2014

Stop This Insanity, Inc., et al., Petitioners, v. Federal Election Commission, Respondent: Petition for a Writ of Certiorari

Patricia E. Roberts
William & Mary Law School, perobe@wm.edu

Tillman J. Breckenridge

Dan Backer

No. 14-____

IN THE

Supreme Court of the United States

STOP THIS INSANITY, INC., *et al.*,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

PATRICIA E. ROBERTS
WILLIAM & MARY LAW SCHOOL APPELLATE AND SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

DAN BACKER
DB CAPITOL STRATEGIES PLLC
203 South Union Street
Suite 300
Alexandria, VA 22314
Telephone: 202-210-5431

TILLMAN J. BRECKENRIDGE*
TARA A. BRENNAN
REED SMITH LLP
1301 K Street, NW
Washington, DC 20005
Telephone: 202-414-9200
Facsimile: 202-414-9299
tbreckenridge@reedsmith.com

*Counsel of Record

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a political committee that makes highly restricted direct contributions has a First Amendment right to engage in unrestricted non-contribution activities through a separate and segregated non-contribution account.

2. Whether the First Amendment forbids a government from restricting political speech based on the disclosure interest—an interest in providing the electorate with information about the sources of election-related spending—including when a more narrowly tailored remedy is available.

PARTIES TO THE PROCEEDINGS

The Petitioners are Stop This Insanity, Inc., Stop This Insanity, Inc. Employee Leadership Fund, and Glengary Inc. Petitioners were plaintiffs and appellants below.

The Respondent is the Federal Election Commission, which was defendant and appellee below.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

Statutes

Regulations

TABLE OF AUTHORITIES (CONTINUED)

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Stop This Insanity, Inc. ("STII") and Stop This Insanity, Inc. Employee Leadership Fund ("ELF") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 761 F.3d 10 and is reproduced at page 1a of the appendix to this petition ("App."). The opinion of the District Court is reported at 902 F.Supp.2d 23 and reproduced at App. 15a.

JURISDICTION

The judgment of the D.C. Circuit was entered on August 5, 2014. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes is set forth in the appendix to this petition. App. 71a.

INTRODUCTION

This case presents questions of exceptional importance on the political speech rights of the majority of all PACs. The Fifth Circuit recently opined that contributions designated solely for use in independent expenditures[1] by hybrid PACs "appears

---

[1] An "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 of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(17).

destined to be a coming campaign-finance law battleground." *Catholic Leadership Coal. of Tex.* v. *Reisman* ("*Catholic Leadership Coalition*"), 2014 WL 3930139, at *25 (5th Cir. Aug. 12, 2014). In that case, the Fifth Circuit further deepened a circuit split already advanced by the D.C. Circuit's decision in this case.

ELF is a connected PAC—a political advocacy organization that is connected to another organization, such as a corporation or a labor union, and can make direct contributions to candidates. ELF, as a connected PAC, is not required to disclose the amount of funds for operating expenses received from the organization to which it is connected. And under the Federal Election Commission's (the "Commission") interpretation of campaign finance statutes, ELF's minor disclosure exemption allows the government to tell ELF that it cannot distribute a pamphlet or send an email to anyone outside of a "restricted class"—comprised mostly of its couple-dozen employees and their spouses—touting its political views and asking for funds to further spread its message.

ELF has sought to become a "hybrid PAC" by creating a separate bank account from that used to solicit, receive, and expend amount- and source-restricted funds from its restricted class. It would receive funds from outside its restricted class for that non-contribution account[2]—consistent with the

---

[2] Petitioners use the term "non-contribution account," rather than the "independent expenditure-only account" because the Commission uses the latter term in referencing Independent Expenditure-Only PACs (colloquially known as "Super PACs") and the former term in referring to the separate bank account hybrid PACs deposit contributions into "for the purposes of

existing regulatory framework created by the Commission since *Citizens United* for precisely this activity—and would engage in only non-contribution expenditures. Even if ELF was to eschew the narrow disclosure exemption it receives, and announce every penny its connected organization, STII, gives it—including contributions to its candidate-contribution activities—under the Commission's interpretation of relevant statutes, ELF still could not form this separate account to further its political speech.

Here, the D.C. Circuit agreed with the Commission—joining the Second Circuit in a conflict with the Tenth Circuit and the Fifth Circuit over whether laws capping contributions to hybrid PACs for non-contribution expenditures and other restrictions on non-contribution activities are constitutionally permissible.

Moreover, the D.C. Circuit upheld limitations involving constitutionally protected political speech rights of an organization, based on the court's wrongly-held belief that the organization's connected corporation is "an unrestrained vehicle" for *unlimited* speech. In so doing, it became the first federal

---

financing independent expenditures, other advertisements that refer to a Federal candidate, and generic voter drives." FEC STATEMENT ON *CAREY* V. *FEC*: REPORTING GUIDANCE FOR POLITICAL COMMITTEES THAT MAINTAIN A NON-CONTRIBUTION ACCOUNT (Oct. 5, 2011), http://www.fec.gov/press/press2011/20111006postcarey.shtml. Similarly, Petitioners use the terms "non-contribution expenditures," and "non-contribution activities," rather than "independent expenditures," and "independent expenditure activities," for continuity and definitional precision as these terms include independent expenditures as well as generic voter drives, etc.

appellate court to elevate the constitutionally permissible use of disclosure to a governmental interest that, in its own right, may justify a *restriction* on speech. This reasoning conflicts with a ruling by the Fifth Circuit, and, if allowed to stand, gives Congress the power to grant a minor disclosure exemption to any individual or organization, and then restrict its ability to speak, based solely on that white elephant gift.

Over 3,000 connected PACs—constituting more than half of all federally registered PACs—are restricted from fully expressing their political views in the way individuals, other PACs, corporations, labor unions, and issue advocacy organizations can. This Court's intervention is needed to put the issues here to rest, and to provide guidance to the courts below as they wade through a host of federal and state provisions limiting the speech of different organizational forms—including hybrid PACs—relative to others. This case presents the appropriate vehicle for providing that guidance.

For these reasons and those that follow, the Court should grant the petition, and reverse the judgment below.

STATEMENT OF THE CASE

The Act And Its Effect On ELF's Speech: Under the Federal Election Campaign Act (the "Act"), a political committee ("PAC") may register as an organization called a separate segregated fund, more commonly known as a "connected PAC." 52 U.S.C. § 30118(b).[3] Connected PACs are connected

[3] On August 8, 2014, voting and election provisions located in Titles 2 and 42 of the United States Code, including the Federal

to other organizations, such as corporations, labor unions, and membership or trade associations, and they are limited in how and from whom they may solicit political contributions, as well as in the content and character of their speech. *See* § 30118.[4]

A connected PAC cannot receive contributions from any entity, such as a corporation or union, that is not its connected organization. § 30118(a).[5] The Act also prohibits a connected PAC from soliciting the general public; it may solicit only 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* § 30118(b)(4)(A)-(C). Contributions that a connected PAC may receive from individuals—even those designated for non-contribution activities—are subject to the same restriction on contributions to any "traditional" PAC that may use them for candidate-contribution purposes: a cap of $5,000 a year. 52 U.S.C. § 30116(a)(1)(C). Using the funds acquired from the restricted class, connected PACs can engage in any political speech, including making campaign contributions subject to the

---

Election Campaign Act, were transferred to Title 52. No statutory text was altered. The new citations are used herein.

[4] In relevant part, a "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." *See* § 30101(8).

[5] The connected entity may pay for the establishment, administration, and solicitation expenses of the connected PAC, but such payments are expressly excluded from the definition of "contribution" in the Act. *See* § 30118(b)(2).

applicable limits. From these limited funds contributed by a limited selection of individuals, ELF would be expected to fund all of its speech, regardless of whether it was a candidate-contribution or a non-contribution expenditure.

Individuals and other organizations—including non-connected PACs, unions, and corporations—are not subject to these burdens on funding for non-contribution expenditures. Moreover, PACs are subject to absolute disclosure; whereas other organizational forms are subject to disclosure only on the final, distributed form of its independent expenditures.

Factual Background: ELF is one of over 3,000 connected PACs. ELF's connected organization is STII, a social welfare organization that operates as TheTeaParty.net, one of the nation's leading "Tea Party" organizations, and does not make any political expenditures or contributions. ELF was founded by employees of STII to increase civic engagement and promote their values. It does not coordinate any of its expenditure activities with candidates or political party committees or their agents.

ELF currently maintains a direct contribution bank account subject to the limitations, prohibitions, and reporting requirements of the Act. It seeks to further its own political speech on relevant issues by opening a separate non-contribution account to solicit funds from the general public to engage in non-contribution expenditures from that separate account. Compl. ¶ 28 (filed July 10, 2012). Plaintiff Glengary Inc. seeks to make contributions to ELF in excess of current statutory limits for the sole purpose of advancing ELF's ability to engage in non-

contribution expenditures. *Id.* at ¶¶ 25, 42, 69-70. Thus, a "non-contribution account" would allow ELF to solicit and receive contributions from outside of its restricted class, in any amount, and from any permissible source and use those funds for non-contribution speech, but not to provide contributions to candidates.[6] ELF does not dispute that contributions and expenditures from this account would be subject to the reporting requirements at 52 U.S.C. § 30104(a), 11 C.F.R. § 100.19, and 11 C.F.R. § 104.4. *Id.* at ¶ 2. Nor does ELF assert that the statutory exemption from the definition of "contribution" for connected organization funds paid on behalf of the connected PAC necessarily extends to non-contribution accounts. *Id.* at ¶ 12. The traditional or "restricted class" bank account would continue to be used for directly contributing to federal candidates. It also would continue to be subject to the broad restrictions on solicitation to only the restricted class, existing amount and source limits, and regular reporting requirements. *Id.* at ¶¶ 9, 23.

After this Court's decision in *Citizens United* v. *FEC*, 558 U.S. 310 (2010), and the Commission's consent settlement in *Carey* v. *FEC*, 791 F.Supp.2d 121 (D.D.C. 2011),[7] ELF believed that its First Amendment rights permit it to operate a "hybrid" PAC—one with a restricted account and a separate non-contribution account. But ELF believed that it risked prosecution under the Act if it solicited contributions from outside the restricted class, even

---

[6] Non-contribution accounts also are commonly referred to as "*Carey* accounts" by the regulated community.

[7] *See* FEC STATEMENT ON *CAREY* V. *FEC*, *supra* note 2.

if those funds were solicited into and solely used through a segregated non-contribution account consistent with existing regulations. To alleviate its concerns, ELF submitted an advisory opinion request to the Commission, AOR 2012-01. *Id.*, Ex. A. 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 [52 U.S.C. § 30118(b)(4)(a)(i)] and [52 U.S.C. § 30118(b)(4)(B)]." *Id.* at 1, 4. The next month, the Commission issued two opposing draft advisory opinions.

Draft Advisory Opinion A ("Draft A"), concluded that ELF could "establish a non-contribution account and solicit and accept unlimited contributions from individuals, other political committees, corporations, and labor organizations" in addition to STII and its restricted class, provided that ELF continued to adhere to the existing restrictions on soliciting employees. *Id.*, Ex. B at 2. Draft A also looked to the Commission's recent consent judgment in *Carey*, 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." *Id.* at 6.

That connected PACs operate differently than non-connected committees was immaterial to the constitutionally protected speech at issue. Even though connected PACs can have their operating 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. *Id.* at 6-7. Accordingly, there was no compelling government interest in restricting ELF's ability to organize itself as a hybrid PAC that would operate one account to accept direct candidate-contributable funds from the restricted class, and a second, non-contribution account to receive unlimited contributions for independent expenditures. *Id.* at 8.

Draft Advisory Opinion B ("Draft B") emphasized the differences between connected and non-connected PACs—in particular, the connected PAC's ability to have operating costs paid by the organization to which it was connected without disclosing such costs because Congress intentionally exempted them from the definition of contribution. *Id.*, Ex. C at 6-8. Thus, the contribution restrictions purportedly were constitutionally permissible. *Id.* at 12. Draft B found the second issue, the solicitation prohibition, was moot in light of how it resolved the first. *Id.* at 13.

The Commission later certified that it failed on a vote of 3-3 to approve either of the advisory opinions. *Id.*, Ex. D at 1. Accordingly, no four-vote, binding advisory opinion was issued, and ELF remained at risk of prosecution if it operated a non-contribution account. *Id.* at ¶ 35. Even the Commission itself is divided on this issue.

Because of the Commission's failure to issue a binding advisory opinion, ELF abstained from speech during the 2012 election season in order to avoid prosecution. Due to its small restricted class and the Act's restrictions on its speech and association, ELF could not raise sufficient funds to run non-contribution expenditure campaigns. *See id.* at ¶ 38.

The Proceedings Below: In June 2012, ELF, STII, and Glengary Inc.—as well as two individuals who sought to make contributions designated for non-contribution expenditures in excess of current statutory limits to ELF[8]—filed a complaint requesting declaratory and injunctive relief to prevent the Commission from enforcing portions of the Act as applied to them.

ELF moved for a preliminary injunction shortly thereafter. *See* Pl.'s Mot. Prelim. Inj. (filed July 18, 2012). In response, the Commission moved for dismissal as a matter of law. *See* Def.'s Mot. Dismiss (filed Sept. 25, 2012).

On November 6, 2012, the district court disposed of both motions through an order denying ELF's motion for a preliminary injunction and granting the Commission's motion to dismiss. App. 15-70a. The court recognized it was "not the [c]ourt's prerogative to question the authority of" the Supreme Court's decision in *Citizens United*, but relying heavily on Justice Stevens' "piercing dissent" in *Citizens United*, ruled 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

---

[8] The two individuals were Todd Cefaratti, Director and Officer (President) of STII and a member of the restricted class; and Ladd Ehlinger, a member of the general public. *See* Compl. ¶¶ 19, 26, 27, 66-68. These individuals no longer are parties to this case as the D.C. Circuit held that it lacked jurisdiction over their claims as they "were not made through the *en banc* certification process prescribed in 2 U.S.C. § 437h." App. 5a n.1 (citing *Wagner* v. *FEC*, 717 F.3d 1007, 1016 (D.C. Cir. 2013)).

entity is in cahoots with the candidates and parties that it coordinates with and supports." App. 54-55a, 64a; *see also* App. 47a, 34-35a n.13. The court pushed further, stating that the reasoning underlying constitutional protection for hybrid PACs "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*." App.55a. For that reason, it ruled that the contribution and solicitation restrictions do not violate the First Amendment, as applied to ELF. App. 67-68a.

ELF timely filed a notice of appeal on January 2, 2013. On August 5, 2014, the D.C. Circuit ruled in favor of the Commission, holding that ELF had no right to speak due to the connected PAC form being a purported "statutory artifact," and the purported fact that its connected organization, STII, "is already capable of sweeping solicitation" and "unrestrained" speech." App. 13a, 2a. The court dismissed the fact that ELF is a separate corporation with its own free speech rights, or that STII has a right *not* to speak, and even applied a lower level of scrutiny based on its belief that there no longer is a practical need to organize in this way. App. 10a ("this idiosyncratic and outmoded congressional arrangement is not deserving of the closest sort of scrutiny"). Thus, the court determined the constitutional political speech rights of an organization based on its wrongly-held belief that the organization's choice of form is not a practical vehicle for speech.

REASONS FOR GRANTING THE WRIT

This case presents critical issues for review on which the circuits are intractably divided. First, the circuits are divided on whether segregated non-contribution accounts sufficiently address any anticorruption rationale for limiting the non-contribution activities of hybrid PACs. Second, the circuits are divided on whether a disclosure interest—separate from its permissible use as a tool of anti-corruption in providing the electorate with information about the sources of election-related spending—justifies *restrictions* on hybrid PACs' non-contribution activities, and ultimately that of other organizational forms.

Moreover, the D.C. Circuit's decision conflicts with this Court's decision in *Citizens United* and others that the government cannot restrict political speech because of the speaker's organizational identity. Similarly, it conflicts with this Court's decision in *Citizens United* that non-contribution expenditures and their attendant fundraising activities do not implicate the anticorruption interest as a matter of law. Lastly, the D.C. Circuit's definition of the anticorruption interest to include within its rationale a disclosure interest runs directly counter to this Court's decision in *Citizens United* and others that the anticorruption interest is limited to *quid pro quo* corruption.

I. THE CIRCUITS ARE INTRACTABLY DIVIDED ON WHETHER A PAC THAT MAKES RESTRICTED DIRECT CONTRIBUTIONS MAY ENGAGE IN UNRESTRICTED NON-CONTRIBUTION ACTIVITIES WITH A SEPARATE ACCOUNT.

Citizens United resolved the right of corporations, unions, nonprofits, and other associations to make non-contribution expenditures without limits as to their source and amount. *Citizens United*, 558 U.S. at 345, 364-65. Courts after *Citizens United* then addressed the next logical question: whether limitations on contributions to organizations that make only non-contribution expenditures are constitutional. The courts uniformly responded by striking down such restrictions. *See Fund For La.'s Future* v. *La. Bd. of Ethics*, 2014 WL 1764781, at *7 (E.D. La. May 2, 2014) (cataloguing cases); *see also McCutcheon* v. *FEC*, 134 S.Ct. 1434, 1442 n.2 (2014) ("A 'Super PAC' is a PAC that makes only independent expenditures . . . . The base and aggregate limits govern contributions to traditional PACs, but not to independent expenditure PACs.").

Now, as recently forewarned by the Fifth Circuit, contributions designated for use in non-contribution expenditures by hybrid PACs to accounts restricted for that purpose "appears destined to be a coming campaign-finance law battleground." *Catholic Leadership Coalition*, 2014 WL 3930139, at *25. This case is that prediction realized.

The lines drawn by the circuits are twofold. First, the circuits are divided on whether the existence of a segregated non-contribution account eliminates the government's interest in preventing

actual or apparent corruption (the "anticorruption interest")—whether limited to *quid pro quo* corruption or broadly construed as including disclosure as held by the court below. *Compare Republican Party of N.M.* v. *King* ("*Republican Party of New Mexico*"), 741 F.3d 1089, 1097-1101 (10th Cir. 2013) *with Vt. Right to Life Comm., Inc.* v. *Sorrell* ("*Vermont Right to Life*"), 758 F.3d 118, 140-45 (2d Cir. July 2, 2014); *and Stop This Insanity*, App. 12-13a. Second, the circuits are divided on whether the disclosure interest justifies restrictions on hybrid PACs' non-contribution activities. *Compare Catholic Leadership Coalition*, 2014 WL 3930139, at *15-16 *and Ala. Democratic Conference* v. *Broussard* ("*Alabama Democratic Conference*"), 541 F. App'x 931, 933 (11th Cir. 2013) *with Stop This Insanity*, App. 12-13a.

A. The D.C. and Second Circuits Directly Conflict with the Fifth and Tenth Circuits on Whether Hybrid PACs Can Be Prohibited.

1. The D.C. Circuit's decision aligns with the Second Circuit in deepening a direct conflict with the Tenth Circuit's decision in *Republican Party of New Mexico* and the Fifth Circuit's decision in *Catholic Leadership Coalition* that laws capping contributions to non-contribution accounts of hybrid PACs and other restrictions are constitutionally impermissible.

The Tenth Circuit in *Republican Party of New Mexico* analyzed the constitutionality of state laws prohibiting the solicitation, contribution, and acceptance of funds greater than $5,000 to PACs—including hybrid PACs—that were designated for non-contribution expenditures. 741 F.3d at 1091.

Granting the plaintiffs' preliminary injunction, the court expressly rejected the district court's ruling in this case that a hybrid PAC's use of separate bank accounts for direct contributions and non-contribution expenditures was insufficient to overcome the appearance of *quid pro quo* corruption. *Id.* at 1101 ("*Stop This Insanity* does not offer a compelling rationale why combining two activities, neither of which by itself is corrupting, into a single entity suddenly increases the risk of real or apparent *quid pro quo corruption*.").

The court ruled that after *Citizens United*, a hybrid PAC's "direct contribution does not alter the non-coordinated nature of its *independent expenditures*; there still must be some attendant coordination with the candidate or political party to make corruption real or apparent." *Id.*[9] The court also reasoned that in any event, the government's anticorruption interest with respect to hybrid PACs was satisfied through both direct contribution limits and anti-coordination laws. *Id.* at 1097, 1101.

In its opinion, the Tenth Circuit also disagreed with the Eleventh Circuit's approach—in an unpublished disposition—of treating corruption as a fact based inquiry: "*Citizens United* did not treat corruption as a fact question to be resolved on a case-by-case basis. Instead, the Court considered whether

---

[9] *See also Lair* v. *Murry*, 871 F. Supp. 2d 1058, 1068 (D. Mont. 2012) (striking down state statute that prevented corporations from making contributions to hybrid PACs designated for independent expenditures); *Thalheimer* v. *City of San Diego*, 2012 WL 177414, at *13 (S.D. Cal. Jan. 20, 2012) (striking down contribution limit as it applied to contributions to hybrid PACs designated for independent expenditures).

independent speech is the type that poses a risk of *quid pro quo* corruption or the appearance thereof." *Id.* at 1096 n.4 (citing *Citizens United*, 558 U.S. at 360).[10] Further, the court rejected the Eleventh Circuit's suggestion that hybrid PACs could pose a unique risk of circumvention of individual contribution limits because that scenario "concerns only the control over the PAC's agenda. It does not affect the funds available in the PAC's hard-money account, which is subject to strict restrictions on the amount it may raise from a single donor and contribute to single candidate." *Id.* at 1102 n.9.

---

[10] The Eleventh Circuit, in *Alabama Democratic Conference* opinion, considered whether a ban on transfers between PACs was unconstitutional as applied to a hybrid PAC that wanted to receive funds from other PACs, which it would then deposit into a separate bank account used only for non-contribution expenditures. 541 F. App'x at 932. The court held that in the as-applied challenge, whether separate accounts eliminated all corruption concerns was a question of fact and the state had produced sufficient evidence below to withstand summary judgment and remanded the case. *Id.* at 934-36. In so holding, the court held at that stage of the proceedings, *Citizens United* did not render the law unconstitutional because "[i]n prohibiting limits on independent expenditures, *Citizens United* heavily emphasized the independent, non-coordinated nature of those expenditures, which alleviates concerns about corruption." *Id.* at 935. Thus, the court reasoned, "[w]hen an organization engages in independent expenditures as well as campaign contributions . . . its independence may be called into question and concerns of corruption may reappear. At the very least, the public may believe that corruption continues to exist, despite the use of separate bank accounts, because both accounts are controlled and can be coordinated by the same entity." *Id.*

Similarly, the Fifth Circuit in *Catholic Leadership Coalition* considered facial and as applied challenges to state laws banning a type of state PAC, which made both non-contribution expenditures and direct contributions, from exceeding $500 in contributions and expenditures until sixty days after it appointed a treasurer. *Id.* at *1-5. Relying primarily on *Citizens United* and *McCutcheon*, the court struck down the 60-day, 500-dollar limit because it did not directly combat corruption and rejected the state's arguments that it was properly tailored because interested speakers had other opportunities for speaking during the 60-day period. *Id.* at *14, *16-*18 & n.27. Similarly, the court held that whatever disclosure interest the state had, it was insufficient to justify the limitation. *Id.* at *15. The court also questioned if the D.C. Circuit's expansion of the anticorruption interest to include disclosure in this case "is permissible at all," but held that in any event, it was not properly tailored as the state could address any "loopholes" by strengthening its disclosure requirements. *Id.*

The Second Circuit went the other way. In *Vermont Right to Life*, the court analyzed an as-applied challenge to a state law setting a $2,000 limit on contributions to PACs from a single source in any two-year general election cycle. 758 F.3d at 139. After finding that the PAC was a de facto hybrid PAC and not a true independent expenditure only PAC because it was enmeshed financially and organizationally with another PAC that made direct contributions,[11] the court, citing the district court's

---

[11] *But see N. Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274 (4th Cir. 2008). In *Leake*, the Fourth Circuit rejected the state's

opinion here, held that restrictions on *all* hybrid PACs could be justified because having separate accounts, while potentially relevant, "does not prevent *coordinated* expenditures—whereby funds are spent in coordination with the candidate." 758 F.3d at 141, 145.

The D.C. Circuit's decision below similarly held that restrictions on solicitations and contributions can validly prohibit a PAC from creating a non-contribution account. The court reasoned that the decision to form a connected PAC subject to these restrictions was purely voluntary and an attempt to avoid disclosure requirements. App. 8-10a; *see also* App. 5a, 12a. Conflating the rights of STII and ELF, it also asserted that nothing prevented STII from speaking on ELF's behalf or restricted amount or manner in which STII could spend money. App. 7-8a, 11a.

2. In the process, the D.C. Circuit's decision resulted in a second circuit split. The decision conflicts with the Fifth Circuit's holding in *Catholic Leadership Coalition*, and the Eleventh Circuit's ruling in *Alabama Democratic Conference* that the disclosure interest cannot justify restrictions on

---

similar argument that a PAC was not actually an independent expenditure committee because it was "closely intertwined" with related PACs. Rather, even if it "share[s] staff and facilities with its sister and parent entities, it is independent as a matter of law." *Id.* at 294 n.8. The court also recognized that the state was essentially requesting it to pierce the corporate veil, but it "decline[d] to do so particularly absent any evidence that the plaintiffs are abusing their legal forms or any legal authority that considers [political committees] and their sponsoring corporation as identical entities." *Id.* (quotation and marks omitted).

funds given to hybrid PACs for non-contribution expenditures. *See* App. 12-13a.

The district court here had relied on Justice Stevens's dissent in *Citizen's United* to find that the anti-corruption interest justified the restrictions at issue here. App. 47a, 55-56a. The Commission itself abandoned that rationale on appeal, instead arguing that the disclosure interest justified restrictions on solicitation and contributions. The D.C. Circuit agreed, ruling in direct conflict with this court that "the evolving technological and political landscape has altered the scope of the anticorruption interest" such that it is not so "anemic" as to be limited to *quid pro quo* corruption. App. 12a. It then characterized *McCutcheon* as "intimat[ing] disclosure is an obvious antidote to the anticorruption rationale," and defined that rationale with unprecedented breadth in holding that the disclosure interest falls within it. *See* App. 12a.

Using this newly fashioned interest, the court justified restrictions on ELF's non-contribution activities because striking them down would "stifle the government's ability to achieve [its] endeavor" in "protecting the First Amendment rights of the public to know the identity of those who seek to influence their vote." App. 13-14a. But that reasoning stood against the Eleventh Circuit's in its unpublished disposition. *Alabama Democratic Conference*, 541 F. App'x at 933 (this Court only has upheld disclosure requirements because they are "a less restrictive alternative to more comprehensive regulations of speech" and "has never held that a government interest in transparency is sufficient to justify limits on contributions or expenditures."). And the Fifth Circuit followed suit, in its precedential decision,

expressly disagreeing with the D.C. Circuit's reasoning on the disclosure interest here. *Catholic Leadership Coalition*, 2014 WL 3930139, at *15.

In sum, fundamental disagreements exist among at least four circuits regarding the constitutionality of restrictions on hybrid PACs' non-contribution activities. This level of uncertainty and patchwork constitutional protections for core political speech across the circuits confirm the urgent need for this Court's intervention.

B. The Anticorruption And Disclosure Interests Do Not Justify Restricting Non-coordinated Spending And Soliciting For Non-Contribution Expenditures.

Citizens United and *McCutcheon* clarified that there is only one governmental interest that may justify restrictions on political speech in connection with the campaign finance regime: preventing the appearance of, or actual, *quid pro quo* corruption. *Citizens United*, 558 U.S. at 359; *McCutcheon*, 134 S.Ct. at 1450-51. Mere ingratiation and access do not suffice. *Citizens United*, 558 U.S. at 359-60; *McCutcheon*, 134 S.Ct. at 1441, 1452. In distinguishing between impermissible *quid pro quo* corruption and mere ingratiation and access, the First Amendment dictates that any uncertainty be resolved in favor of protecting political speech rather than suppressing it. *McCutcheon*, 134 S.Ct. at 1451. And this Court has "consistently rejected attempts to suppress campaign speech based on other legislative objectives." *Id.* at 1450.

In *Citizens United*, the Court was unequivocal that independent expenditures are by definition not

coordinated with candidates and as a matter of law cannot lead to the appearance of *quid pro quo* corruption. *Id.* at 357, 360; *see also Am. Tradition P'ship*, v. *Bullock*, 132 S.Ct. 2490, 2491 (2012) (striking down a state law banning corporations from making expenditures in connection with a candidate or a political committee that supports or opposes a candidate or political party).

Under the logic of *Citizens United*, it follows—as even the Commission has recognized[12]—that (1) soliciting, receiving, and spending money to make non-contribution expenditures, while (2) independently making direct candidate contributions from a separate account that is separately funded and subject to amount and source restrictions does not risk the appearance of, or actual, *quid pro quo* corruption beyond the scope of the direct contributions themselves.

But any risk of *quid pro quo* corruption posed by the direct contributions already is resolved by the direct contribution limits, anti-coordination laws, and anti-bribery laws. *See Republican Party of New Mexico*, 741 F.3d at 1101 ("combining two activities, neither of which by itself is corrupting, into a single entity [does not] suddenly increase the risk of real or

---

12 Under current FEC enforcement policy, non-connected political committees and non-profit entities may engage in unrestricted independent expenditures and [for non-connected political committees] restricted direct contributions so long as they use separate accounts. *See, e.g.*, FEC STATEMENT ON *CAREY* V. *FEC*, *supra* note 2; Explanation and Justification for Final Rules on Funds Received in Response to Solicitations, 75 Fed. Reg. 13223, 13224 (Mar. 19, 2010).

apparent *quid pro quo* corruption"). Indeed, the direct contribution limits themselves are merely a prophylactic measure "because few if any contributions to candidates will involve *quid pro quo* arrangement." *McCutcheon*, 134 S.Ct. at 1458 (quoting *Citizens United*, 558 U.S. at 357). Thus, restricting non-contribution activities on top of these laws stacks prophylaxis-upon-prophylaxis.

Similarly, to the extent that the government's interest in preventing corruption also can encompass regulations that prevent circumvention of laws that prevent corruption—*e.g.*, contribution limits—the segregated bank accounts,[13] their attendant accounting requirements, and the other reporting requirements for PACs ensure that contributions designated for non-contribution activities will be used accordingly.[14]

And once shorn of an anticorruption justification, there is no constitutionally sufficient interest in abridging a hybrid PAC's non-contribution activities.

The disclosure interest fares no better in justifying restrictions on political speech. Although the D.C. Circuit is correct that the Court in *McCutcheon* recognized that disclosure requirements may "deter actual corruption and avoid the appearance of corruption by exposing large

---

13 Indeed, this Court in *McCutcheon* proposed segregated, nontransferable accounts as an alternative to restricting direct contributions through aggregate limits. *Id.* at 1458.

14 Moreover, the restrictions are not narrowly tailored to any anti-circumvention corruption interest because multiple alternatives exist that do not stifle a hybrid PACs non-contribution activities. *See id.* (detailing alternatives that are less restrictive than aggregate limits on direct contributions).

contributions and expenditures to the light of publicity," 134 S.Ct. at 1459-60 (quotation and marks omitted), it did not hold that these financial transactions *must* be publicly disclosed—only that disclosure may be adequate and is a constitutionally permissible means to achieve the anti-corruption interest. Nor did it come close to suggesting that minor disclosure exemptions somehow justify otherwise-unconstitutional restrictions on political speech.

The Court has sanctioned disclosure requirements *because* they are "a less restrictive alternative to flat bans on certain types or quantities of speech" and "do not impose a ceiling on speech." *Id.*; *Citizens United*, 558 U.S. at 369. *See also Catholic Leadership Coalition*, 2014 WL 3930139, at *15 n.25 & 26 (questioning the permissibility of the D.C. Circuit's efforts to link disclosure requirements to the anticorruption interest and recognizing that disclosure laws "are generally meant to be an *alternative* to, and not necessarily a justification for, the firm limits on political speech set by expenditure limits). Indeed, the Court appears to have never held that it is constitutionally permissible to restrict contributions or expenditures simply by failing to require disclosure.

To the contrary, in *Citizens Against Rent Control* v. *Berkley*, 454 U.S. 290 (1981), this Court rejected the government's assertion that an ordinance limiting contributions to PACs formed to support or oppose ballot measures submitted to the public was necessary as a prophylactic measure to make known the identity of supporters and opponents of the measures. *Id.* at 298-99. The Court reasoned: "The integrity of the political system will be adequately

protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions." *Id.* at 299-300. Accordingly, because there was "no significant state or public interest in curtailing debate and discussion of a ballot measure," the "limits on contributions which in turn limit[ed] expenditures plainly impair[ed] freedom of expression" and were struck down. *Id.*

In any event, the restrictions here are asymmetrical to whatever merit a purported disclosure interest has in abridging ELF's speech as applied. The only thing ELF need not report are the operating costs STII may pay on its behalf with regard to its direct contribution activities.[15] But STII already discloses its entire operating budget, as a 501(c)(4) nonprofit corporation, to the IRS on its annual form 990 or related forms. Every other dollar received or disbursed in any way by ELF is disclosed. Indeed, ELF must report its non-contribution expenditures like all other PACs. And like the regulatory scheme at issue in *Citizens Against Rent Control*, ELF must disclose contributions it receives over $200, including contributor name, address, occupation, and name of employer. *See* 11 C.F.R. § 104.3; 11 C.F.R. § 114.5. *See also Citizens United*, 558 U.S. at 338 (detailing some of the disclosures connected PACs must make). Likewise, the connected organization's identity always is disclosed.

---

[15] ELF does not assert that payments by STII for costs to solicit the general public for its non-contribution account and activities are necessarily within the scope of the exemption to the definition of "contribution;" a determination properly left to the Court.

ELF—like all connected PACs—is required to use the connected organization's name within its own name. *See* 11 C.F.R. § 102.14(c).

That ELF must disclose the names of its contributors exposes that the D.C. Circuit's reliance on a purported disclosure interest is critically flawed. STII, as a 501(c)(4) nonprofit corporation, can accept unlimited amounts of donations but is not required to publicly disclose its donors. The Court recently recognized this very point in *McCutcheon*: "The existing aggregate limits may in fact encourage the movement of money away from entities subject to disclosure . . . . Individuals can, for example, contribute unlimited amounts to 501(c) organizations, which are not required to publicly disclose their donors." 134 S.Ct. at 1460 (citing 26 U.S.C. § 6104(d)(3)).

Thus, the D.C. Circuit's justification of the restrictions based on a disclosure interest and its admonishments that "[i]f the Fund wants to solicit freely, it must do so in the light" rings hollow. "Rhetoric ought not obscure reality." *Citizens United*, 558 U.S. at 355.

II. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *CITIZENS UNITED* THAT THE FIRST AMENDMENT PROHIBITS POLITICAL SPEECH RESTRICTIONS BASED ON ORGANIZATIONAL FORM.

Citizens United is unequivocal in establishing that the government cannot impose speech-based restrictions because the speaker is an association rather than a corporation, a union, or an individual. *Id.* at 342-43; *First Nat'l Bank of Boston* v. *Bellotti*,

435 U.S. 765, 777 (1978) ("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."). Put simply, after *Citizens United*, the government cannot penalize "certain disfavored associations of citizens" because they opt for a particular organizational form. 558 U.S. at 356.[16]

These principles extend to connected PACs like ELF, which is simply a collection of STII's employees grouping together seeking to engage in political speech separately from STII and independently from any candidates or political parties. *See* § 30101(4) (defining political committee).

The D.C. Circuit, however, wrongly refused to apply *Citizens United* to this case. First, the court distinguished *Citizens United* by conflating ELF's separate speech rights with those of STII. *See* App. 7-8a (holding that *Citizens United* is inapposite because "[n]othing prevents the corporation from speaking on behalf of the PAC; in fact the regulatory scheme specifically provides for such activity, albeit with strings attached"). This is flat wrong.[17]

---

16 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.*at 341 (cataloguing cases).

17 The court also characterized *Citizens United* as "indicat[ing] these segregated funds were capable of speaking not unduly restrained by their various obligations" and that it never "suggest[ed] the statutory scheme for segregated funds 'muzzled' their speech." App. 6-7a. That this Court did not overturn the restrictions on connected PACs, however, is not

In *Citizens United*, this Court expressly recognized that a connected PAC is a separate association, distinct from its connected organization. 558 U.S. at 337 ("A PAC is a separate association from the corporation."). Thus, the connected PAC's speech rights could not be imputed to its connected organization. *Id.* (the connected PAC's "exemption from [§30118's] expenditure ban . . . does not allow corporations to speak"). And contrary to the D.C. Circuit's characterization of ELF and STII as "two parts of the same whole," *see* App.11a, they are not.

Despite the D.C. Circuit's skepticism that ELF has "a distinct set of constitutional protections attendant to it," *id.*, this Court has regularly reminded the lower courts that organizations such as connected PACs have First Amendment rights to engage in political speech. *See, e.g.*, *Citizens United*, 558 U.S. at 343; *see also Catholic Leadership Coalition*, 2014 WL 3930139, at *16 n.27. Indeed, the Court has expressly rejected the notion that a connected PAC's "form of organization or method of solicitation diminishes [its] entitlement to First Amendment protection." *FEC* v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985).

Further, the D.C. Circuit's reliance on the fact that STII "begot the fund" and does not exist wholly

---

because it found them constitutionally permissible; rather, the restrictions on Citizens United's speech was the particular burden on political speech that the Court faced in *Citizens United*. *See Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2820 (2011) (rejecting Arizona's attempt to distinguish *Davis* because "the reach of that opinion is limited to asymmetrical contribution limits. It is because that was the particular burden on candidate speech we faced in *Davis*.").

independent from STII could have dangerous, wide-ranging implications. Under its reasoning, the government could restrict the speech of wholly-owned subsidiaries of corporations because they do not exist separately from the control of the company that owns them. And no PAC or other association of individuals can exist separately from the desire of its contributors to speak. That STII may pay for ELF's administrative and solicitation costs does not transform ELF into a mere conduit for STII's own speech.

Therefore, it is irrelevant whether STII chooses to speak, how much it chooses to speak, or why it chooses to speak or not speak. STII is a separate organization, and its ability to speak is no more justification for restricting ELF's speech as does the right to speak of any other company, person, or organization.[18]

The D.C. Circuit's second reason for finding *Citizens United* inapposite fares no better. Specifically, it refused to sanction what it

---

[18] In any event, STII does not want to speak and it should not be forced to do so. Its 501(c)(4) status was pending for more than three years during the time this case arose, which overlapped with the IRS scandal that occurred from May 2012 through 2013, and is ongoing. *See, e.g.*, Richard Rubin, *Big-Money Politics Groups Get Clarity From IRS They Hate*, BLOOMBERG, http://www.bloomberg.com/news/2014-02-19/big-money-politics-groups-get-clarity-from-irs-they-hate.html. And now, as a 501(c)(4), it is subject to amorphous and confusing rules about how much political speech it may make before it risks losing its exempt status. *See, e.g.*, DANIEL WERFEL, IRS, CHARTING A PATH FORWARD AT THE IRS: INITIAL ASSESSMENT AND PLAN OF ACTION 22, 24-25 (June 24, 2013), http://online.wsj.com/public/resources/documents/IRS_InitialAssessmentAndPlanOfAction-2013.pdf.

characterized as the "illogical conclusion" that *Citizens United* permits STII and its employees' to "do things the hard way"—namely, that instead of forming a non-connected PAC, they voluntarily choose a connected PAC despite knowing that subsidization of their operating costs would require them to trade their speech rights. App.8-9a.

Citizens United is not inapposite merely because STII and its employees had the idea to form a connected PAC. Connected PACs 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. Rather, the court's reasoning otherwise is based on two flawed premises: (1) that Congress's grant of an exemption enables it to require fundamental speech rights as the "trade-off"; and (2) the availability of other avenues of speech for an association's constituent parts excuses the imposition of an unconstitutional speech burden.

Connected PACs are, to be sure, given a statutory exemption that Congress is under no obligation to confer. But so too are other associations and private individuals given all sorts of special advantages that the government need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies. *See Austin* v. *Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting). And if the disclosure exemption creates an unfair advantage or something that "no political action committee has," s*ee* App. 10a, it is Congress's role, not the Judiciary's, to eliminate the "advantage" through methods that do not unnecessarily abridge the fundamental rights to

speech and association to which connected PACs and their contributors are entitled. *See McCutcheon*, 134 S.Ct. at 1458 ("If Congress agrees that [the ability of party committees to transfer money freely] is problematic, it might tighten its permissive transfer rules. Doing so would impose a lesser burden on First Amendment rights, as compared to aggregate limits that flatly ban contributions beyond certain levels.").

It is a bedrock constitutional principle that the government cannot exact as the price of a benefit the forfeiture of First Amendment rights. *Citizens United*, 558 U.S. at 351 (internal quotation marks omitted). *See also Catholic Leadership Coalition*, 2014 WL 3930139, *16 n. 27 (rejecting the state's argument that because it grants special privileges to certain types of PACs, it may regulate them as it pleases without speech restrictions having to withstand constitutional scrutiny). But that is exactly the effect of the D.C. Circuit's decision. Congress has not yet changed disclosure requirements for connected PACs in light of *Citizens United*. But such Congressional inaction cannot justify the continued unconstitutional suppression of ELF's independent speech.

Importantly, under the D.C. Circuit's logic, the government could simply undo *Citizens United* and restrict the speech of corporations, labor unions, non-connected PACs and non-profit entities simply by granting even minor disclosure exemptions. If the government can strip constitutional rights by granting purportedly offsetting statutory benefits, no speaker is safe from Congress's generosity.

Second, under *Citizens United* and others, the availability of other avenues of speech for an association's constituent parts does not excuse the imposition of an unconstitutional burden on organizations wanting to engage in speech. *See, e.g.*, *Spence* v. *Washington*, 418 U.S. 405, 411, n.4 (1974) *(per curiam)* (Although a prohibition's effect may be "'minuscule and trifling,'" a person "'is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place'") (quotation omitted). Indeed, at the time *Citizens United* was decided, the Citizens United organization operated a connected PAC for a decade and made candidate contributions. But this did not prevent the Court from implicitly rejecting Justice Stevens' 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." 558 U.S. at 419 (Stevens, J., dissenting). *See also McConnell* v. *FEC,* 540 U.S. 93, 256 (2003) (Scalia, J., dissenting) (banning newspapers' use of the partnership form "would be an obvious violation of the First Amendment, and it is incomprehensible why the conclusion should change when what is at issue is the pooling of funds for the most important (and most perennially threatened) category of speech: electoral speech"); *Tex. for Free Enter.* v. *Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (rejecting state's argument that "corporations have plenty of other opportunities for speech—they may speak themselves or create their own independent PACs" because this Court has expressly rejected that line of

reasoning (citing *Citizens United*, 558 U.S. at 357)). The Act's limitations on connected PACs must rise and fall on their own merits.

III. THIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE THAT SHOULD BE SETTLED BY THIS COURT.

1. Connected PACs are a major avenue for political speech. Thus, the question of what restrictions on them are constitutionally allowable is exceptionally important. As of June 30, 2014, of the 5,618 PACs registered with the FEC, 3,042—over 54%—are connected PACs.[19] So, far from a "vintage relic," App. 6a, this case presents relevant issues for more than half of the federally-registered PACs in existence today and any ruling by this Court will impact the thousands of PACs that hold this form.

Even if true, the D.C. Circuit's characterization of connected PACs as "the hard way" of engaging in associational political speech because they "are no longer necessary for independent expenditures," App. 6a, also does not dilute their entitlement to protection under the First Amendment. That STII's employees voluntarily chose to organize ELF as a connected PAC is not "doing things the hard way." It is doing things the "legal and congressionally sanctioned way." Their choice of that available mode of expression is still protected: the First Amendment mandates that "citizens must be able to discuss

---

19 *See* FEC, PAC Count – 1974 to Present, http://www.fec.gov/press/resources/paccount.shtml (last visited Sept. 28, 2014). In contrast, only 1,701 are Non-connected PACs, 796 are Independent Expenditure-Only PACs (Super PACs), and 79 are Non-connected PACs with Non-contribution accounts.

issues, great or small, through the means of expression they deem best suited to their purpose." *Hill* v. *Colorado*, 530 U.S. 703, 781 (2000); *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 790–791 (1988); *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988).

And necessary or not, connected PACs exist. Even if the lowly connected PAC organizational form is utilized, the association has political speech rights after *Citizens United* that cannot be infringed upon for naught. And after *Citizens United*, "any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority." *See* 558 U.S. at 326.

2. Without the Court's intervention, there is no clear answer as to whether laws that burden the non-contribution activities of these hybrid PACs are constitutional. The deadlock in the circuits—both on the constitutionality of restrictions on hybrid PACs non-contribution activities and on the sufficiency of the disclosure interest—is clear evidence of the confusion.

Further, currently, at least 15 states allow some form of a hybrid PAC, and the Commission similarly has consented to non-connected PACs making both restricted direct contributions and unrestricted non-contribution expenditures from separate segregated accounts. [20] Absent clarity from this court, improper interpretation will continue to chill, or risk chilling,

---

[20] These include Texas, New Mexico, Alabama, California, Delaware, Maine, Minnesota, Mississippi, Missouri, Montana, New Jersey, North Dakota, Oregon, Utah, and Virginia.

this most fundamental speech. *See Citizens United*, 333-34; *see also U.S.* v. *Congress of Indus. Orgs.*, 335 U.S. 106, 139-40 (1948) (Rutledge, J., concurring) ("when regulation or prohibition touches [the making of political contributions and expenditures], this Court is duty bound to examine the restrictions and to decide in its own independent judgment whether they are abridged within the Amendment's meaning. That office cannot be surrendered to legislative judgment, however weighty").

3. Lastly, the rights at issue here are of the utmost importance, necessitating the Court's intervention. It is unassailable that political speech is the primary object of First Amendment protection. *See, e.g.*, *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). And "[b]ecause the FEC's business is to censor, there inheres the danger that [it] may well be less responsive than a court . . . to the constitutionally protected interests in free expression.'" *Citizens United*, 558 U.S. at 355 (quoting *Freedman* v. *Maryland,* 380 U.S. 51, 57-58 (1965)). ELF 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 an appropriately tailored restriction that furthers a sufficient government interest.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

PATRICIA E. ROBERTS
WILLIAM & MARY LAW SCHOOL APPELLATE AND SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

DAN BACKER
DB CAPITOL STRATEGIES PLLC
203 South Union Street
Suite 300
Alexandria, VA 22314
Telephone: 202-210-5431

TILLMAN J. BRECKENRIDGE*
TARA A. BRENNAN
REED SMITH LLP
1301 K Street, NW
Washington, DC 20005
Telephone: 202-414-9200
Facsimile: 202-414-9299
tbreckenridge@reedsmith.com

*Counsel of Record

Counsel for Petitioner