. Additionally, the solicitation restrictions do not advance any anti-coercion interest as applied here. Even assuming employee coercion is a legitimate interest, prohibiting SSFs from soliciting *non*-employees does not advance that interest. The Leadership Fund seeks only to solicit third parties and the general public. It does not seek to skirt the limitations on solicitations of members of the restricted class. Third party and general public

solicitations would not have a coercive effect on the connected corporation's employees and to the extent solicitation restrictions are applied to outlaw such solicitations, they are unconstitutional. Moreover, the restrictions are redundant—a separate provision of the Act prohibits coercion. Therefore, invalidating the solicitation restrictions as applied here will not permit a corporation or a connected committee to threaten, retaliate against, or terminate employees of the corporation.

The district court, in apparent disagreement with the Supreme Court's decision in *Citizens United*, upheld contribution and solicitation restrictions based on purportedly compelling interests that have already been rejected by the Supreme Court. For that reason and more, the district court's order dismissing this case and denying the Leadership Fund's motion for a preliminary injunction should be reversed with directions to enter the preliminary injunction requested by the Leadership Fund.

STANDARDS OF REVIEW

This Court reviews the grant of a motion to dismiss *de novo*. *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012). A court "must assume all the allegations in the complaint are true [and] must give the plaintiff the benefit of all reasonable inferences derived from the facts alleged." *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008) (citations and internal quotation marks omitted). When reviewing a denial of a preliminary

injunction, the Court reviews the denial for abuse of discretion, but any legal conclusions *de novo*. *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011).

ARGUMENT

I. RESTRICTING THE LEADERSHIP FUND'S RIGHT TO SOLICIT, RECEIVE, AND MAKE INDEPENDENT EXPENDITURES UNCONSTITUTIONALLY ABRIDGES ITS POLITICAL SPEECH RIGHTS BASED ON ITS ORGANIZATIONAL FORM.

A. The Leadership Fund's Independent Rights To Associate and Engage In Political Speech May Not Be Abridged Based On Its Organizational Form.

Restrictions on the Leadership Fund's ability to solicit and receive contributions to engage in independent expenditures implicate fundamental speech and association rights. Political expression is "at the core of our electoral process and of the First Amendment freedoms." *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (citations omitted). Included in this core are contributions and expenditures about political campaigns. *See EMILY's List v. FEC*, 581 F.3d at 5 (citing *Buckley*, 424 U.S. at 14). Indeed, the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United*, 130 S. Ct. at 898 (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)). As such, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 881.

The First Amendment prohibits restrictions on political speech that distinguish among different speakers, allowing speech by some but not others. *Id.*

at 883 ("We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."). Such restrictions may operate as a means to control content and deprive the non-preferred speaker "the right to use speech to establish worth, standing, and respect for the speaker's voice." *Id.* at 899. The Supreme Court has thus only recognized one narrow exception to the prohibition against identity-based distinctions—when the government performs a uniquely governmental function in limited settings, such as special restrictions within the military, corrections systems, and public schools. *See id.* (cataloguing cases).

The First Amendment protects not only an individual's political speech rights, but associational rights as well. And collective speech is no less protected because it comes from an association of individuals rather than a single individual. *See id.* at 904; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (stating that the worth of speech "does not depend on the identity of its source, whether corporation, association, union or individual"). As such, the government cannot make speech-based restrictions because the speaker is an association rather than an individual. *Citizens United*, 130 S. Ct. at 900.

The government also may not restrict an association's political speech based on how it chooses to organize itself. In determining the degree of First Amendment protection, it is irrelevant whether the speaker organizes itself as a

corporation, an association, a union, or otherwise. *See Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual."); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion) ("Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.") (quotation and marks omitted). Simply put, the government cannot penalize "certain disfavored associations of citizens" because they opt for a particular organizational form. *Citizens United*, 130 S. Ct. at 908.

These principles, most recently articulated in *Citizens United*, extend to political committees like SSFs, which are simply collections of individuals grouping together to engage in political speech, *see* 2 U.S.C. § 431(4) (defining political committee), separately from the organizations to which they are connected, *see Citizens United*, 130 S. Ct. at 897 ("A PAC is a separate association from the corporation."), and independently from any candidates or political parties. Thus, the connected organization's ability to speak is not an excuse to restrict contributions to the SSF. It is a separate association, with separate rights to engage in political speech. *See id.* (holding that "Section 441b is ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak"

because a PAC is a separate association from the corporation and thus, the PAC's own ability to speak "does not allow corporations to speak").

In *EMILY's List v. FEC*, this Court considered FEC regulations that required some associations to fund expenditures through accounts—called "hard money accounts"—subject to source and amount restrictions. *See* 581 F.3d at 5, 16-18 (describing the regulations). EMILY's List agreed that direct contributions to candidates and administrative expenses should be paid out of its hard money account, but wanted to use a separate account to make other expenditures.

This Court concluded that "hybrid PACs"—political committees engaging in both direct contributions and non-contribution expenditures—like EMILY's List are constitutionally protected from restrictions on non-contribution expenditures. In so holding, the Court noted that making direct contributions does not somehow pollute the independence of the non-contribution expenditures. *Id.* at 12. Maintaining separate accounts was the appropriate method of maintaining the independence necessary to avoid the anti-corruption interest. *See id.* at 18. Thus, the regulations were invalid. *Id.*

The district court distinguished *EMILY's List* based on the fact that EMILY's List was a non-connected organization. JA229-30. But that was error. *EMILY's List*—decided while *Citizens United* was pending—came against the backdrop of a legal regime that still allowed speech restrictions based on

organizational form. *See EMILY's List*, 581 F.3d at 7 (identifying as an "overarching principle of relevance" that "the Court has been more tolerant of regulation of for-profit corporations and labor unions"). At that time, the prevailing reading of precedent supported a belief that SSFs implicated an anti-distortion interest due to their association with their connected organizations. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 688 (1990) (applying the anti-distortion interest to corporations).

But *Citizens United* overturned *Austin* and eliminated distinctions between "non-profit" and "for-profit," and between "non-connected" and "connected." *Compare EMILY's List*, 581 F.3d at 7-8 (using as one of its guiding principles that "the Court has upheld laws that prohibit for-profit corporations and unions from making expenditures for activities expressly advocating the election or defeat of a federal candidate") (citing *Austin*, 494 U.S. 652 (1990)) *with Citizens United*, 558 U.S. at 913 ("Due consideration leads to this conclusion: *Austin* should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

Some types of connected political committees still raise valid anti-corruption concerns. For example, national political parties are so closely associated with the

candidates that the anti-corruption interest is still implicated. *See EMILY'S List* at 14 (discussing the national political parties "inherent relationship with federal candidates and officeholders"). But other connected political committees do not raise these concerns. SSFs are not so closely connected with a candidate, and they certainly are no more closely connected with a *candidate* than non-connected PACs. And after *Citizens United*, any interests in anti-distortion or anti-corruption because of an affiliation with a corporation or labor union are invalid.

EMILY's List and *Citizens United* establish that any speaker that is not directly associated with a candidate or political party has a First Amendment right to make contributions without giving up the right to make unlimited uncoordinated political expenditures.

But the district court cast *EMILY's List* aside, ruling that the structure of SSFs rendered them vulnerable to restrictions on their speech and that the contribution and solicitation restrictions were valid. JA224-25, 240-42, 249-50. It resolved that "SSFs are creatures of statute" and thus, they are at the whim of Congress on what constitutional rights they may exercise. JA250. Throughout its opinion, the district court attempts to distinguish SSFs from non-connected committees and other organizational forms by asserting that "there is a major statutory trade-off for SSFs"; namely, "that an SSF can have all of its administrative and solicitations costs paid for by its connected corporation and

need not report the amount or source of those funds, but in order to enjoy those financial, non-disclosure, and non-reporting benefits the SSF must limit its solicitation base." JA222-23. Therefore, the court asserts, it is "eminently reasonable and important for connected PACs to abide by Congress's countervailing restriction on the universe of people to whom SSFs' solicitations may be directed" under 2 U.S.C. § 441b(b)(2)(C). JA250. To hold otherwise, "would allow the disclosure and reporting exception to swallow the rule." *Id.*

But this reasoning ignores the bedrock constitutional principle that the government cannot exact as the price of a benefit the surrender of First Amendment rights. *See Pickering v. Board of Educ. Twp. High School*, 391 U.S. 563, 568 (1968) (rejecting that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work"); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (holding that because a tax exemption is a "privilege" or "bounty" does not preclude its denial from constituting an impermissible infringement of speech). After *Citizens United*, the exemptions passed by Congress 37 years ago may allow SSFs to "have their cake and eat it too," JA251, but neither the district court nor the Commission may craft opinions or regulatory interpretations that create a solicitation regime that they believe Congress "would have wanted" following

Citizens United. Rather, if the exemptions create anomalous results after *Citizens United*, it is Congress's role to fashion the appropriate balances among *statutory*—and not constitutional—rights.

Moreover, the district court's resolution rests on the fallacy that the Leadership Fund can, with no greater burden, create another political action committee rather than open up a separate bank account. JA242 n.25. But that is beside the point. The Leadership Fund has its own First Amendment rights. And there can be no dispute that they are burdened by restricting contributions and solicitations. The First Amendment prohibits the government from restricting political speech by distinguishing among speakers based solely on their identity (or corporate form). Thus, the court's assertion that SSFs are "completely unnecessary to allow the plaintiffs to engage in unlimited independent expenditures, individually or together," JA224, is a constitutionally infirm justification under the First Amendment.

Requiring the Leadership Fund to clone itself to make independent expenditures—rather than allow the Leadership Fund to use a non-contribution account—is proof of the burden. The availability of avenues "more burdensome than the one foreclosed is 'sufficient to characterize [a regulatory interpretation] as an infringement on First Amendment activities.'" *Austin*, 494 U.S. at 708 (Kennedy, J., dissenting) (quoting *FEC v. Massachusetts Citizens for Life, Inc.*,

479 U.S. 238, 255 (1986) ("*MCFL*")). The additional requirements of creating a second political committee "may create a disincentive for [plaintiffs] to engage in political speech. Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage." *MCFL*, 479 U.S. at 254-55. *See also Citizens United*, 130 S. Ct. at 897 (establishing a PAC is burdensome); *MCFL*, 479 U.S. at 263 ("While the burden on MCFL's speech [establishing a political committee] is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification.").

Indeed, if the onerous ability to disband and reform or create a second more favored organizational structure is all that justifies restricting speech absent a compelling interest, it is surprising that the Supreme Court in *Citizens United* did not justify the corporate independent expenditure bans because the individuals forming the corporation could merely disband it and engage in the same speech if they acted as individuals. Similarly, at the time *Citizens United* was decided, the Citizens United organization operated an SSF for a decade and made candidate contributions. But this did not prevent the Court in *Citizens United* from implicitly rejecting Justice Stevens's position that if Citizens United wanted to speak right

before the primary, all it needed to do was "abjure business contributions or use the funds in its PAC, which by its own account is "one of the most active conservative PACs in America." *Citizens United*, 130 S. Ct. at 944 (Stevens, J., dissenting). Thus, the availability of other organizational forms to speak through did not justify the independent expenditure restrictions in *Citizens United*, and it should not justify the restrictions here.

It is of no moment that SSFs are "creatures of statute." Corporations are creatures of statue and non-connected PACs are creatures of statute. The Supreme Court expressly held in *Citizens United* that corporations' status as organizations does not limit their rights to free speech or give Congress free reign to muzzle them in exchange for the benefits received. Nor would it be reasonable to allow Congress unfettered discretion to limit non-connected PACs' ability to solicit and receive contributions if Congress simply chose to exempt some contributions from disclosure. By the same token, connected committees do not cede their First Amendment rights simply by organizing in a way that allows them to receive operating expenses from another organization without disclosing the amount of operating expenses they receive. And if that creates an "unfair" advantage, it is Congress's role, not the Judiciary's, to eliminate the "advantage" through methods that do not squelch the fundamental rights to speech and association to which SSFs and their contributors are entitled.

B. No Government Interest Exists to Restrict The Leadership Fund's Right To Engage In Political Speech Through Non-Contribution Expenditures.

Focusing on organizational structure, the district court lost sight of the critical inquiry—what interest the government has in restricting the Leadership Fund's exercise of its First Amendment rights. It has none. "Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 130 S. Ct. at 898 (quoting *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (opinion of Roberts, C.J.)) (quotation marks omitted). In the context of restricting political speech in connection with campaign financing, the Supreme Court has only recognized one interest that may outweigh the First Amendment interests: preventing quid pro quo corruption or the appearance of such corruption (the "anti-corruption interest"). *SpeechNow*, 599 F.3d at 692.

The anti-corruption interest was first recognized in *Buckley v. Valeo* and used to sustain a limit on direct contributions to political candidates. *See Buckley*, 424 U.S. at 24-26. Because of the close coordination between the political candidate and the contributor, the Supreme Court reasoned that direct contributions could be given "to secure a political quid pro quo" and that "the scope of such pernicious practices can never be reliably ascertained." *Id.* at 27. That interest was

limited to quid pro quo corruption. *Citizens United*, 130 S. Ct. at 909-10. The appearance of favoritism and influence do *not* justify restrictions on political speech. *Id*. Rather, "[r]eliance on a generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.* at 910 (quotation and marks omitted).

Several other purported governmental interests to justify restrictions on independent expenditures have been analyzed and rejected over time. Equalizing differing viewpoints has never been a legitimate interest. *See Citizens United*, 130 S. Ct. at 904 (citing *Davis v. FEC*, 554 U.S. 724, 741-42 (2008)). Neither has protecting competing views of members within an association. *See id.*; *see also Bellotti*, 435 U.S. at 794-95 (stating that shareholders may engage in corporate democracy to direct the view of a corporation, and are presumed competent to protect their own interests). The Supreme Court overruled any reliance on an "anti-distortion interest"—the theory that the government has an interest in preventing the effects of "immense aggregation of wealth" might have on public support for ideas—in *Citizens United*. *See id.* at 904-05. And this Court sitting en banc in *SpeechNow* dismissed an "informational interest" in '"identifying the sources of support for and opposition to' a political position or candidate" as "not enough to justify the First Amendment burden." *SpeechNow*, 599 F.3d at 692.

Indeed, the only governmental interest supporting restrictions on political speech is the anti-corruption interest. *Id*. But that interest is not implicated by non-contribution expenditures. *Citizens United*, 130 S. Ct. at 909. Independent expenditures, by definition, are completely un-coordinated with any candidate or party. 2 U.S.C. § 431(17) (2006) ("The term 'independent expenditure' means an expenditure by a person (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."). Other non-contribution expenditures involve even less concern about corruption and have traditionally been considered less regulable.[5] JA237-38. Because they are uncoordinated, private speakers cannot make non-contribution expenditures as a corrupting "quid" for a politician's corrupt "quo." *See SpeechNow*, 599 F.3d at 694-95; *see also Citizens United*, 130 S. Ct. at 909. ("independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption").

Despite the unequivocal rejection of the anti-distortion and equalization interests as justifications for restrictions on independent expenditures, the district court relied on these interests without qualification to fashion an exception to the

[5] As a practical matter, any First Amendment protection independent expenditures receive also applies to other non-contribution expenditures.

holdings in *Citizens United*, *EMILY's List*, and *SpeechNow*. JA225 (anti-distortion: "[O]fficials with control of the money spigot at the connected corporation can completely dominate the operations and contribution policies of the SSF."); JA224 (equalization: "In this manner, political committees would be able to influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committee's operations would be able to do acting alone."). And it relied on the plainly inapplicable anti-corruption interest.

The district court improperly distinguished SSFs from other political committees and then, because of these purported differences, justified creating an unsupported carve-out from the uncontroverted principle that independent expenditures do not implicate the anti-corruption interest. Indeed, to support this novelty, the district court relied on the *dissent* in *Citizens United*—the very analysis the majority *rejected* in finding that the anti-corruption interest *cannot* justify restrictions on independent expenditures. JA235 ("the 'belief that quid pro quo arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.'" (quoting *Citizens United*, 130 S. Ct. at 961 (Stevens, J., dissenting))); JA240 (stating that allowing organizations to provide both direct contributions and make independent expenditures "is naïve and simply out of touch with the American public's clear disillusionment with the

massive amounts of private money that have dominated the political system, particularly since Citizens United" (citing *Citizens United*, 130 S. Ct. at 964 (Stevens, J., dissenting))). Thus, the district court's carve-out of SSFs from the constitutional protections other PACs and organizations enjoy is wholly unsupported by the jurisprudence of both the Supreme Court and this Court.

II. THE RESTRICTIONS ON SOURCES AND AMOUNTS OF CONTRIBUTIONS TO SSFs VIOLATE THE FIRST AMENDMENT AS APPLIED TO PROHIBIT CONTRIBUTIONS TO A NON-CONTRIBUTION ACCOUNT.

A. Source Restrictions Are Subject To Strict Scrutiny.

Under any standard, the government does not have any interest sufficient to justify restricting SSFs from receiving contributions from contributor outside of the restricted class, or the amounts of the contributions, for the purpose of engaging in non-contribution expenditures. Laws, like these restrictions, that "burden political speech are subject to strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 130 S. Ct. at 898 (quotation and marks omitted). But the Court need not resolve which level of scrutiny is applicable because the government cannot provide a sufficient interest for the restrictions here under any test. *See SpeechNow*, 599 F.3d at 696 (applying that methodology).

B. The Anti-Corruption Interest Does Not Apply To Non-Contribution Expenditures And May Not Be Used To Justify The Source Restrictions As Applied To The Leadership Fund.

The Supreme Court has recognized only one interest that justifies restrictions on contributions for political speech: the anti-corruption interest. *SpeechNow*, 599 F.3d at 695. And the anti-corruption interest is not implicated by non-contribution expenditures—whether in making them or receiving contributions for them. *See id.* at 692-93; *Citizens United*, 130 S. Ct. at 909. The Supreme Court and this Court have also held that limits on contributions to groups that make independent expenditures are necessarily restrictions on their expenditures. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981); *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). Combined, these principles demonstrate that the anti-corruption interest cannot justify the limits for funding non-contribution expenditures as applied to the Leadership Fund. Thus, as applied here, the source restrictions prohibiting the Leadership Fund from receiving contributions from outside of the restricted class fail any test of constitutionality. "All that matters is that the First Amendment cannot be encroached upon for naught." *SpeechNow*, 599 F.3d at 695.

In *SpeechNow*, a nonprofit association that intended to engage in express advocacy sought a ruling that limits on contributions to the organization were unconstitutional as applied. *Id*. at 689. At the outset, the Court recognized that in

order to regulate *financing* of political advocacy, the government "must have a countervailing interest that outweighs the limit's burden on the exercise of First Amendment rights." *Id*. at 692. It then noted that the Supreme Court has rejected all purported governmental interests "suggested as a justification for contribution or expenditure limits" except the interest against corruption or the appearance of corruption. *Id*. Those rejected interests include equalization, identification of sources of funds, and anti-distortion. *Id*.

Because the contributions sought were solely for financing independent expenditures, the anti-corruption interest was not implicated. *Id*. at 694-95 ("In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."). Thus, the contribution limits were invalid under any standard.

That the Leadership Fund would also make direct contributions from a separate, highly regulated account does not change this analysis. *Citizens United*, *EMILY's List*, and *SpeechNow* concluded that making non-contribution expenditures, receiving contributions to make non-contribution expenditures, and separately making direct contributions in addition to non-contribution expenditures do not implicate the anti-corruption interest beyond the direct contributions

themselves. Though the cases' holdings invalidated the restrictions as applied to specific types of speakers (i.e. nonprofit associations), their reasoning is not limited solely to the particular organizational form at issue in those cases. Rather, the only identity-based exception that can be supported for political committees is one for committees directly associated with a candidate or political party. *EMILY's List*, 581 F.3d at 7. And of course political parties have far different relationships with candidates than SSFs. Indeed, the candidates run for office in their parties' names.

"[C]ontributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." *SpeechNow*, 599 F.3d at 695. It follows—as the FEC has recognized[6]—that contributions to bank accounts that make only independent expenditures and other non-contribution expenditures cannot corrupt elected government officials or create the appearance of corruption either. That much is clear in this Court's holding in *EMILY's List*, 581 F.3d at 19, that, so long as the organization maintained separate accounts for independent expenditures and direct contributions, an organization could not, consistent with the First Amendment, be prohibited in engaging in non-contribution expenditures.

[6] *See, e.g.*, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), *available at* http://www.fec.gov/press/Press2011/20111006postcarey.shtml.

The district court already applied these principles to 2 U.S.C. §§ 441a(a)(1)(c) and 441a(a)(3) in another case and held the anti-corruption interest inapplicable. In *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), the court found that non-connected committees "are *not* the same as political parties" and therefore, "do *not* cause the same concerns of *quid pro quo* money for access." *Id.* at 131 (emphasis in original). Moreover, even if some compelling interest had existed, that court—correctly following the Supreme Court—concluded the restrictions were not sufficiently narrowly tailored. *Id*.

The Commission chose not to appeal. Instead, it entered into a consent judgment stating that it would "no longer enforce statutory and regulatory provisions that prohibit non-connected political committees from accepting contributions from corporations and labor organizations, provided the political committee maintains and deposits those contributions into a non-contribution account."[7] Under current Commission enforcement policy, then, non-connected political committees may engage in unrestricted independent expenditures and restricted direct contributions.

Despite *Carey* and the Commission's agreement to the consent judgment, the district court in this case concluded that the same principles underlying those decisions do not apply to the Leadership Fund; rather, the Leadership Fund's

[7] Press Release, Federal Election Commission Statement on *Carey v. FEC* (Oct. 5, 2011), available at http://www.fec.gov/press/Press2011/20111006postcarey.shtml.

activities risk an appearance of corruption. JA235-36, 239-41, 247-48. It made two errors while reaching that conclusion. First, the district court isolated this Circuit's holdings in *SpeechNow* and *EMILY's List* from each other and failed to follow the reasoning that led to each court's holding. JA236 n.19 ("declin[ing] the plaintiff's invitation" to "conclude that the dual-account model supplied by *EMILY's List* for hybrid PACs to be read in tandem with *SpeechNow* to expand *SpeechNow*'s holding to any organization that engages in some amount of independent expenditure activity."). Second, it based its analysis on artificial, inaccurate, and irrelevant distinctions emphasizing the relationship between the SSF and the connected organization, but failing to identify a distinction that links SSFs with *candidates* they purportedly corrupt. As a result, the district court relied on distinctions that make no difference from either a factual or constitutional perspective. The three mistaken distinctions it makes are between (1) expenditures and independent expenditures, (2) connected and non-connected organizations, and (3) contribution allocation limitations and contribution amount limitations.

The district court distinguished *EMILY's List* as involving only "expenditures" and not "independent expenditures," which are among the non-contribution expenditures the Leadership Fund intends to make. JA229 n.15 (noting that the *EMILY's List* Court was "careful not to use the statutory term of art 'independent expenditure' . . . because the plaintiffs in *EMILY's List* did not

engage in any express advocacy communications that would have been considered 'independent expenditures'"). It also implied that independent expenditures give rise to corruption. JA239 ("[A]s the Court's preceding analysis makes clear, the 'independence' of hybrid PAC expenditures is suspect."). It is wrong for three reasons.

First, the record in *EMILY's List* indicates that EMILY's List did make independent expenditures. *See* Brief of Plaintiff-Appellant, *EMILY's List*, 581 F.3d 1 (No. 08-5422), 2009 WL 772945 (drawing a comparison between EMILY's List and a political committee in a previous case because they both "made independent expenditures to influence federal elections"). Second, the term "expenditure"—both in *EMILY's List* and generally—includes independent expenditures. 2 U.S.C. § 431(9)(A) ("expenditure" is "any purchase, payment . . . or anything of value, made by any person for the purpose of influencing any election for Federal office."). *See also EMILY's List*, 581 F.3d at 9 (describing a right to make unlimited expenditures as the right to "raise and spend unlimited money in support of candidates for elected office"). Thus, the reasoning that applies to expenditures applies to all expenditures, including independent expenditures. Finally, the Court quoted cases that specifically addressed independent expenditures to support its reasoning regarding expenditures generally. *EMILY's List*, 581 F.3d at 9 (citing *Cal-Med.*, 453 U.S. at 203); *id.* at 11

(citing *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 292 (4th Cir. 2008)). All of *EMILY's List's* reasoning about expenditures applies to independent expenditures. Holding to the contrary is like animal control refusing to apply a leash law on a bulldog because the law uses the term "dogs," but not "bulldogs."

The district court's distinction between "allocation restrictions" and "contribution limits" is also a distinction without a difference. The allocation restrictions in *EMILY's List* acted as contribution limits. For instance, one provision forced certain political committees "to use their hard-money accounts to pay 100% of the costs of advertisements or other communications that 'refer' to a federal candidate." *EMILY's List*, 581 F.3d at 17. By "allocating" the expenditure to the hard money account—a term used to identify an account that is subject to contribution limitations—the regulation effectively limited the receipts for that purpose. Allocation restrictions channel money into accounts that limit how much political committees can raise from contributors. The effect of limiting contributions is the problem, not the separation into a specific bank account.

The non-connected versus connected distinction does not matter either. The district court dedicates a lengthy footnote to distinguishing *EMILY's List*, JA237 n.21, and a briefer one to distinguish *SpeechNow*, JA239 n.23, on this ground. Rather than explore why this Court viewed connected PACs and non-connected PACs differently in those cases, the district court did "not venture to speculate as

to the doctrinal importance of the non-connected nature." JA237 n.21. The doctrinal importance is clear though. As previously explained, the reason that connected status mattered when *EMILY's List* was decided was because *Austin* authorized differentiating among speakers based on organizational structure. *See supra*, § 1.A. But *Austin* was overturned in *Citizens United*, 130 S. Ct. at 913, which expressly held that such discrimination among speakers based on organizational identity is unconstitutional.

Finally, the district court erred by finding that there is an appearance of corruption because the independent layperson may not be aware that the entity's spending comes from two separate bank accounts. This contradicts the court's recommendation that the Leadership Fund clone itself to create a separate action committee engaging in the same activity: the second committee, the court concedes, could bear essentially the same name, which would not alter the perception of the layperson. JA242-43 n.25. Thus, this reasoning is nothing more than upholding a political speech restriction based on an organization's chosen form—a prohibited, identity-based restriction under the First Amendment.

None of the district court's distinctions or caveats warrant departing from the reasoning in *EMILY's List* and *SpeechNow*—let alone binding Supreme Court precedent—regarding the anti-corruption interest. And the import of those cases is inescapable. Political committees whose expenditures are made independently

from political parties or candidates do not pose a risk of quid pro quo corruption or the appearance of quid pro quo corruption. Without that interest, the Commission cannot justify the burden on the Leadership Fund's speech.

III. THE SOLICITATION PROHIBITION FAILS ANY LEVEL OF SCRUTINY AS APPLIED TO THE LEADERSHIP FUND BECAUSE IT DOES NOT FURTHER THE ANTI-CORRUPTION OR ANTI-COERCION INTERESTS.

A. Strict Scrutiny Applies To The Solicitation Prohibition.

The Leadership Fund seeks to solicit the general public for contributions to its non-contribution account—the same right that any non-connected political committee, business, or individual has. This would allow the Leadership Fund to engage in collective speech with other private citizens. Current law permits SSFs to solicit only individuals in a "restricted class," subject to certain restrictions. *See* 2 U.S.C. § 441b(b)(4)(B) (defining the "restricted class" as "any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons" of the connected organization). The Leadership Fund is not requesting that the Court invalidate the limitations on solicitations directed at those in the restricted class. Instead it seeks the ability to make generalized advertisement solicitations and targeted solicitations to individuals unrelated to the Leadership Fund or its connected organization.

Given its inherent nature as political speech, strict scrutiny should apply to the solicitation ban. In *Village of Schaumberg v. Citizens for a Better*

Environment, 444 U.S. 620 (1980), the Court concluded that soliciting financial support in many contexts was protected by the First Amendment. *Id.* at 833. Any regulation of solicitation had to be "undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Id.* at 834.

Thus, the Supreme Court has afforded different levels of protections to different types of solicitations. For example, a solicitation to engage in unlawful behavior is completely unprotected. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 579 (2001) (Thomas, J., concurring in part and concurring in the judgment); *see also id.* at 552 ("[T]he state may prohibit inchoate offenses that attach to criminal conduct, such as solicitation.") (O'Connor, J., opinion of the Court). Solicitations to engage in a purely commercial transaction have received intermediate scrutiny. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980) (defining commercial speech as "speech proposing a commercial transaction" and later applying intermediate scrutiny). And solicitations for charitable contributions that would be partially used for charitable purposes and partially to pay salaries warranted a higher level of scrutiny. *Village of Schaumberg*, 444 U.S. at 637 (permitting regulations that serve the government's "legitimate interests . . . by narrowly drawn regulations

designed to serve those interests without unnecessarily interfering with First Amendment freedoms"). Solicitation is not a separate category of speech; it is both speech and a corollary to speech, and receives at least the same protection as the type of speech it arises in the context of. *E.g.*, *Groden v. Random House, Inc.*, 61 F.3d 1045, 1052 (2d Cir. 1995) (dismissing false advertising claim regarding advertisement of a book). Solicitation for contributions to fund political speech necessarily involves making protected political speech so that potential contributors are persuaded to provide funds. Therefore, because the solicitation prohibition burdens political speech, strict scrutiny applies. *See Citizens United*, 130 S. Ct. at 898 ("laws that burden political speech are subject to strict scrutiny") (quotation and marks omitted); *Blount*, 61 F.3d at 941 ("solicitation of political funds is close to the core of protected speech").

Solicitations are particularly important to a small group like the Leadership Fund. Because the Leadership Fund is not connected to a large for-profit corporation or union, its restricted class is tiny—only seven people and their family members at the time of the Advisory Opinion request. JA196. Thus, contrary to the district court's assertion that "the act of soliciting money in certain amounts, by itself, does not warrant strong First Amendment protection—even if it is for the purpose of later engaging in protected speech," JA245, solicitations of people

outside of the restricted class are vital to the Leadership Fund's and the general public's First Amendment rights.

In any event, the solicitation prohibition does not comport with the First Amendment under any level of scrutiny for much the same reasons that the contribution prohibitions are unconstitutional. The district court identified two potential interests that the government sought to protect through the solicitation prohibition: the anti-corruption interest and the anti-coercion interest. Neither justifies prohibiting an organization from soliciting funds to engage in independent expenditures.

B. The Solicitation Prohibition Does Not Further The Anti-Corruption Interest.

For similar reasons to those stated above, solicitation restrictions do not further the anti-corruption interest. Solicitation restrictions are another form of source restrictions. *See Citizens United*, 130 S. Ct. at 909. And as discussed previously, source restrictions for funding non-contribution expenditures do not give rise to actual or perceived corruption of a candidate. *See, infra*, § II.B. Thus, because the anti-corruption interest cannot justify restrictions on non-contribution expenditures or the sources of funds for non-contribution expenditures, it follows that it also does not apply to restrictions on solicitation restrictions for funding to make non-contribution expenditures.

The district court, however, incorrectly relied upon *NRWC*—which involved a challenge to § 441b(b)(4)(A)(i)'s prohibition on an SSF soliciting beyond the membership of its restricted class—to justify the solicitation prohibition based on the anti-corruption interest. *See* JA246-47. *NRWC* does not control this case, and the anti-corruption interest is not implicated despite the district court's assertion otherwise.

In *Citizens United*, the Supreme Court specifically addressed and limited *NRWC*'s holding to restrictions on solicitations for funds that would finance *direct contributions* to candidates. *See id.* at 909 (finding that *NRWC* was of little relevance because *NRWC* was "no more than . . . a restriction on a corporation's ability to solicit funds for its segregated PAC, which made direct contributions to candidates" while Citizens United was challenging only independent expenditures—not restrictions on direct contributions). And the Leadership Fund's proposed solicitation is for funding non-contribution expenditures only.

Indeed, in light of *Citizens United*, *NRWC* is not persuasive authority. It wrongly assumed that identity-based distinctions are permissible. *See NRWC*, 459 U.S. at 210-211. The Court in *Citizens United* cited it as the first case to rely on a "flawed historical account of campaign finance laws" to begin deviating from the rules in *Buckley* and *Bellotti*. *Citizens United*, 130 S. Ct. at 912. And *NRWC* relied on two justifications—the anti-distortion interest and the shareholder

protection interest, *see NRWC*, 459 U.S. at 207-08—that the Supreme Court has since rejected. *See Citizens United*, 130 S. Ct. at 904-08 (rejecting the anti-distortion interest); *id.* at 911 (rejecting the shareholder protection interest). Therefore, both the holding and the reasoning of NRWC are inapposite in this case.

Accordingly, First Amendment protections against solicitation prohibitions are the same as those for contribution prohibitions and independent expenditure prohibitions—the only cognizable government interest is preventing actual or apparent quid pro quo anti-corruption. And the anti-corruption interest is not implicated because the related speech is, by definition, not coordinated with a candidate's campaign.

C. The Solicitation Prohibition Does Not Further An Anti-Coercion Interest.

The district court concluded that the prohibition protected a different interest as well: an anti-coercion interest. Preventing employees from being coerced into contributing to a political committee may be a legitimate governmental interest justifying restrictions on speech *within* the workplace, but the Court need not decide that question because such an interest is not implicated by the solicitation prohibition as applied here.

The purported concern about employee coercion in the campaign finance context is that an employer will use its economic power to compel employees to contribute. JA247-49. The restrictions on soliciting employees allegedly prevent

compulsion by forcing solicitations to be made in a way to prevent any implicitly threatening situations. JA248-49. Solicitations of the restricted class must be made by written letter to the employees' residences, and the restrictions make it difficult to track who does, and does not respond to the solicitation. *See* 2 U.S.C. § 441b(b)(3)(B). Because the regulations remove the potential of a corporation coercing employees in the workplace, the narrow focus of anti-coercion interest is preventing threats of retaliation. On top of these constraints, the Act renders coercion illegal. The paragraph immediately before the solicitation ban prohibits separate segregated funds from using any financial resource "secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisals." 2 U.S.C. § 441b(b)(3)(A). None of this would be upset by ruling in the Leadership Fund's favor.

EMILY's List similarly involved solicitation restrictions. If a solicitation expressed an intent that the money would be used in support of a "clearly identified candidate or party," it was subject to contribution limitations. *See EMILY's List*, 581 F.3d at 17-18. That burden was qualitatively and quantitatively less restrictive than the solicitation prohibition here because EMILY's List could solicit a much broader group and had broad freedom to tailor its message. But this Court still concluded that the provision at issue in *EMILY'S List* violated the First Amendment. Because EMILY's List was entitled to raise unlimited funds, it had a

First Amendment right to solicit people without the government dictating the form or scope of its message. *See id.* at 18. ("Non-profits are entitled to raise money for their soft-money accounts to help support their preferred candidates, yet this regulation prohibits non-profits from saying as much in their solicitations.") The Court supported that conclusion, in part, with the principle that a "provision that requires choice between 'unfettered political speech' and 'discriminatory fundraising limitations' violates the First Amendment." *Id.* at 18 (citing *Davis*, 554 U.S. at 726). And that is exactly what the solicitation restriction here imposes.

Moreover, allowing the solicitations the Leadership Fund seeks would not have any coercive effect on members of the restricted class. All that would result from the Leadership Fund having a separate non-contribution account is that the Leadership Fund would create general advertisements and directly solicit members of the general public who are *not* members of the restricted class. Of course, an employee would not be coerced by hearing a radio advertisement, seeing an internet advertisement, or otherwise running across general advertising. If the employee does not want to see or hear the message, the employee may stop watching or listening to it. Unlike directed solicitations, the employee has no social or employment obligation to be solicited. And without a targeting or tracking mechanism, the employer cannot retaliate when employees choose to tune out.

Direct solicitations of third parties likewise do not implicate the anti-coercion interest. Restricted class members need not even be aware of the Leadership Fund's targeted solicitations of third parties; without such knowledge, it would be impossible for these solicitations to affect the employees, much less coerce them. Even if anti-coercion was a legitimate interest, it could only be achieved through the narrow restraint on targeting communications to non-restricted class employees.

The district court, however, concluded that the anti-coercion interest applied here and justified the solicitation prohibition. JA247-49. In so concluding, the court conflated the employee coercion interest with the discredited anti-distortion and equalization interests. It cited Justice Stevens' dissent in *Citizens United*, discussing the anti-distortion interest and then stated that "allowing unlimited amplification of corporate political speech will also inevitably chill the political speech of corporate employees whose views diverge from their corporate employers." JA247-48. The government may not, however, restrict one party's speech in order to enhance the voice of others. *Davis*, 554 U.S. at 742.

Therefore, because the solicitation prohibition does not further the anti-coercion interest, that interest cannot support restricting the Leadership Fund's First Amendment rights under any level of scrutiny. *SpeechNow*, 599 F.3d at 696. And, under strict scrutiny as would apply to any restriction on solicitations in

furtherance of non-contribution speech, the solicitation prohibition would be too broadly tailored to permissibly serve the anti-coercion interest.

Moreover, under the "closely drawn" tailoring of intermediate scrutiny or narrow tailoring of strict scrutiny, the solicitation prohibition runs far afield of any reasonable demarcation of an appropriate infringement on speech and association to meet a government need. The Leadership Fund is absolutely prohibited from discussing a topic with all but a select few individuals. In fact, the only people the Leadership Fund may talk to are the ones actually at risk for coercion. This scheme prohibits far more speech than is necessary to protect the employees from being coerced, failing the closely drawn standard and the over-inclusive prong of narrow tailoring.

The district court did not correctly analyze whether the solicitation prohibition was narrowly tailored. Instead of comparing the burden on speakers' constitutionally protected rights with the government's purported interests, it balanced the burden on speech against an alleged benefit that Congress conferred. JA249 ("The solicitation restrictions in § 441b are also narrowly drawn to serve the foregoing governmental interests because the restrictions are tailored to match the special benefit that Congress extended SSFs—exempting all funds used for the 'establishment, administration, and solicitation of contributions to a [SSF]" from the definition of 'contributions.'")). Tailoring under either strict scrutiny or

intermediate scrutiny is not concerned with the benefit the government provides, only its justification for any speech restriction.[8]

The district court's analysis of burden imposed on speech here is particularly problematic because of what it means for future cases. Under its theory, the government can restrict speech as much as it likes so long as it provides a countervailing "special benefit." For example, Congress could grant non-connected political committees or other associations the same "special benefit" that it grants SSFs and that would be a sufficient basis to prohibit them from soliciting the general public. If the government can strip constitutional rights by granting purportedly offsetting statutory benefits, no speaker is safe from Congress's generosity.

The Leadership Fund has a right to raise unlimited funds for its non-contribution expenditures. The restrictions on solicitation go beyond merely dictating the form of message to entirely prohibiting the message. Because the prohibition does not further any government anti-corruption or anti-coercion

[8] The Leadership Fund also takes issue with calling the contribution exemption a "special benefit," much less one that is evenly balanced against a debilitating limitation on non-contribution expenditures that supposedly offsets it. The district court seems to presume that the lack of speech regulation is a "special benefit," when in reality it should be the beginning point. When the government regulates speech, it must justify regulation; the speaker does not have to explain why the government should let it speak.

interests, the restriction has no legitimate justification and must be invalidated as applied to the Leadership Fund.

IV. THE LEADERSHIP FUND DID NOT WAIVE ITS SECTION 441b(a) CHALLENGE.

The district court wrongly concluded that the Leadership Fund had not properly stated a claim for relief from 2 U.S.C. § 441b(a). The relevant part of § 441b(a) reads, "It is unlawful for any . . . corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to political office . . . or for any . . . political committee . . . to accept or receive any contribution prohibited by this section." The Leadership Fund wishes to receive contributions from corporate contributors and to solicit corporate contributors. Glengary LLC wishes to make contributions. This section prohibits that.

The District Court acknowledged that the Leadership Fund objected to the application of § 441b(a) in this case, but concluded that "[b]ecause the plaintiffs only mention this provision in passing, the Court does not construe the plaintiffs' Complaint to state a claim for relief against that provision, and the Court will not further address § 441b(a) in this opinion." JA213 n.2. Particularly relevant for the Court was the absence of an explicit challenge to § 441b(a) in the prayer for relief. *Id*.

But the prayer for relief did contain a challenge to § 441b(a). The Complaint uses the term of art "Carey contributions" and defines it as "contributions not subject to the limits of 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) or the source prohibitions of 2 U.S.C. § 441b(a) to finance independent expenditures." JA5. In the prayer for relief, the plaintiffs then request injunctive relief as to prohibitions on "*Carey* contributions" three times. JA23-24. Indeed, the Leadership Fund's challenge to § 441b(a) was much more than just "passing." The opening paragraph of the Leadership Fund's Complaint explicitly states that it challenges the application of § 441b(a). JA5. So though the Leadership Fund did not write out the phrase "§ 441b(a)" in its causes of action or prayer for relief, it referenced the provision by defining the term "*Carey* contributions" in the opening paragraph and using that term repeatedly in the prayer for relief. The challenge to § 441b(a) was not waived.

Moreover, there was no unfair surprise to the Commission or the court resulting from the inclusion of § 441b(a) in the definition of "*Carey* account" and incorporating it by reference. The Leadership Fund consistently and explicitly requested that the district court enjoin the source restrictions in § 441b(a) with respect to corporate contributions in other litigation documents. JA88, 96-97, 99, 102, 121, 125 (challenging § 441b(a) in the Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction); JA170, 184 (reiterating its

challenge in the Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction); JA207 (reiterating its challenge in Plaintiff's Opposition to Defendant's Motion to Dismiss); *see also* JA93 (not challenging the source restrictions with respect to "national banks, federal contractors, or foreign nationals"). And in responding to the Leadership Fund's requests, the Commission acknowledged that the specific validity of § 441b(a) was at stake. JA134, 136 (discussing § 441b(a) as applied to the Leadership Fund and Stop This Insanity, Inc. in the Defendant's Opposition to the Plaintiff's Motion for Preliminary Injunction); JA209 (declaring that § 441b(a) would apply to contributions by corporations to a political committee).

Section 441b(a)'s prohibition on corporate contributions is related to all of the other challenged prohibitions on contributions and solicitations to SSFs. It violates the First Amendment as applied here for the same reasons the other prohibitions violate the First Amendment. In light of the fact that the challenge to § 441b(a) was not waived, the Court should declare it invalid as applied here just as it should with respect to the other sections impeding the Leadership Fund's right to engage in non-contribution expenditures.

V. THE DISTRICT COURT IMPROPERLY DENIED THE LEADERSHIP FUND'S REQUEST FOR A PRELIMINARY INJUNCTION.

"Because the FEC's business is to censor, there inheres the danger that [it] may well be less responsive than a court . . . to the constitutionally protected interests in free expression.'" *Citizens United*, 130 S. Ct. at 896 (quoting *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965)). The Leadership Fund deserves court protection now because the right to engage in political speech is not a boon to be awarded or restricted at the grace of the Commission or Congress. Rather, it is a fundamental right of every person that may not be restricted under the First Amendment absent a narrowly-tailored restriction that furthers a compelling government interest.

To warrant preliminary injunctive relief, the Leadership Fund must show (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). When there is a strong likelihood of success on the merits, a preliminary injunction is more appropriate. *See Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009). And anytime a

plaintiff suffers a constitutional violation, irreparable harm is established. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Mills*, 571 F.3d at 1312.

The Leadership Fund established a strong likelihood of success above. The government has no interest in prohibiting the Leadership Fund from opening and fully utilizing a non-contribution bank account.

The prohibition against the account has caused, and will continue to cause irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. Under the contribution limits of 2 U.S.C. §§ 441a(a)(1)(C) and 441b, the Leadership Fund may not solicit and accept unlimited contributions in order to conduct independent expenditures. These directly infringe and chill the Leadership Fund's First Amendment rights. And the consequences of denying the injunction are certain and direct. There is no need to speculate about whether they will or will not occur; they have occurred. *See Chaplaincy of Full Gospel Churches*, 454 F.3d at 301 (stating that "[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed").

For similar reasons, the balance of equities weighs in favor of the Leadership Fund. The Supreme Court has made clear that in any conflict between First Amendment rights and regulation, courts "must give the benefit of any doubt to protecting rather stifling speech," and that "the tie goes to the speaker, not the

censor." *WRTL*, 551 U.S. at 469, 474. Thus, although the injunction would "force the FEC to ignore congressionally mandated limits on the fundraising activities of SSFs," JA252, under the Supreme Court's approach to First Amendment rights in *WRTL*, the Commission's interest simply cannot trump the First Amendment rights of the Leadership Fund. And an injunction will not harm the Commission. The Supreme Court "has long viewed the First Amendment as protecting a marketplace for the clash of differing views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted." *Citizens Against Rent Control*, 454 U.S. at 295.

Finally, a preliminary injunction would serve the public interest. Removing the contribution and solicitation restraints on the Leadership Fund's full-throated speech is in the public interest. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 130 S. Ct. at 898 (quotation and marks omitted). Indeed, the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Id.* Accordingly, the First Amendment reflects our "profound national commitment to the principle that debate on public issues should

be uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

The Leadership Fund wishes to participate in the marketplace of ideas by attempting to convince citizens to support candidates who share its views and to oppose candidates who do not. "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . includ[ing] discussion of candidates." *Mills*, 384 U.S. at 218. Thus, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. In short, Plaintiffs' activities are at the core of the First Amendment and should be protected with a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Leadership Fund and other appellants respectably request that this Court reverse the district court's order dismissing this case and denying a preliminary injunction, and direct that the district court enter a preliminary injunction enjoining the contribution limits contained in 2 U.S.C. § 441a(a)(1)(C), the source prohibitions at § 441b(a), the solicitation restrictions at

§ 441b(b)(4)(A)(i) and all related regulatory requirements as they apply to the Appellants.

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Dated: April 23, 2013

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 23rd day of April, 2013, I caused this Brief of Appellants and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 23rd day of April, 2013, I caused the required copies of the Brief of Appellants and Joint Appendix to be hand filed with the Clerk of the Court and a copy of the Joint Appendix to be served, via UPS Ground Transportation, to Counsel for Appellee at the above listed address.

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ADDENDUM

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2 U.S.C. § 441a(a)(1): Except as provided in subsection (i) of this section and section 441a-1 of this title, no person shall make contributions…
(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000;

2 U.S.C. § 441a(a)(3): During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than--
(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;
(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

2 U.S.C. § 441b(a): In general—
It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

2 U.S.C. § 441b(b)(4)(A): Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.