ORAL ARGUMENT SCHEDULED FOR FEBRUARY 23, 2016

No. 15-5264

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PURSUING AMERICA'S GREATNESS,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), appellee the Federal Election Commission submits this Certificate as to Parties, Rulings, and Related Cases.

(A) Parties and Amici. Pursuing America's Greatness ("PAG") is the plaintiff before the district court and is the appellant in this Court. The Federal Election Commission ("Commission") is the defendant before the district court and is the appellee in this Court. The Pacific Legal Foundation and James Madison Center for Free Speech have filed an amicus brief in support of PAG in this Court.

(B) Rulings Under Review. PAG appeals the September 24, 2015 Memorandum Opinion and Order of the Honorable Tanya S. Chutkan of the United States District Court for the District of Columbia denying PAG's motion for a preliminary injunction. The Memorandum Opinion is reported at ___ F. Supp. 3d ___, 2015 WL 5675428 (D.D.C. Sept. 24, 2015). A copy of the slip opinion is included in the Joint Appendix at pages J.A. 258-91.

(C) Related Cases. The Commission knows of no related cases. *Stop Hillary PAC v. FEC*, No. 15-1208 (E.D. Va.), identified in PAG's Certificate as to Parties, Rulings, and Related Cases, is not a related case under Circuit Rule 28(a)(1)(C), as PAG acknowledges, because it is not currently pending before the Fourth Circuit Court of Appeals.

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GLOSSARY

Administrative Procedure Act	=	APA
CAP Advisory Opinion	=	Federal Election Commission's Advisory Opinion 2015-04 (Collective Actions PAC)
FEC	=	Federal Election Commission
FECA or Act	=	Federal Election Campaign Act
J.A.	=	Joint Appendix
PAG	=	Pursuing America's Greatness
PAG's Br.	=	Appellant Pursuing America's Greatness's Opening Brief

COUNTERSTATEMENT OF JURISDICTION

The district court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 706. On September 24, 2015, the district court denied Pursuing America's Greatness's ("PAG") motion for a preliminary injunction. (J.A. 258-91.) PAG filed a timely notice of appeal on September 28, 2015. (J.A. 296.) This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the district court abused its discretion or otherwise erred in denying PAG's motion for a preliminary injunction in light of PAG's failure to demonstrate that it was likely to succeed on the merits of its claims, that it will be irreparably injured absent an injunction, that the balance of equities favored granting the injunction, and that an injunction would be in the public interest.

APPLICABLE STATUTES AND REGULATIONS

All applicable statutory provisions and regulations are contained in the Brief for PAG at pp. 3-12 of the Addendum.

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Election Commission

The Federal Election Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly

enforce the Federal Election Campaign Act ("FECA" or "Act"), 52 U.S.C. §§ 30101-30146. The Commission is specifically empowered to "formulate policy" with respect to the Act, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," *id.* § 30107(a)(8); to issue advisory opinions construing the Act, *id.* §§ 30107(a)(7), 30108; and to civilly enforce the Act, *id.* § 30109. By statute, no more than three of the FEC's six Commissioners may be members of the same political party, and at least four votes are required for certain Commission actions, including, *inter alia*, rendering advisory opinions and developing and amending rules to implement FECA. *Id.* § 30106(a)(1), (c); *id.* § 30107(a)(7), (8).

B. FECA's Name Identification Requirement

For thirty-five years, FECA has contained a name identification requirement compelling political committees to disclose, within very broad boundaries, whether they speak on behalf of a particular candidate or candidates. Under the Act, each candidate for federal office (other than a nominee for Vice President) is required to "designate in writing a political committee . . . to serve as the principal campaign committee of such candidate" within "15 days after becoming a candidate." 52 U.S.C. § 30102(e)(1). Candidates may also designate other "authorized" committees. *Id.* An "authorized committee" is "the principal campaign committee

or any other political committee authorized by a candidate . . . to receive contributions or make expenditures on behalf of such candidate." *Id.* § 30101(6).

Given this central focus of the statutory framework on disclosing whether a political committee is speaking on behalf of a candidate, Congress mandated that, if a political committee is an authorized committee — *i.e.*, it is a principal campaign committee or another authorized committee — then its name "shall include the name of the candidate who authorized" it. 52 U.S.C. § 30102(e)(4). And for the same reason, the statute correspondingly provides that "any political committee which is not an authorized committee . . . shall not include the name of any candidate in its name." *Id.* The names "Huckabee for President, Inc." and "Pursuing America's Greatness" thus convey that while the former is an authorized committee of Mr. Huckabee, the latter is not.

When Congress added the name identification provision to the Act in 1980, it did so premised on the specific experience of the agency charged with administering the Act. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 102, 93 Stat. 1339, 1346 (1980). Based on its past experience, the FEC had alerted Congress that "in some cases, it is difficult to determine which candidate a principal campaign committee supports. In such cases the committee name does not contain the candidate's name as, for example, 'Good Government Committee' or 'Spirit of '76.'" *Federal Election Campaign Act Amendments,*

1979: Hearing Before the Senate Comm. on Rules and Administration, 96th Cong., 1st Sess. 23 (1979) (FEC's Legislative Recommendations) (Appendix to Statement of Robert Tiernan, Chairman of the FEC). "In order to avoid confusion," the Commission recommended that Congress amend FECA to "require [that] the name of [a] principal campaign committee . . . include in its name the name of the candidate which designated the committee." *Id.*; *see Common Cause v. FEC*, 842 F.2d 436, 445-46 (D.C. Cir. 1988) (quoting same).

After Congress enacted the provision, now codified at 52 U.S.C. § 30102(e)(4),[1] the FEC largely echoed the statutory provision in its implementing regulation, but carved out exceptions for unauthorized "delegate" and "draft" committees. 11 C.F.R. § 102.14(a)-(b) (1980). Delegate committees are groups solely dedicated to "influencing the selection of one or more delegates to a national nominating convention." 11 C.F.R. § 100.5(e)(5). Draft committees are groups solely established "to draft an individual or to encourage him or her to become a candidate." *Id.* § 102.14(b)(2).

C. *Common Cause v. FEC*

In 1988, this Court considered whether the FEC had acted "contrary to law," 52 U.S.C. § 30109(a)(8)(C), in declining to pursue allegations that several

[1] Effective September 1, 2014, the provisions of FECA formerly codified in Title 2 of the United States Code were recodified in Title 52. Section 30102(e)(4) was previously codified as 2 U.S.C. § 432(e)(4).

unauthorized political committees had violated section 30102(e)(4)'s name identification requirement. "[T]he evidence showed that in several campaign communications the unauthorized committees included the name of candidate [Ronald] Reagan in letterheads and return addresses and, in some of the communications, asked for contributions with checks made payable to accounts bearing Reagan's name." *Common Cause*, 842 F.2d at 439.

In evaluating the Commission's argument that "'name' in [§ 30102(e)(4)] . . . refer[s] only to the official or formal name under which a political committee must register," against Common Cause's interpretation that "'name' . . . does not mean only the officially registered 'name' of a political committee but rather *any* title under which such a committee holds itself out to the public for solicitation or propagandizing purposes," the Court addressed the purpose of the name identification provision. *Common Cause*, 842 F.2d at 440-41. "[S]ubsection (e)(4)," it explained, "serves, in conjunction with § [30120]" — requiring committees to state whether certain communications are authorized or not — to "clarify[] for readers and potential contributors the candidate authorization status of the political committees who sponsor advertisements and fund solicitations." *Id.* at 442; 52 U.S.C. § 30120.

The Court found that although the FEC's view "obviously comport[ed] with the plain language of § [30102(e)(4)]," Common Cause's interpretation "could also

be accommodated within the provision's literal language." *Common Cause*, 842 F.2d at 440-41. It then analyzed the legislative history of section 30102(e)(4), concluding that there was "little" in that history which "explicitly touches on the precise scope of § [30102(e)(4)'s] candidate name provision." *Id.* at 447. Ultimately, the Court concluded that the provision was ambiguous and deferred to the agency's interpretation, explaining that the FEC's interpretation of FECA is a context "particularly appropriate" for deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* at 448 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)).

Then-Circuit Judge Ruth Bader Ginsburg dissented in part from the decision. In her view, a narrow interpretation of FECA's name identification provision "defie[d] common sense and [would] foster[] the very confusion Congress sought to prevent when it decreed" that a "'political committee which is not an authorized committee shall not include the name of any candidate in its name.'" *Id.* at 451 (R.B. Ginsburg, J., dissenting in part) (quoting section 30102(e)(4)). Then-Judge Ginsburg explained that because of the "overriding and unambiguous legislative purpose 'to avoid confusion,' . . . 'name' for § [30102(e)(4)] purposes must mean whatever name a committee presents to the public for identification, and not simply the committee's formal, registered name." *Id.* Her opinion contended that confusing naming practices by the subject committees and actual confusion by

"[e]ven the politically astute" was "abundantly documented in the record." *Id.* at 452. It concluded that "[s]ensibly and purposively construed, the § [30102(e)(4)] prohibition covers not only the formal, registered name . . . , but also the name the committee actually uses to identify itself in communications with the public." *Id.*

D. The Commission's Revisions of 11 C.F.R. § 102.14

Following the *Common Cause* decision, the Commission found that "the use of candidate names in the titles of projects or other unauthorized communications [was] increasingly becom[ing] a device for unauthorized committees to raise funds or disseminate information." FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees*, 57 Fed. Reg. 31,424, 31,424 (July 15, 1992) ("1992 Rule"). Explaining that circumstances in the early 1990s "differ[ed] significantly from that of the early 1980's," the FEC chose to revise its regulation implementing the Act's name identification, 11 C.F.R. § 102.14, through two notice-and-comment rulemakings.

First, in 1992, the Commission revised subsection 102.14(a) to provide that "'name'" for purposes of the regulation "includes any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation." 1992 Rule, 57 Fed. Reg. at 31,426.

Two years later, after further experience, the FEC revised subsection 102.14(b) to add a third exception to the existing ones for draft and delegate committees, providing that "[a]n unauthorized political committee may include the name of a candidate in the title of a special project name or other communication if the title clearly and unambiguously shows opposition to the named candidate." FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees*, 59 Fed. Reg. 17,267, 17,269 (Apr. 12, 1994) ("1994 Rule"). The FEC recognized "that the potential for fraud and abuse is significantly reduced" where a candidate's name is used in a project name clearly and unambiguously opposing that candidate. *Id.*

The Commission modified subsection 102.14(a) because of its "increasing[] concern[s] over the possibility for confusion or abuse" under the original (1980) version of the regulation upheld by this Court in *Common Cause*. 1994 Rule, 59 Fed. Reg. at 17,268. Based on the rulemaking records, which contained "substantial evidence that potential contributors often confuse an unauthorized committee's registered name with the names of its fundraising projects," *id.*, the FEC found that "the potential for confusion is equally great in all types of committee communications," not merely solicitations, 1992 Rule, 57 Fed. Reg. at 31,425. It rejected the idea of limiting the issue to the fundraising context by focusing only on "check payees" as "proposed in the NPRM," among other

proposals. *Id.* In explaining the revised rule, the FEC emphasized that "[u]nauthorized committees remain free to discuss candidates . . . and to use candidates' names as frequently, and highlight them as prominently (in terms of size, typeface, location, and so forth) as they choose." 1994 Rule, 59 Fed. Reg. at 17,268-69. "In other words, while a committee could not establish a fundraising project called 'Citizens for Doe,' if Doe is a federal candidate, it could use a subheading such as 'Help Us Elect Doe to Federal Office,' and urge Doe's election, by name, in large, highlighted type, throughout the communication." *Id.* at 17,269.

E. The FEC's Application of the Name Identification Requirement

A number of FEC advisory opinions and enforcement matters under review ("MURs") demonstrate the Commission's application of the name identification requirement. In 1995, in response to an advisory opinion request from an unauthorized committee named "NewtWatch PAC," the FEC explained that although "NewtWatch" could not be used as part of the committee's name because it clearly conveyed the identity of then-Speaker Newt Gingrich, "the Act and Commission regulations do not prohibit the Committee from using the name 'NewtWatch' as a project name" under the opposition exception it created in 1994. FEC Advisory Op. 1995-09 (NewtWatch PAC), 1995 WL 247474, at *5 (Apr. 21,

1995). The committee had also used NewtWatch in its website's uniform resource locator ("URL"). *Id.* at *1.

Since the NewtWatch advisory opinion, the FEC has issued a number of other advisory opinions and proceeded on various MURs applying the name identification requirement. For example, in FEC Advisory Opinion 2013-13 (Freshman Hold'em JFC), the agency concluded that a joint fundraising committee could not use the name "Freshman Hold'em JFC" due to the failure to include the names of the candidates who had authorized it. 2013 WL 6094229, at *1-2 (Nov. 14, 2013). In MUR 5889 (Republicans for Trauner), the FEC found that an unauthorized committee had violated, *inter alia*, the name prohibition by including the name of Gary Trauner, a candidate for Congress, in its name and entered into a conciliation agreement requiring the committee to pay a civil penalty and cease and desist from further violations. FEC, MUR 5889 (Republicans for Trauner), Conciliation Agreement at 2, 8 (2007), http://eqs.fec.gov/eqsdocsMUR/0000677E.pdf. In MUR 6399 (Yoder for Congress), the Commission voted 2-3 on whether to find "reason to believe" on a matter in which an *authorized* candidate's committee used the candidate's *opponent's* name in the URL of its website. FEC, MUR 6399, Certification at 1 (Apr. 28, 2011), http://eqs.fec.gov/eqsdocsMUR/11044292473.pdf. Because the

Commission lacked the required four votes to proceed, it dismissed the matter. *Id.* at 2.[2]

More recently, in Advisory Opinion 2015-04 (Collective Actions PAC), 2015 WL 4480266 (July 16, 2015) ("CAP Advisory Opinion"), the FEC unanimously concluded that Collective Actions PAC, an unauthorized political committee, could not use 2016 presidential candidate Bernie Sanders's name in the names or URLs of its websites or social media pages that failed to clearly express opposition to Senator Sanders. (J.A. 14.) Although the committee did not intend to solicit donations to itself, the FEC explained that it had "specifically considered and rejected" this proposed fundraising "distinction" in 1992: "When the Commission revised the definition of 'name' . . . to include 'any name under which a committee conducts activities,' the Commission rejected a proposal to limit the restriction to fundraising projects; instead, [it] noted that 'the potential for confusion is equally great in all types of committee communications.'" (J.A. 15.)

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[2] The Commission also addressed another administrative complaint alleging a violation of the name identification requirement by issuing a cautionary warning to the respondent "to take steps to ensure that its conduct is in compliance with the Act and the Commission's Regulations, by amending its Form 1 to remove the parenthetical '(DUMPREID PAC)' [which included the name of a candidate] from its official name, and by including the Committee's full name in the 'paid for by' section of its website disclaimer and in any future public communications." *See* MUR 6213 (Decidedly Unhappy Mainstream Patriots Rejecting Evil-mongering Incompetent Democrats PAC), Letter from Susan L. Lebeaux, FEC, to Benjamin L. Ginsberg, Patton Boggs, LLP http://eqs.fec.gov/eqsdocsMUR/10044271813.pdf.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. PAG

PAG is an independent-expenditure-only political committee (also known as a "super PAC") that was formed in 2015 to "independently advocate for the election of Mike Huckabee as President of the United States." (J.A. 23 ¶ 6; J.A. 28 ¶ 27.)[3] It describes itself on its website as "the Super PAC supporting former Arkansas Governor Mike Huckabee in his candidacy for President." (J.A. 95.) PAG is "not authorized by any candidate or candidate's committee." (Appellant PAG's Opening Brief ("PAG's Br.") at 7; *see also* J.A. 23 ¶ 6.) It "intends to make independent expenditures, and . . . intends to raise funds in unlimited amounts. [It] will not use those funds to make contributions, whether direct, in-kind, or via coordinated communications, to federal candidates or committees." FEC, *Statement of Organization (PAG)* at 1, 2, 5 (Mar. 11, 2015), http://docquery.fec.gov/pdf/823/15950859823/15950859823.pdf.

In July 2015, PAG entered into a contract with another entity, Strategic Media 21, pursuant to which PAG now controls the operation and maintenance, including the content, of the website www.ilikemikehuckabee.com and Facebook page "I Like Mike Huckabee," which are both owned by Strategic Media 21. (J.A.

[3] An "independent expenditure" is a communication "expressly advocating the election or defeat of a clearly identified candidate" and that is made without coordinating with the candidate or a political party. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

24 ¶¶ 10-11.) PAG alleges that on July 17, 2015 it "ceased any further work on updating, maintaining, promoting or changing" the "I Like Mike Huckabee" Facebook page and website in response to the FEC's issuance of the CAP Advisory Opinion. (J.A. 26 ¶ 18.) Both the Facebook page and website remain publicly available at https://www.facebook.com/ilikemikehuckabee and http://www.ilikemikehuckabee.com. PAG also alleges that it wishes to establish a Twitter account with a name that incorporates Mr. Huckabee's name, but it has not yet done so. (J.A. 24 ¶ 13; J.A. 26 ¶ 19.)

According to PAG's FEC filings, as of mid-2015 it had received contributions of at least $3.6 million from seven individuals. FEC, *Report of Receipts and Disbursements* (PAG) at 2, 6-8, http://docquery.fec.gov/pdf/553/201507319000480553/201507319000480553.pdf. Since October 2015, it has spent at least $1,289,905.60 on independent expenditures of direct mail, radio advertisements, or other media advertising supporting Mr. Huckabee and at least $115,643.44 more on expenditures opposing the candidacies of Marco Rubio and Ted Cruz.[4] PAG has also established other

[4] FEC, *24/48 Hour Report of Independent Expenditures* at 1 (PAG), http://docquery.fec.gov/pdf/486/201510299003253486/201510299003253486.pdf, http://docquery.fec.gov/pdf/487/201510299003253487/201510299003253487.pdf, http://docquery.fec.gov/pdf/964/201511109003298964/201511109003298964.pdf, http://docquery.fec.gov/pdf/134/201511199003384134/201511199003384134.pdf, http://docquery.fec.gov/pdf/179/201511279004120179/201511279004120179.pdf, http://docquery.fec.gov/pdf/937/201512029004124937/201512029004124937.pdf,

websites and social media accounts to use to disseminate its messages of support for Mr. Huckabee, including its own website, pagpac.com, its Facebook page "Pursuing America's Greatness," https://www.facebook.com/PursuingAmericasGreatness, its Twitter account "AmericasGreatness," https://twitter.com/PAGPAC, and its YouTube channel "Pursuing America's Greatness," https://www.youtube.com/channel/UC-ZBI2mNaC1l2n9OaMbhHgw.

B. Procedural History

After the FEC issued the CAP Advisory Opinion, PAG sued the agency and moved for a preliminary injunction. PAG claims that the FEC's interpretation of FECA's name identification requirement in its regulations and the CAP Advisory

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http://docquery.fec.gov/pdf/944/201512029004124944/201512029004124944.pdf, http://docquery.fec.gov/pdf/838/201512089004153838/201512089004153838.pdf, http://docquery.fec.gov/pdf/983/201512129004175983/201512129004175983.pdf, http://docquery.fec.gov/pdf/547/201512159004210547/201512159004210547.pdf, http://docquery.fec.gov/pdf/171/201512189004315171/201512189004315171.pdf, http://docquery.fec.gov/pdf/183/201512189004315183/201512189004315183.pdf, http://docquery.fec.gov/pdf/171/201512189004315171/201512189004315171.pdf, http://docquery.fec.gov/pdf/548/201512239004414548/201512239004414548.pdf, http://docquery.fec.gov/pdf/619/201512299004424619/201512299004424619.pdf, http://docquery.fec.gov/pdf/405/201512309004425405/201512309004425405.pdf, http://docquery.fec.gov/pdf/380/201512319004426380/201512319004426380.pdf, http://docquery.fec.gov/pdf/931/201601019004426931/201601019004426931.pdf, http://docquery.fec.gov/pdf/933/201601019004426933/201601019004426933.pdf, http://docquery.fec.gov/pdf/494/201601029004427494/201601029004427494.pdf, http://docquery.fec.gov/pdf/496/201601029004427496/201601029004427496.pdf, http://docquery.fec.gov/pdf/215/201601089004444215/201601089004444215.pdf. (Because PAG's reports are not providing calendar year-to-date aggregate totals, the FEC has calculated PAG's total expenditures using its individual reports.)

Opinion are invalid under the Administrative Procedure Act ("APA") and unconstitutional under the First Amendment as an impermissible prior restraint or content-based restriction on speech. (*See generally* J.A. 31-39 ¶¶ 44-70.)

The district court denied PAG's motion after briefing and oral argument. (J.A. 258-91.) After setting out the history of the regulation (J.A. 260-68), the court found that PAG was unlikely to succeed on its APA claim because "the relevant evidence from the 1992 and 1994 rulemakings establishes the requisite rational connection between the facts found and the choice made in promulgating the [revisions to 11 C.F.R. § 102.14(a)-(b)], as well as in issuing the CAP Advisory Opinion." (J.A. 273 (internal quotation marks omitted).) The court credited the Commission's assessment of whether it could use alternative means, agreed that the name identification requirement has a limited effect in practice, and found that the agency's concerns regarding confusion as to the sources of election-related speech were justified, especially in light of the "hundreds of comments on the Facebook page [PAG controls] that appear to be directed to Governor Huckabee himself." (J.A. 273-77 (citing "Exhibit A to the FEC's opposition brief" which "illustrates the potential for confusion"); *see also* J.A. 107-110, Decl. of Jayci A. Sadio, August 10, 2015 ¶ 4 (identifying 779 separate comments directed "to" Mr. Huckabee himself on the "I Like Mike Huckabee" Facebook page).)

The district court also found that PAG was unlikely to succeed on its First Amendment claims because the name identification requirement it challenges is "part and parcel of FECA's disclosure regime." (J.A. 280 (citing *Common Cause*, 842 F.2d at 442); J.A. 282 (noting the "clear references to § 30102(e)(4) being a part of FECA's disclosure regime" in *Common Cause* and *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1367-68 (D.C. Cir. 1988)).) The requirement "'only appl[ies] to the titles' of an unauthorized committee's projects, leaving any such committee 'free to promote [any candidate] by name in the body of any website or other communication,' such as those posted on Facebook pages or Twitter accounts." (J.A. 280 (quoting CAP Advisory Opinion at 4).) "[T]o use counsel for PAG's own words" at oral argument, the requirement "'doesn't prohibit the speech at all[,] . . . [i]t just prohibits where you can make the speech.'" (J.A. 284 (quoting argument transcript).) The district court thus concluded that the requirement is "substantially related to the government's interests in limiting confusion, fraud, and abuse because it . . . clarif[ies] the candidate-authorization status of political committees." (J.A. 286 (internal quotation marks omitted).)

The district court's analysis of the remaining factors "reinforce[d] its finding that the entry of a preliminary injunction [wa]s not warranted." (J.A. 288.) It observed that "PAG has not demonstrated that it will be prevented from speaking, as opposed to merely having one aspect of its speech . . . relegated from the titles

of its special project communications to the bodies of those communications." (J.A. 288-89.) It further found that the balance of equities did not favor granting the injunction and "credited the . . . FEC['s] arguments" that enjoining the agency from performing its duties and "upsetting its regulatory framework" would not be in the public interest. (J.A. 289-90.)

After the district court issued its decision, PAG moved for an injunction pending appeal. The district court denied that motion. (J.A. 333.)[5] PAG then moved for an injunction pending appeal in this Court and, alternatively, for resolution of the merits in its favor. Following briefing, a motions panel of this Court denied the motion and established an expedited merits briefing schedule. (J.A. 334-35.) PAG then sought an emergency injunction pending appeal in the Supreme Court and gave notice of its intent to petition that Court for certiorari review prior to judgment. Chief Justice Roberts denied PAG's motion. (J.A. 336.) PAG then informed the Supreme Court's emergency applications clerk of its decision not to seek certiorari prior to judgment and intent to proceed in this Court. (J.A. 340.)

[5] Although PAG includes this order in its recitation of the rulings under review (PAG's Br. at i-ii), PAG never noticed an appeal of the order and instead sought the same relief by separate motions, as discussed in the text.

SUMMARY OF ARGUMENT

The district court's decision should be affirmed. Its opinion denying PAG's request for a preliminary injunction thoroughly explains why PAG is unlikely to succeed on any of its claims and why none of the other remaining factors support such relief. (J.A. 258-91.) PAG offers no basis for this Court to find that the district court abused its discretion or otherwise erred. Instead, PAG repeats the erroneous arguments that the district court rightly rejected, continuing its attempt to transform a necessary and constitutional disclosure requirement that does not prevent PAG from speaking into a "speech ban."

The district court correctly determined that PAG is unlikely to succeed on the merits of its First Amendment claims because the name identification requirement is part of FECA's disclosure regime and satisfies the applicable level of "exacting" intermediate scrutiny. The requirement helps disclose the sources of election-related spending and ensures that "once a contributor learns who is paying for the advertisements or who is to be the recipient of his funds, he simultaneously learns by a glance at the title whether that recipient is an authorized or unauthorized vehicle of the candidate." *Common Cause*, 842 F.2d at 442. At the same time, the FEC has carefully calibrated the regulation in order to provide committees flexibility while still serving the government's important interests in

limiting opportunities for confusion, fraud, and abuse resulting from committees' use of candidate names in their own names and special project names.

PAG does not attempt to argue that the name regulation fails intermediate scrutiny. It instead argues that the Court should use strict scrutiny to evaluate its First Amendment challenges because the name regulation is a content-based restriction or prior restraint. Not so. As an initial matter, PAG lacks standing to challenge a portion of the regulation that, if severed and struck, would not affect whether PAG can use Mr. Huckabee's name. Even assuming it has standing, PAG's content-based argument is flawed because the requirement does not restrict speech on the basis of content. As the district court explained, the name identification requirement is like FECA's other disclaimer requirements and simply compels PAG to disclose (i) "whether [it] . . . is authorized" by Mr. Huckabee, and "(ii) dictates that such disclosure be made in the name of the committee itself, or in any name under which the committee conducts activities, including a special project name." (J.A. 281.) The Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) is therefore inapplicable. And contrary to PAG's sensational claim that the situation presented by this case is analogous to repressive governmental book banning, the FEC's name regulation plainly would not prevent PAG from publishing a book, chapter, or film entitled "I Like Mike Huckabee." This is not a book banning case.

PAG's prior restraint argument suffers from the analogous fundamental problem that the name regulation is not a prior restraint — or even the equivalent of a prior restraint. PAG has not been restrained from making any speech. As the district court agreed, "PAG is free to say whatever it wants about Mr. Huckabee." (J.A. 276 (internal quotation marks omitted).) Moreover, the Supreme Court long ago rejected the idea that the burdens imposed by disclosure requirements like the name requirement are prior restraints. Rather, they are "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Buckley v. Valeo*, 424 U.S. 1, 82 (1976) (per curiam).

PAG's APA challenge is also meritless. PAG argues that the name identification regulation cannot be applied to it because it does not intend to use the "I Like Mike Huckabee" website and Facebook page to solicit contributions. This challenge depends upon PAG's premise that the FEC's justification for the regulation was confined to addressing *fundraising* confusion, abuse, and fraud. But the Commission expressly declined to so limit the regulation's application. It considered a potential fundraising "distinction" at the time it was amending the regulation and instead crafted the regulation to limit the potential for confusion, fraud, and abuse resulting from "'all types of committee communications,'" not just those regarding "fundraising projects." (J.A. 15 (quoting 1992 Rule, 57 Fed.

Reg. at 31,425).) The FEC thus "specifically considered and rejected" the grounds upon which PAG stakes its APA claim (*id.*), and the Court must defer to the agency's reasonable judgment.

Finally, PAG has failed to demonstrate that any of the other preliminary injunction factors weigh in its favor. PAG is not being injured by the name requirement; having to disclose that its speech is not Mr. Huckabee's speech does not prevent it from communicating its messages. Furthermore, PAG has raised millions of dollars and can spend as much as it wants on social media posts and print and radio advertisements supporting Mr. Huckabee. Indeed, since October 2015, PAG already has spent more than one million dollars on independent expenditures of direct mail and other advertisements supporting Mr. Huckabee. Its histrionic claim that it cannot speak at all except through websites and social media pages that include Mr. Huckabee's name in their titles is untrue. Moreover, enjoining the name regulation would harm the government and the public by increasing the potential for confusion, fraud, and abuse resulting from committees' uses of candidate names. As the evidence in the district court showed, the hundreds of comments on the "I Like Mike Huckabee" Facebook page PAG operates directed to Mr. Huckabee indicate that viewers of that page incorrectly believe its communications are on behalf of Mr. Huckabee when they are not. (J.A. 107-110.)

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews "the district court's balancing of the[] four [preliminary injunction] factors for abuse of discretion, while reviewing de novo the questions of law involved in that inquiry." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014); *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011); *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20. A plaintiff must make a "clear showing" that the extraordinary remedy is necessary, and it cannot be "based only on a possibility of irreparable harm." *Id.* at 22.

As the district court explained, this Court has "used a 'sliding scale' approach in analyzing the four preliminary injunction factors, meaning that a particularly strong showing on one factor could make up for a weaker showing on another." (J.A. 269 (quoting *Davenport v. Int'l Bhd. of Teamsters, AFL-CIO*, 166

F.3d 356, 360-61 (D.C. Cir. 1999).) It is "not clear whether this approach survives . . . *Winter*, which suggested that a likelihood of success on the merits must always be shown." (*Id.* (citing *Sherley*, 644 F.3d at 393.) While in this Circuit "it remains an open question whether the likelihood of success factor is an independent, free-standing requirement," *Aamer*, 742 F.3d at 1043 (internal quotation marks omitted), even if the sliding-scale approach does survive, "where a movant makes 'a weak showing on the first factor,' the movant must 'show that all three of the other factors so much favor the [movant] that they need only have raised a serious legal question on the merits.'" (J.A. 270 (quoting *Am. Meat Inst. v. U.S. Dep't of Agric.*, 746 F.3d 1065, 1074 (D.C. Cir. 2014), *reinstated in relevant part by* 760 F.3d 18 (D.C. Cir. 2014) (en banc)).)

The Court need not resolve which approach must be used in this case because PAG's claim fails under either.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT PAG IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS FIRST AMENDMENT CLAIMS

PAG is unlikely to prevail on its First Amendment claims because, as the district court found, the name identification requirement is a FECA disclosure requirement that satisfies the intermediate level of constitutional scrutiny applicable to campaign-finance disclosure requirements. (J.A. 278-87.) PAG's

contentions that the requirement constitutes content-based discrimination or acts as an impermissible prior restraint are meritless.

A. The Name Regulation Is a Disclosure Requirement

Relying on this Court's precedents, the district court concluded that "§ 30102(e)(4) and the other components of the Name Identification Requirement are part and parcel of FECA's disclosure regime because they are 'directed solely at *disclosure* of whether a political committee that solicits funds from the public is part of the authorized campaign machinery of a candidate.'" (J.A. 280 (quoting *Common Cause*, 842 F.2d at 442 (emphasis added)).) The committee name provision is among those in FECA that "require political bodies to *disclose* the identity of persons associated with them." *Common Cause*, 842 F.2d at 442 (emphasis added); *Galliano*, 836 F.2d at 1367-68 (characterizing section 30102(e)(4) as part of the Act's "specific disclosure requirements" or "extensive disclosure requirements").

As this Court explained in *Common Cause*, "[s]ection [30102(e)(4)] mainly supplements § [30120(a)] by ensuring that once a contributor learns who is paying for the advertisements or who is to be the recipient of his funds, he simultaneously learns by a glance at the title whether that recipient is an authorized or unauthorized vehicle of the candidate." 842 F.2d at 442; *see also* 52 U.S.C. § 30120(a). Section 30102(e)(4) thus "avoids the kind of confusing disclaimer

previously possible, 'Paid for by Reagan for President. Not authorized by President Reagan,' and makes § [30120(a)'s] disclaimers more effective." *Common Cause*, 842 F.2d at 442; *id.* at 447 n.31 ("Congress's general intent [was] to prevent confusion arising from misleading committee names"); *cf. Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (explaining that other disclaimer and disclosure provisions in FECA similarly serve to "'insure that the voters are fully informed' about the person or group who is speaking" about a candidate (quoting *Buckley*, 424 U.S. at 76)). In its recent CAP Advisory Opinion, the Commission reiterated that it is precisely to "limit '[such] potential for confusion'" that the regulation mandates a floor level of disclosure about the relationship of the speaker to messages of candidates, including those it may be speaking about — independently, against, or on behalf of. (J.A. 15.)

Accordingly, the district court found that "[t]he Name Identification Requirement simply (i) requires a political committee to disclose whether that committee is authorized or unauthorized, and (ii) dictates that such disclosure be made in the name of the committee itself, or in any name under which the committee conducts activities, including a special project name." (J.A. 281.) In a case PAG has highlighted (PAG's Br. at ii-iii) in which other plaintiffs are separately challenging the name identification requirement, the United States District Court for the Eastern District of Virginia reached the same conclusion.

Stop Hillary PAC v. FEC, No. 15-1208, Mem. Op. and Order (E.D. Va. Dec. 21, 2015) ("*Stop Hillary PAC*"), Supp. Add. 13 ("The name identification requirement is an integral part of FECA's *disclosure regime*."); Supp. Add. 6 ("The purpose of § 30102(e)(4) . . . is simple: to alleviate the constant public confusion surrounding [political committees].").

Although PAG acknowledges that this Court has described FECA's name provision as "'mainly supplement[ing]' FECA's statutory disclaimer provisions" (PAG's Br. at 37 (quoting *Common Cause*, 842 F.2d at 442)), it nevertheless contends that the requirement is "not . . . *itself* a disclosure provision (*id.* at 37-39). PAG is incorrect. In *Common Cause*, the Court explained that section 30102(e)(4) by itself compels political groups to "disclose" the identity of persons associated with them. 842 F.2d at 442. In *Galliano*, which PAG's brief does not mention, the Court likewise characterized the provision as part of FECA's "disclosure requirements." 836 F.2d at 1367-68. While the name identification requirement does reinforce FECA's other disclosure provisions (as part of the Act's comprehensive regime), and vice-versa, it is not merely supplementary.

PAG posits that "'disclosure' exists in [only] two forms: (1) disclaimers required to be included on communications; and (2) public reports filed that disclose a person's or committee's address, directors/officers, contributions, and expenditures." (PAG's Br. at 38; *id.* at 39 & n.14.) But "disclosure" is not limited

to these "two forms" of disclaimer and reporting requirements. PAG's brief cites *Buckley*, 424 U.S. at 66-67, and *Citizens United*, 558 U.S. at 366-67, in purported support of this proposition, (PAG's Br. at 38), but neither of these passages supports PAG's contention. *See also infra* p. 44 (discussing another disclosure provision this Court upheld that does not fall into PAG's posited two categories). Its argument is also belied by the fact that the name identification requirement *is*, in PAG's words, a "disclaimer[] required to be included on communications." (PAG's Br. at 38.) As the district court explained in rejecting this argument, "the [name regulation] *does* require a disclosure to 'be on' or 'incorporated into the communication' by requiring disclosure in the name or title of the special project that is disseminating that communication." (J.A. 282 (quoting argument transcript).)

B. The District Court Correctly Found That the Name Identification Requirement Is Substantially Related to the Government's Important Interests in Limiting Confusion, Fraud, and Abuse

As a disclosure provision, the name identification requirement is reviewed for "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66; *McConnell v. FEC*, 540 U.S. 93, 231-32 (2003), *overruled in part by Citizens United*, 558 U.S. 310)). "[L]ike other '[d]isclaimer and disclosure

requirements[,]'" the name requirement "'do[es] not prevent anyone from speaking.'" (J.A. 280 (quoting *Citizens United*, 558 U.S. at 366).) Accordingly, "[s]uch limited burdens on speech 'often represent[] a less restrictive alternative to flat bans on certain types or quantities of speech,' and are subject to intermediate or exacting scrutiny." (*Id.* (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014)).) Applying intermediate scrutiny, the district court properly determined that the requirement is "substantially related to the government's interests in limiting confusion, fraud, and abuse because it serve[s] to clarify the candidate-authorization status of political committees." (J.A. 286 (internal quotation marks omitted).)

1. Disclosing to Voters and Contributors Whether a Political Committee Is Authorized by a Candidate Serves Important Governmental Interests

As this Court recognized almost thirty years ago, section 30102(e)(4) permits listeners and contributors to "learn[] by a glance" if a political committee or its special project "is an authorized or unauthorized vehicle of the candidate." *Common Cause*, 842 F.2d at 442. In adding the provision to FECA, Congress recognized that "the positive requirement of including candidate names in [the names of] authorized committees cannot function without the corresponding restriction for unauthorized committees." J.A. 286 (internal quotation marks omitted); *Stop Hillary PAC*, Supp. Add. 5-6. Otherwise, the candidate's

authorized committee could be lost in a sea of similarly titled groups — *e.g.*, "Huckabee for America," "We Want Huckabee," etc. Thus, section 30102(e)(4) both requires authorized committees to use the candidate's name and prohibits unauthorized committees from doing so.

Evidence has continued to confirm the need for such disclosures. In revising 11 C.F.R. § 102.14 in the 1990s, the Commission was presented with substantial evidence that "potential contributors often confuse an unauthorized committee's registered name with the names of its fundraising projects, and wrongly believe that their contributions will be used in support of the candidate(s) named in the project titles." 1994 Rule, 59 Fed. Reg. at 17,268. One example from the rulemaking records included "a comment from an authorized committee of a major party presidential candidate stat[ing] that an unauthorized project using that candidate's name raised over $10,000,000 during the 1988 presidential election cycle, despite the candidate's disavowal of and efforts to stop these activities." 1994 Rule, 59 Fed. Reg. at 17,268. A television documentary included in the record also detailed how an unauthorized committee "had, over several election cycles, established numerous projects whose titles included the names of federal candidates. The named candidates had no connection with the projects, had not authorized the use of their names in this manner, and received no money from the $9 million raised in response to these appeals." *Id.* "Such cases," the

Commission concluded, "point up the potential for confusion or abuse when an unauthorized committee uses a candidate's name in the title of a special fundraising project, or other designation under which the committee operates." *Id.*

The evidence before the court below similarly demonstrated that "[t]he hundreds of comments posted on" the "I Like Mike Huckabee" Facebook page "that appear to be directed to Governor Huckabee highlight the need for such disclosures." (J.A. 287 (citing J.A. 107-95).) Even a cursory review of such comments illustrates this potential for confusion. Comments such as "Amen! You would really change some things, in Washington. God bless you."; "We just need a leader and you are the leader we need!!!!"; "You have my vote for President"; "You are a good man Mike, you have my vote!!!!!"; "Mike we would have been better off years ago with you in the White House" appear throughout the page, demonstrating that many viewers of the "I Like Mike Huckabee" Facebook page apparently believe that the advocacy on that page is not independent but rather on behalf of Mr. Huckabee himself. (J.A. 107-09 ¶¶ 4-5 (identifying 779 separate comments directed "to" Mr. Huckabee himself on the Facebook page); *see also* J.A. 110-95.) Based on this evidence, the district court found that the regulation is particularly important "in the context of dissemination of communications via internet-based special projects like websites, Facebook pages and Twitter accounts," because "'the public has an interest in knowing who is speaking about a

candidate shortly before an election.'" (J.A. 287 (quoting *Citizens United*, 558 U.S. at 369).)[6] This "legitimate . . . interest . . . goes hand-in-hand with the legitimate government interest in limiting the possibility of fraud, confusion and abuse in federal elections." (J.A. 287.)

Contrary to PAG's mantra that the FEC's justification for the regulation is limited to "preventing confusion, fraud, and abuse in the *fundraising* context" (*e.g.*, PAG's Br. at 41 (emphasis added)), when the FEC proposed the enactment of section 30102(e)(4) to Congress it articulated the goal of "'avoid[ing] confusion'" without mentioning fundraising. *Common Cause*, 842 F.2d at 445-46 (quoting the FEC's proposal). The Commission revised its regulation in 1992 to "'minimiz[e] the possibility of fraud and abuse'" and limit "'the potential for confusion'" resulting from "'*all types* of committee communications,'" not just those regarding "fundraising projects." (J.A. 15 (quoting 1992 Rule) (emphasis added).) The FEC

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[6] PAG's amici contend that the many comments on the "I Like Mike Huckabee" Facebook page evidencing confusion should be understood as "'parasocial interactions,'" arguing that comments addressed to fictional characters or public figures on other websites do not reflect confusion. (Brief Amicus Curiae of Pacific Legal Foundation and James Madison Center for Free Speech in Support of Plaintiff-Appellant and Reversal ("PLC and JMC Br.") at 14-15.) In addition to being dubious on its face, this unqualified faux expert theory is outside the record and fails to demonstrate that the district court's factual determination that there is "confusion on display throughout the Facebook page" was clearly erroneous. (J.A. 276.) Moreover, as referenced below, *see infra* pp. 32-33, the confusion apparent on the "I Like Mike Huckabee" Facebook page is consistent with other documented instances of confusion resulting from other groups' violations of the name identification requirement.

thus "specifically considered and rejected" the fundraising distinction upon which PAG premises its arguments. *Id.*

Indeed, the district court found that the record evidence "belie[d] PAG's arguments [(PAG's Br. at 41-45)] that clarifying the authorization status of an unauthorized committee's special projects could constitute a legitimate government interest only in the fundraising context." (J.A. 287.) Without the name identification requirement, the attractiveness of using large contributions to secure quid pro quos from candidates, *see, e.g.*, *McCutcheon*, 134 S. Ct. at 1450, could create similar opportunities for committees through their special projects to "exploit ambiguity about their candidate authorization status." (J.A. 273 (internal quotation marks omitted).) Unlike a candidate, an independent-expenditure-only committee like PAG can receive contributions of any size. "[P]ermitting unauthorized committees to include a candidate's name in the name of their special projects may allow those committees to . . . take advantage of confusion created by their project names." (J.A. 273 (internal quotation marks omitted).) For example, "a contributor [may] *think*[] that a $50,000 contribution to a project such as 'I Like Mike Huckabee' *is* a contribution to Mr. Huckabee, even though it is not." *Id.* (internal quotation marks omitted); *cf.* Colby Itkowitz, *Report: Actor Daniel Craig, a.k.a James Bond, donated to Bernie Sanders' super PAC. Where did his money go?*, Wash. Post (Sept. 10, 2015),

https://www.washingtonpost.com/news/powerpost/wp/2015/09/10/report-actor-daniel-craig-a-k-a-james-bond-donated-to-bernie-sanders-super-pac-or-a-fraud/ (last visited Jan. 8, 2016) (super PAC originally named "Ready for Bernie Sanders 2016" and "Bet on Bernie 2016" before the FEC required that the name be changed received contributions from donors "who believed they were giving to the Sanders campaign"); Alan Rappeport, *Bernie Sanders Has a Fan in the James Bond Actor Daniel Craig*, N.Y. Times (First Draft) (Sept. 10, 2016 3:58 p.m.), http://www.nytimes.com/politics/first-draft/2015/09/10/bernie-sanders-has-a-fan-in-the-james-bond-actor-daniel-craig/?_r=0 (last visited Jan. 8, 2016) ("[M]any people have given to [the] super PAC by coming across it online and thinking it was the official way to donate to Mr. Sanders.").

Because confusion, fraud, and abuse plainly can occur outside of the context of fundraising, the FEC's regulation not only covers "[s]pecial [f]undraising [p]rojects," but also "[o]ther [u]se" of candidate names in the operating titles of unauthorized committees. 1994 Rule, 59 Fed. Reg. at 17,267; J.A. 273 (PAG's "reading ignores the fact that the words 'Other Use of Candidate Names' clearly reveal a 'focus' on the use of candidate names in the titles of things other than special fundraising projects."). "[J]ust as an unauthorized project that trades on a candidate's name in its title can divert dollars away from a candidate's message, it can also divert (or distort) information, confusing readers into believing, say, that

PAG's message is Mr. Huckabee's." (J.A. 286 (internal quotation marks omitted).) Mr. Huckabee may disagree with everything that appears on the "I Like Mike Huckabee" Facebook page PAG operates, and PAG can say what it wants to about Mr. Huckabee. But permitting PAG to imply that its speech is Mr. Huckabee's by using the candidate's name in the title to present *PAG's* messages undermines the important interest in the public knowing who is speaking in the context of an election. *Cf. John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.").

Importantly, many courts, including the Supreme Court and this Court, have repeatedly embraced the important interests that FECA's disclosure provisions such as section 30102(e)(4) support. In *McCutcheon*, the Supreme Court's plurality opinion reiterated that "[d]isclosure requirements are in part justified based on a governmental interest in provid[ing] the electorate with information about the sources of election-related spending." 134 S. Ct. at 1459 (internal quotation marks omitted); J.A. 285 (same) (quoting *Citizens United*, 558 U.S. at 367); *Citizens United*, 558 U.S. at 367 (noting that in *McConnell*, "[t]here was evidence in the record that independent groups were running election-related advertisements while hiding behind dubious and misleading names" (internal quotation marks omitted)). "With modern technology, disclosure now offers a

particularly effective means of arming the voting public with information." *McCutcheon*, 134 S. Ct. at 1460.

In *Citizens United*, eight Justices agreed that the challenged disclosure provisions were constitutional, observing that "the public has an interest in knowing who is speaking about a candidate shortly before an election," even when such speech occurs in communications that lack express candidate advocacy. 558 U.S. at 368-69; *see also* J.A. 285 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." (citations omitted))); *Buckley*, 424 U.S. at 68 (holding that the Act's disclosure requirements for political committees "directly serve substantial governmental interests"). Similarly, in *SpeechNow.org v. FEC*, this Court unanimously held that political committee disclosure requirements further the public's "interest in knowing who is speaking about a candidate and who is funding that speech," and "deter[] and help[] expose violations of other campaign finance restrictions." 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 553 (2010). "'At the very least,' the Name Identification Requirement helps to 'avoid confusion by making clear' to the voting public that communications disseminated via unauthorized committees'

special projects 'are not funded by a candidate or political party.'" (J.A. 286 (quoting *Citizens United*, 558 U.S. at 368).)

Accordingly, the government's interests in preventing confusion, fraud, and abuse through the name identification requirement easily meet the "'sufficiently important' governmental interest" standard. *Citizens United*, 558 U.S. at 366-67. This interest "may properly be labeled 'compelling.'" *Cf. McCutcheon*, 134 S. Ct. at 1445-46 (explaining that although government's interest in preventing quid pro quo corruption needed to be only "sufficiently important" to satisfy the closely drawn scrutiny that applies to contribution limits, the Court had itself previously stated that that "interest may properly be labeled 'compelling'"). The Supreme Court has already "concluded that a State has a compelling interest in protecting voters from confusion and undue influence." *Burson v. Freeman*, 504 U.S. 191, 199 (1992); J.A. 282-84 (explaining why *Burson* is "instructive here"); *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election.").

2. The Name Identification Requirement is Substantially Related to the Government's Important Interests in Limiting Confusion, Fraud, and Abuse Relating to Whether Committees Speak on Behalf of Candidates

In revising the name identification regulation in the 1990s, the Commission sought to ensure that it was "narrowly designed to further [its] legitimate

governmental interest[s]." 1992 Rule, 57 Fed. Reg. at 31,425. That narrow tailoring is evident in the both the extremely limited scope of the rule, which applies only to committee and project names, and not to any content, and in the extensive care with which the FEC crafted and revised the regulation over time. *See supra* pp. 2-9; *accord Common Cause*, 842 F.2d at 448 (noting that the FEC "must allow the maximum of first amendment freedom of expression in political campaigns commensurate with Congress' regulatory aims").

PAG itself suggests no less restrictive means of tailoring. (J.A. at 236-37 ("THE COURT: So you can't suggest to this court any less restrictive suggestions how to calm the kind of confusion the FEC is attempting to protect against? MR. TORCHINSKY: In URLs and social media, no, Your Honor."); PAG's Br. at 47 (vaguely suggesting that "a narrowly tailored approach to this supposed problem would seek to identify and target the specific contexts in which the use of a candidate's name causes confusion").)[7] PAG instead simply repeats that it prefers the Commission's initial 1980s-era interpretation. But the FEC's decision to revise that regulation was based upon the agency's recognition that "the situation today

[7] The brief filed by PAG's amici illustrates why PAG may be reluctant to move beyond generalities about the regulation's tailoring. That brief's evidence-free assurances about what names might "*theoretically*" be confusing to "inexperienced Facebook users," as opposed to supposedly "nonconfusing, accurate" names like "'Mike Huckabee Fans'" (PLC and JMC Br. at 11), reveals that further tailoring would require *more* of the kind of subjective analysis by FEC Commissioners PAG says it dislikes.

differs significantly from that of the early 1980's" and "increasing[] concern[] over the possibility for confusion or abuse inherent in [the] interpretation" PAG favors. 1992 Rule, 57 Fed. Reg. at 31,424. PAG notes that "Facebook, Twitter, and other forms of 'social media' did not exist" during the 1980s (PAG's Br. at 22 & n.11), yet it seeks to reintroduce that era's obsolete regulatory approach.

The record shows that the Commission specifically considered whether it could accomplish its goals through alternative means, and it contains the agency's explanation why the regulation it adopted was superior to alternate proposals, such as "stronger," "larger," and "bold typeface" disclaimers. 1994 Rule, 59 Fed. Reg. at 17,268. The Commission thought that those requirements "could be more burdensome . . . while still not solving the potential for fraud and abuse in this area." *Id.* It likewise rejected a proposal to create an exemption for groups "which will not actively mislead the public or injure the candidate," believing this standard (similar to what PAG suggests) to be vague. *Id.* at 17,269. And it rejected the idea of limiting the issue to the fundraising context by focusing only on "check payees" as "proposed in the NPRM." 1992 Rule, 57 Fed. Reg. at 31,425.

The Commission also took pains to note how limited the effect of the regulation would be in practice: "[W]hile a committee could not establish a fundraising project called 'Citizens for Doe,' if Doe is a federal candidate, it could use a subheading such as 'Help Us Elect Doe to Federal Office,' and urge Doe's

election, by name, in large, highlighted type, throughout the communication." 1994 Rule, 59 Fed. Reg. at 17,269. Indeed, "[t]he absence here of a total denial of any speech rights is precisely how the FEC distinguished" *Buckley* and *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), "during the rulemaking process back in the early 1990s, noting that both of those cases involved total bans on independent expenditures, or certain types of independent expenditures, whereas the Special Projects Name Regulation did not." (J.A. 285 (internal quotation marks omitted).) The district court rightly agreed that the regulation thus has a "limited . . . effect . . . in practice, given that an unauthorized committee can still use a candidate's name in a special project's subheading and urge that candidate's election, by name, in large, highlighted type, throughout the communication." (J.A. 274 (internal quotation marks omitted).)

Accordingly, "preventing the use of candidate names in the names of unauthorized political committee projects is thus 'responsive to the problem' of confusion, and therefore is substantially related to the government's important disclosure interests." J.A. 286-87 (internal quotation marks omitted); *see also Stop Hillary PAC*, Supp. Add. 16 ("[T]he fact that the government's interest only impedes on Plaintiffs' ability to include a candidate's name in its *title* alone, further demonstrates that § 30102(e)(4) is the *least restrictive means* of accomplishing the government's interest for transparency in [political

committees]." (second emphasis added)). Moreover, the district court correctly found that permitting unauthorized political committees to establish special projects that use candidate names as PAG desires under the "shell of the actual committee would vitiate [the provision]." (J.A. 286 (internal quotation marks omitted).) The name identification regulation is substantially related to the government's important interest in limiting confusion, fraud, and abuse resulting from committee and project names.

C. PAG's Challenge to the Regulation as a Content-Based Speech Restriction Fails

PAG does not dispute the district court's analysis of the regulation using intermediate scrutiny. Instead, it argues that the name identification regulation is an impermissible content-based restriction that should be reviewed for strict scrutiny. Although the foregoing analysis indicates that the regulation could also survive strict scrutiny, that level of scrutiny does not apply.

Initially, PAG lacks standing to maintain this challenge because, even if the Court agreed with PAG and enjoined the allegedly offending portion of the regulation, PAG would still not be able to use Mr. Huckabee's name. And in any event, because the regulation is not a content-based restriction, the Supreme Court's decision in *Reed* is inapplicable and strict scrutiny does not apply.

1. PAG's Content-Based Argument Seeks Relief That Will Not Redress Its Purported Injury

PAG's content-based challenge is wholly premised on the notion that 11 C.F.R. § 102.14(b)(3) "is a content-based speech restriction that prohibits the use of a candidate's name" for "communications that *support* the candidate's election, but allows other committees to use the candidate's name in the same manner so long as the committees' communications evidence *opposition* to the candidate." (PAG's Br. at 5 (emphasis added).) Again and again, PAG returns to this basis for its content-based claim, arguing that the regulation "require[s]" the FEC "to examine the content of the communication to discern whether the speech opposes or supports the candidate whose name appears in the communication" (*id.* at 26-27), and that the FEC has created "two categories of speech: (1) speech that shows opposition; and (2) speech that does not show opposition. Oppositional speech is permitted, while non-oppositional speech is prohibited" (*id.* at 35).

PAG is plainly incorrect in suggesting that the *content* of any committee's communications matter for purpose of the regulation. The name regulation applies only to committee and special project *names*. 11 C.F.R. § 102.14(a)-(b).

But even if PAG's argument were corrected to focus on the regulatory distinction between the "content" of supportive vs. oppositional project *names*, what is clear is that PAG's content-based challenge is exclusively to subsection 102.14(b)(3), the opposition exception the Commission added to the regulation in

1994. (For example, PAG does not challenge the different "content" that applies to committee names depending upon whether they are authorized or not — *i.e.*, that authorized committees must use the "content" of a candidate's name and unauthorized committees must not. (J.A. 260 n.2.)) The remedy to PAG's claim is therefore for the Court to strike subsection 102.14(b)(3), because that judicial action would remove the supportive vs. oppositional element of the name rule that PAG finds objectionable. PAG's view is that neither oppositional nor "non-oppositional" names should be permitted.

That remedy would fail to redress PAG's injury, however. Subsection 102.14(b)(3) "is severable," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988), having been separately added to the previously functioning version of the regulation by the Commission in its effort for ever more narrow tailoring. Striking that severed portion of the regulation would not enable PAG to use Mr. Huckabee's name in its project titles because such use would still violate subsection 102.14(a)'s requirement that committees not use candidate names in their project titles. Ironically, then, the remedy for this portion of PAG's challenge would be stricter regulation of special project names and, if successful, would not allow it to do what it desires. *McConnell*, 540 U.S. at 229 ("A ruling in the . . . plaintiffs' favor, therefore, would not redress their alleged injury, and they accordingly lack standing."). PAG thus lacks standing to bring this claim. *Lujan*

v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (the "irreducible constitutional minimum" of Article III standing contains three elements: (1) injury-in-fact, (2) causation, and (3) redressability).[8]

2. The Regulation is Not a Content-Based Speech Restriction

Even if the standing problem were overlooked, PAG's content-based challenge still fails because section 102.14 is not a content-based restriction. (*Contra* PAG's Br. at 32-48.) The regulation was not promulgated to "prevent[] general confusion" by "ban[ning]" references to candidate names, as PAG incorrectly suggests. (*Id.* at 34; *id.* at 46 (contending that the regulation is a "complete and indiscriminate speech ban").) Rather, it effectively furthers the FEC's narrower objective of *limiting* confusion "about the person or group who" is making *election-related speech* and helps make clear that such groups' communications "are not funded by a candidate" or its authorized campaign apparatus. *Citizens United*, 558 U.S. at 368. And "[d]espite the FEC's use of the word 'ban,'" the district court rightly concluded that the "Name Regulation does not 'ban' any speech outright." (J.A. 282.)

The regulation does not control PAG's expression any more than FECA's other disclaimer requirements — or even this Court's commonsense rules

[8] The district court did not address this argument (J.A. 279), but this Court is required "'to satisfy itself . . . of its own jurisdiction.'" *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1151 (D.C. Cir. 2010).

requiring, *e.g.*, the cover of PAG's brief to be blue and the cover of this brief to be red, *see* D.C. Cir. R. 32(a)(2), thereby helping the Court to distinguish between the parties' briefs at a "glance," *Common Cause*, 842 F.2d at 442.

Indeed, this Court rejected an analogous argument that another FEC disclosure regulation wrongly banned content by requiring that a committee's follow-up request seeking a contributor's information could "not contain anything other than the request for the missing information, [a] mandatory statement, and an expression of gratitude." *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 404, 409-10 (D.C. Cir. 1996); *see also* 11 C.F.R. § 104.7(b)(2) ("The written or oral request shall not include material on any other subject or any additional solicitation, except that it may include language solely thanking the contributor for the contribution."). Just as PAG believes that the name regulation distinguishes between speech that does or "does not show opposition" (PAG's Br. at 35), the same could be said of a follow-up letter requesting information that does or does not show the group's "thank[s]," 11 C.F.R. § 104.7(b)(2). Yet the "simple answer" to the plaintiffs' challenge in that case — and this one — is "*Buckley*'s holding that the Act's disclosure requirements are not inconsistent with the First Amendment." *Republican Nat'l Comm. v. FEC*, 76 F.3d at 409. *Republican National Committee* is on all fours.

Contrary to PAG's emphasis on *Reed v. Town of Gilbert*, that case does not apply here. *Reed* concerned an Arizona town's imposition of varying restrictions on how, where, and for how long individuals were permitted to display outdoor signs, and, in particular, the regulation's distinct requirements for different categories of signs. 135 S. Ct. at 2224-25. All of the Justices agreed that the challenged restrictions were unconstitutional and three of them thought that the restrictions even failed the "laugh test." *Id.* at 2239 (Kagan, J., concurring). The law restricted the amount, location, and duration of certain speech on the basis of what kind of message the sign communicated. "Ideological messages [we]re given more favorable treatment than messages concerning a political candidate, which [we]re themselves given more favorable treatment than messages announcing an assembly of like-minded individuals." *Id.* at 2230.

The "paradigmatic example of content-based discrimination" at issue in *Reed*, *id.*, is wholly absent from the FEC's regulation, which permits unauthorized committees the unfettered ability to "discuss candidates throughout" the content of their "communication; and to use candidates' names as frequently, and highlight them as prominently . . . as they choose," 1994 Rule, 59 Fed. Reg. at 17,268-69; *see Republican Nat'l Comm.*, 76 F.3d at 410 (the regulation leaves committees "free to express their views . . . in other communications"); J.A. 284 (the requirement "'doesn't prohibit the speech at all[,] . . . [i]t just prohibits where you

can make the speech'" (using PAG's counsel's "own words" attempting to distinguish *Burson*)). That is why the district court correctly determined that *Reed* was inapplicable, and why the only other court to consider the question has similarly found that, contrary to the sign law at issue in "*Reed*, § 30102(e)(4) is not a content based restriction because it does not 'target[] speech based on its communicative content.'" *Stop Hillary PAC*, Supp. Add. 11 (quoting *Reed*, 135 S. Ct. at 2226). (*Contra* PAG's Br. at 39 ("Every court that has addressed restrictions on the content of speech following *Reed* in the election context has found that *Reed* controls.").)[9]

Reed is inapposite for the additional reason that the sign law at issue there — like the regulations involving robocalls, "ballot selfies," credit card surcharges, and advice column at issue in other cases PAG mentions (PAG's Br. at 40) — did not promote *any* disclosure interest. Nor was it "part and parcel of FECA's disclosure regime" (J.A. 280) that has been deemed constitutional since *Buckley* and overwhelmingly supported by eight current Supreme Court Justices and the entirety of this Court as recently as 2010. *See supra* pp. 34-36 (discussing cases from *Buckley* to *McCutcheon*). The district court correctly determined that *Reed* should not be interpreted to silently displace this longstanding precedent. *Cf.*

[9] Even PAG's amici acknowledge that the regulation may be viewed as content-neutral, and accordingly devote the bulk of their brief to analyzing the requirement under intermediate scrutiny. (PLC and JMC Br. at 9-21.)

Wagner v. FEC, 793 F.3d 1 (D.C. Cir. 2015) (en banc) (unanimously upholding FECA's provision banning solicitations of, and contributions by, federal contractors and not interpreting *Reed* to alter the intermediate "closely drawn" scrutiny the Court has long used to evaluate such contribution restrictions), *petition for cert. filed sub. nom. Miller v. FEC*, No. 15-428 (S. Ct. Oct. 2, 2015); *Wagner*, 793 F.3d at 28 & n.33 (citing *Reed* as an example where the "statutory purpose" was "vitiated" by its design, contrasting the upheld FECA provision).

Most fundamentally, PAG's content-based argument errs by failing to recognize the essence of disclosure. FECA's requirements that committees must state "whether [a certain] communication has been paid for and/or authorized by a candidate or that candidate's authorized committee," or that certain televised advertisements "must include a disclaimer that '_____ is responsible for the content of this advertising'" (J.A. 281 n.6), compel committees to say some things and not others. (*Contra* PAG's Br. at 39 (asserting that "[n]o disclaimer or reporting provision prohibits the use of certain words").) That PAG must state that it is "not authorized" by Mr. Huckabee in certain communications, even though it might prefer to state that it "is authorized" or leave the matter ambiguous, does not restrict speech based on content. Similarly, PAG's inability to imply authorization by using Mr. Huckabee's name in the title of its special project does not transform the name identification requirement into a content-based restriction.

Finally, PAG's contention that the name identification requirement could be thought to "apply with equal force to the titles of books or documentary movies" (PAG's Br. at 48) is incorrect. Contrary to its claims, PAG could "legally produce a book or movie titled 'I Like Mike Huckabee'" (*id.*) because the Commission has never determined that a published book (or chapter in a book) or feature-length film like "Hillary: The Movie" is a special project of a committee. The regulation at issue here refers to "any *name* under which a committee *conducts activities*, such as solicitations or other communications, including a special project name or other designation," 11 C.F.R. § 102.14(a) (emphases added), and thus does not apply to every project or communication done *under the committee's own name*.[10] PAG's hypothetical book or movie "I Like Mike Huckabee" would not be confusing with respect to who is speaking, because unless PAG (fraudulently) uses Mr. Huckabee's name as the author of the book or script, it would not be understood to be *by* Mr. Huckabee; it would be *by* PAG. There is also no record evidence here — or in the FEC's 1992 and 1994 rulemakings — that books or

[10] PAG also errs in contending that the permissibility of the title "Hillary: The Movie" turns on whether "that film evidenced clear opposition to Hillary Clinton." (PAG's Br. at 28.) Setting aside the fact that Citizens United is not a political committee, even if "Hillary: The Movie" were an *operating name* of an unauthorized committee, it would be impermissible because it does not "clearly and unambiguously show[] opposition" to Hillary Clinton. 11 C.F.R. § 102.14(b)(3). But "Hillary: The Movie" was a film produced *by* Citizens United, and was not a name under which Citizens United was conducting activities.

feature-length films raise the same concerns of confusion, abuse, or fraud addressed by the name requirement.

D. The Regulation Is Not a Prior Restraint

PAG alternatively argues (PAG's Br. at 48-53) that the name identification requirement should be reviewed using strict scrutiny because it operates as a prior restraint on its speech. This is also wrong. First, as the district court found in agreeing with the FEC, "PAG is free to say whatever it wants about Mr. Huckabee." (J.A. 276 (internal quotation marks omitted).) PAG's speech cannot have been restrained if it is free to say whatever it wants, and PAG is plainly wrong in contending that the FEC has "acted as a censor." (PAG's Br. at 31.) Second, PAG's prior restraint argument asks the Court to accept the self-defeating notion that it is being restrained from publishing communications that it has, as a matter of fact, already published and is presently publishing by maintaining them on the subject websites, as well as its other sites. *See* https://www.facebook.com/ilikemikehuckabee; http://www.ilikemikehuckabee.com; *see also* J.A. 69 ("We like Mike Huckabee for his integrity, leadership and all that he stands for!"); *supra* pp. 13-14 (listing PAG's sites, which have been frequently updated during the pendency of this suit).

"The term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that

such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (internal quotation marks omitted) (Supreme Court's emphasis). "Temporary restraining orders and permanent injunctions — *i.e.*, court orders that actually forbid speech activities — are classic examples of prior restraints." *Id.*

As the Supreme Court pointed out, at considerable length in the case PAG itself cites to define the term, there is a "distinction, solidly grounded in our cases, between prior restraints and subsequent punishments." *Id.* A subsequent RICO forfeiture order, as in *Alexander*, or a subsequent enforcement proceeding under FECA (*see* J.A. 30-31 ¶¶ 41-42 (PAG's allegations of fear of future prosecution)), is "no prior restraint," and accepting PAG's vague characterization would "undermine the time-honored distinction between barring speech in the future and penalizing past speech." *Alexander*, 509 U.S. at 550-53; *accord Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1190 (D.C. Cir. 1992) ("[T]here is nothing 'previous' about this sanction, not in the respect *Near v. Minnesota*, 283 U.S. 697, 715 (1931), used the term.").

Citizens United, upon which PAG also relies (PAG's Br. at 49-50), similarly fails to support PAG's characterization of the requirement and advisory opinion as a prior restraint. Indeed, the Court in *Citizens United* confirmed that the regulatory scheme under discussion was "*not* . . . a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory

opinion from the FEC before the speech takes place." 558 U.S. at 335 (emphasis added) (comparing *Near*, 283 U.S. at 712-13).

The Court did criticize an FEC "two-part, 11-factor balancing test" implementing another ruling, cited "the complexity of the regulations," and said that they (along with other aspects of regulation) "function[ed] as the equivalent of [a] prior restraint." *Id.* But here there is no complex, multi-factor balancing test, *id.*, or injunction against the publication of future "malicious, scandalous or defamatory" material, *Near*, 283 U.S. at 706. As we explained to the district court, the rule the Commission adopted *is* deliberately crystalline: subject to three bright-line exceptions, "no unauthorized committee shall include the name of any candidate in its name. For purposes of this paragraph, 'name' includes any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation." 11 C.F.R. § 102.14(a). The regulation applies only to the *name* of an unauthorized committee and its special projects; it does not restrain *any* content of such committees' activities or communications. 1994 Rule, 59 Fed. Reg. at 17,268-69; *contra* PAG's Br. at 3 (arguing that the permissibility of project names depends upon whether "the FEC believes the communication adequately evidences opposition to the named candidate"); *id.* at 27 (suggesting that the permissibility of

the name turns on whether "PAG's communications are (or would be) in *support*" of Mr. Huckabee).

Buckley itself rejected an argument attempting to challenge disclosure requirements for political committees on the ground that they operated as unconstitutional prior restraints. 424 U.S. at 80-83. There, the Supreme Court explained that such disclosure requirements bear "a sufficient relationship to a substantial governmental interest." *Id.* at 80. They serve an "informational interest" and increase "the fund of information concerning those who support the candidates." *Id.* at 81. "The burden [they] impose[]," the Court said, "is no prior restraint, but a reasonable and minimally restrictive method of *furthering* First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82 (emphasis added); *accord Am. Frozen Food Inst. v. Mathews*, 413 F. Supp. 548, 555 (D.D.C. 1976) (holding that Food and Drug Administration regulation concerning disclosures on food labels did not "constitute a prior restraint in violation of the First Amendment"), *aff'd sub nom. Am. Frozen Food Inst. v. Califano*, 555 F.2d 1059 (D.C. Cir. 1977). The name identification requirement is no prior restraint.

III. THE DISTRICT COURT CORRECTLY FOUND THAT PAG WAS UNLIKELY TO SUCCEED ON ITS APA CHALLENGE

PAG does not seriously challenge the district court's finding that it is unlikely to succeed on the merits of its APA challenge. (PAG's Br. at 54-56.)

PAG concedes that the FEC is owed "'substantial deference'" in interpreting its own regulation (*see also* J.A. 271), but argues that the CAP Advisory Opinion is arbitrary, capricious, and contrary to law because it applied the rule "in a manner that goes far beyond the FEC's asserted justification and intent," relying on its ipse dixit that there is "no potential for *fundraising* fraud, abuse or confusion" in such circumstances. (PAG's Br. at 55 (emphasis added).)

The district court correctly rejected PAG's incorrect premise that the agency's justification was limited to fundraising abuses. (J.A. 272-77.) It credited the FEC's actual explanations; it observed that "the words 'Other Use of Candidate Names'" in the titles of the FEC's explanations and justifications "clearly reveal[ed] a 'focus' on the use of candidate names in the titles of things other than special fundraising projects"; and it found that PAG's interpretation could allow unauthorized committees to exploit ambiguity about their candidate-authorization statuses even in non-solicitation communications. *Id.*; *see supra* pp. 15-17. It also agreed with the FEC (J.A. 275-76) that the evidence showing confusion on the "I Like Mike Huckabee" Facebook page validated the concerns regarding confusion shared by Congress, the FEC, and this Court. *Common Cause*, 842 F.2d at 442 (section 30102(e)(4) "avoids the kind of confusing disclaimer previously possible, 'Paid for by Reagan for President. Not authorized by President Reagan,' and makes [52 U.S.C. § 30120(a)'s] disclaimers more effective").

PAG is wrong that, prior to the CAP Advisory Opinion, the "FEC previously evidenced no intent to apply the [regulation] to modern social media platforms, and subsequently expressed an intent not to regulate such Internet communications." (PAG Br. at 55.) PAG's assertion is belied by the agency's application of the name regulation in the NewtWatch Advisory Opinion, in which the agency determined in 1995 that "[t]he operation of a *World Wide Web site* would be considered a project of the Committee." 1995 WL 247474, at *5 (emphasis added).

PAG further errs in contending that the name identification requirement "cannot be applied to [its] Facebook or Twitter communications" under 11 C.F.R. § 110.11(a) because such messages are not "'public communications.'" (PAG's Br. at 55-56.) Nothing in section 110.11 "conflict[s] with" (*id.* at 51) or relieves political committees of their obligation to comply with FECA's name identification requirement. And for good reason. (*See* J.A. 276 (noting that the confusion on the "I Like Mike Huckabee" Facebook page exists despite other disclaimers, "reinforc[ing] the FEC's finding" that the other disclaimers such as those imposed by section 110.11 are "not, on [their] own, sufficient to address the kind of confusion that the" regulation "was designed to protect against").)

The FEC's regulation reflects a considered, well-reasoned, and measured approach to implementing section 30102(e)(4). Consistent with its mandate to

"protect[] the integrity of the electoral process," and to prevent confusion, fraud, and abuse, 1994 Rule, 59 Fed. Reg. at 17,267-68, the FEC broadened its interpretation of section 30102(e)(4) in a deliberate, bipartisan manner. *See Common Cause*, 842 F.2d at 440-41 (observing that an interpretation similar to the one the FEC adopted in 1992 could "be accommodated within the provision's literal language" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); *accord FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded."). The rule was revised based upon the "substantial evidence" in the record, which established both the increasing "use of candidate names in the titles of projects or other unauthorized communications . . . for unauthorized committees to raise funds *or disseminate information*" and actual instances in which contributors had apparently been confused by the use of candidate names in fundraising projects by unauthorized committees. 1994 Rule, 59 Fed. Reg. at 17,268 (emphasis added). Indeed, "[p]rogram investigators found that elderly people are particularly vulnerable to being misled in this manner." *Id.*

Accordingly, the district court found "no reason to doubt or question the conclusion reached by the FEC, after two rounds of full-bore notice-and-comment rulemaking." (J.A. 286 (internal quotation marks omitted).) The Commission was

reasonably concerned that voters may fail to distinguish between projects of the actually authorized "Huckabee for President, Inc." committee and an unauthorized committee's project that might be named, say, "Huckabee for America" or "Citizens for Huckabee." Because "the relevant evidence from the 1992 and 1994 rulemakings thus establishe[d] the requisite 'rational connection between the facts found and the choice made' in promulgating the [revisions to 11 C.F.R. § 102.14(a)-(b)], as well as in issuing the CAP Advisory Opinion" (J.A. 273 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))), the district court rightly determined that PAG is unlikely to succeed on the merits of its APA challenge.

IV. THE DISTRICT COURT CORRECTLY FOUND THAT NONE OF THE OTHER FACTORS SUPPORTED ENTERING A PRELIMINARY INJUNCTION

PAG's cursory treatment of the other preliminary injunction elements incorrectly presumes the validity of its invalid merits arguments. (PAG's Br. 52-53.) But consideration of these factors "reinforce[s the district court's] finding that the entry of a preliminary injunction [wa]s not warranted here." (J.A. 288.)

A. PAG Failed to Demonstrate Irreparable Injury

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation and internal quotation marks omitted). This Court "has set a high standard for

irreparable injury," underscoring that the injury "must be both certain and great . . . actual and not theoretical." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation marks omitted). Here, "PAG has not demonstrated that . . . it will be prevented from speaking, as opposed to merely having . . . [its] referencing of candidate names . . . relegated from the titles of its special project communications to the bodies of those communications." (J.A. 288-89.)

PAG purports to rely on *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality), but *Elrod* held that conditioning municipal employment on membership in a particular political party was an unconstitutional infringement on First Amendment rights. *Id.* at 372. That holding rested on the finding that government employees had already been "threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge," and it was "clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Id.* at 373. *Elrod* thus did not eliminate a First Amendment plaintiff's burden to show that its interests are actually threatened or being impaired. *Nat'l Treasury Emps. Union v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991).

PAG's claim (PAG's Br. at 53) that it has "'los[t]'" its First Amendment freedoms is incorrect. In contrast to PAG's assertion that not being able to use Mr.

Huckabee's name "*prohibits* [its] speech advocating for the nomination and election of" Mr. Huckabee (PAG's Br. at 1 (emphasis added)), PAG is in fact "free to say whatever it wants about Mr. Huckabee" (J.A. 276 (internal quotation marks omitted)). If it does not want to bring the "I Like Mike Huckabee" website and Facebook page into compliance by moving its use of Mr. Huckabee's name to a subheading, it can simply continue to use its other websites, Facebook pages, Twitter accounts, or YouTube channel. *See supra* pp. 13-14; *see also* J.A. 284, 290 (discussing *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (per curiam) (issuance of permit for shorter than requested parade route did "not constitute irreparable harm" because group could still "convey their message")). There are no reasons for PAG to have stopped updating the Huckabee website and Facebook page yet leave them publicly available other than litigation-driven ones. The Facebook page and website remain in plain violation of the name regulation because the titles still improperly include the name of a candidate, while the regulation has never restricted their content. All the name identification requirement does is limit the extent to which PAG can suggest through the names under which it operates that its speech *is* Mr. Huckabee's when it is not.

PAG is also free to spend the millions of dollars it has raised on as many social media posts and communications supporting Mr. Huckabee's candidacy as it

wishes. Super PACs like PAG routinely raise millions of dollars. In the current presidential election cycle, for example, the super PAC "Right to Rise" has already raised more than $100 million. FEC, *Candidate and Committee Viewer* (Right to Rise), http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do.[11] PAG itself has raised millions of dollars and has spent more than $1.4 million on direct mail and other advertising supporting Mr. Huckabee or opposing one of his rivals. *See supra* pp. 13-14 & n.4. PAG is not being harmed by having to identify itself in a way that is not misleading, and its assertion that it has "stopped speaking" (PAG's Br. at 53) is specious.

B. The Relief PAG Requests Would Harm the Government and Undercut the Public Interest

Permitting PAG's unauthorized desired use of Mr. Huckabee's name would undermine the government's interests in limiting fraud, abuse, and confusion, thereby harming the public and the government. This harm is evident from the confusion shown on the unauthorized "I Like Mike Huckabee" Facebook page. (J.A. 275-76.)

[11] Contrary to PAG's contention that the use of a candidate's name is necessary to enable an authorized committee that supports a candidate to be "easily found" on the Internet (PAG's Br. at 47-48), a Google search for "Jeb Bush super PAC" returns Right to Rise's website as the first listed result. A search for "Mike Huckabee super PAC" returns PAG's website as the second listed result. (Exh. 1 (Google searches as of January 8, 2016).)

The current version of the name identification requirement has been law for twenty-one years. There is a "presumption of constitutionality which attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984); *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 50 (D.D.C. 2012) (same), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014). Furthermore, "upsetting [the FEC's] regulatory framework with the upcoming Presidential election just over the horizon. . . would be imprudent, to say the least, and certainly not in the public interest." (J.A. 290 (internal quotation marks omitted).) The Supreme Court has made clear that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Granting preliminary relief in this case would do precisely the opposite.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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January 13, 2016

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,731 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2016, I electronically filed the Brief for the Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. Service was made on the following through CM/ECF:

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I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

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SUPPLEMENTAL ADDENDUM
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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP HILLARY PAC, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:15-cv-1208-GBL-IDD
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiffs STOP Hillary PAC's and Dan Backer's Motion for Preliminary Injunction (Doc. 3). Plaintiffs' have launched a facial constitutional challenge to Federal Election Commission regulation 52 U.S.C. §30102(e)(4), contending that it restricts Plainitffs' free speech, in violation of the First Amendment. *Id.* Plaintiffs' seek a preliminary injunction prohibiting Defendant Federal Election Commission ("FEC") from enforcing 52 U.S.C. §30102(e)(4)—a statutory disclosure requirement which prohibits political committees from using a candidate's name in its title. In support of its motion, Plaintiffs' seek an order enjoining the FEC from pursuing any adverse administrative, civil, or criminal action against Stop Hillary PAC or Dan Backer, based on Stop Hillary PAC's name, throughout the duration of this lawsuit. *Id.* The FEC responds that 52 U.S.C. §30102(e)(4), as a disclosure regulation, is not a content based restriction on free speech and does not violate the First Amendment because the regulation is intended to avoid voter confusion about whether a PAC is authorized by a political candidate. (Doc. 25). Additionally, the FEC contends that even an oppositional PAC, like Plaintiffs are prohibited from using a political candidate's name because some voters may be misled into confusion that an oppositional PAC is really in support of former

Senator and Secretary of State Hillary Rodham Clinton's opponent, thus still creating voter confusion. *Id.*

The issue presented is whether Plaintiffs STOP Hilary PAC and Dan Backer have shown likelihood of success in showing that 52 U.S.C. §30102(e)(4), is a restraint on speech and thus violates the First Amendment. A party "seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest." *Dewhurst v. Century* Aluminum *Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

The Court holds that Plaintiff has not shown the first prong required to obtain a preliminary injunction, that is, likelihood of success on the merits. Plaintiffs' have not shown that 52 U.S.C. §30102(e)(4), is a restraint on speech or was enacted because of the content of speech. Plaintiffs' have not shown that the existing regulations prohibit Plaintiffs from running their "Stop Hillary" PAC website, social media, electronic and print oppositional materials. The only FEC restriction in place is that the regulations prohibit the PAC from using a political candidate's name in the name of the PAC. The regulation supporting 52 U.S.C. §30102(e)(4) allows precisely the type of oppositional speech Stop Hillary PAC and Backer seek. Additionally, 52 U.S.C. §30102(e)(4) is sufficiently tailored to allow Stop Hillary, an unauthorized PAC, to include the name of a candidate in the title of a special project name or other communication if the title clearly and unambiguously shows opposition to the named candidate.

Thus, having reviewed the pleadings, heard oral arguments, and considered the relevant case law, the Court holds that, based on the facts available at this stage, Plaintiffs have not met

all four prongs required to warrant granting the extraordinary remedy of ordering a preliminary injunction. The Court denies Plaintiffs' Motion for Preliminary Injunction.

I. BACKGROUND

Plaintiffs STOP Hilary PAC and Dan Backer ("Plaintiffs") brings this civil action against Defendant Federal Election Commission ("Defendant") contesting the constitutionality of § 30102(e)(4), which prohibits a Political Action Committee ("PAC") from using a political candidate's name in its title. 52 U.S.C. §30102(e)(4). Specifically, Plaintiffs' claims assert that § 30102(e)(4), both on its face and as applied to political committees with names that unambiguously oppose a federal candidate, violates the First Amendment and the Equal Protection Component of the Due Process Clause.

Stop Hillary PAC is a unauthorized and non-connected hybrid political committee that its Treasurer, Dan Backer, and others formed on May 16, 2013, by filing a Statement of Organization with Defendant Federal Election Commission ("FEC"). *See* Declaration of Dan Backer in Support of Plaintiffs' Motion for Preliminary Injunction (hereafter, Backer Decl.); *see also* Compl., Ex. 1. The Statement of Organization listed "Stop Hillary PAC" as the PAC's name, and Dan Backer as its Treasurer and custodian of records. Backer Decl., Ex. 1.

Stop Hillary PAC has operated continuously for the past two years and four months, since its founding, in pursuit of its mission: to ensure that Hillary Clinton, former United States Senator and Secretary of State, "never becomes President of the United States." Backer Decl., Ex. 2. At the time Backer registered the committee with the FEC, he "was aware" of the Act's "prohibition on including candidate names in the names of PACs," but believed Hillary Clinton would not seek the 2016 Democratic Party nomination for the office of President. (Compl. ¶

13.). When Backer formed Stop Hillary PAC, Hillary Clinton was not a candidate for federal office. Mtn. for Prelim. Injun. at 2.

II. STANDARD OF REVIEW

To obtain a preliminary injunction, the plaintiff must establish that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council Inc.*, 129 S. Ct. 365, 374-76 (2008); *The Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355, 355 (4th Cir. 2010) (reissuing *Real Truth About Obama,* 575 F. 3d 342, 345-47 (4th Cir. 2009)).

III. DISCUSSION

a) *Section 30102(e)(4) of Title 52 of the U.S. Code is a Well-Established Law, Used to Help the Voting Public Decipher Between Authorized and Unauthorized Political Action Committees for the Last 35 Years.*

A party "seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest." *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). Each of these four prongs "must be satisfied as articulated" before a court can grant a motion for preliminary injunction. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) ("*RTAO*"), *vacated by* 130 S. Ct. 2371 (2010), *reinstated in relevant part by* 607 F.3d 355 (4th Cir. 2010). Plaintiffs bear the burden of proving each prong. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). For election cases in particular, preliminary injunctions are "'disfavored'" and require the movant to "'satisfy an even heavier burden of showing that the four factors listed

above weigh heavily and compellingly in movant's favor.'" *Cornwell v. Sachs*, 99 F. Supp. 2d 695, 704 (E.D. Va. 2000) (quoting *Tiffany v. Forbes Custom Boats, Inc.*, 959 F.2d 232 (table), No. 91-3001 (4th Cir. 1992)). More importantly, "[c]onsiderations specific to election cases" weigh even further against the issuance of injunctions. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) (vacating lower court's injunction against enforcement of election statute *and noting potential for pre-election injunctions to cause confusion among voting public*); *id.* ("[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.).

Here, Plaintiffs contend that they meet all four prongs required for a preliminary injunction and thus, their motion should be granted. (Doc. 3). However, the Court holds that Plaintiffs are unlikely to succeed on the merits of their claim—the first prong required before a court can grant a motion for preliminary injunction. The statute Plaintiffs contend is unconstitutional, 52 U.S.C. §30102(e)(4), has been in use for 35 years. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 102, 93 Stat. 1339, 1346 (1980); *see also* 52 U.S.C. §30102(e)(4). What's more, the statute simply requires each political candidate to ensure that the candidate's official committee includes the candidate's name. *See* 52 U.S.C. §30102(e)(4).

More precisely, 52 U.S.C. § 30102(e)(4) states:

> The name of each authorized committee shall include the name of the candidate who authorized such committee under paragraph (1). *In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name. Id.* (emphasis added).

Naturally following this requirement that candidates include their name in the title of their official PAC, Congress amended 52 U.S.C. §30102(e)(4) to include the "Name Prohibition," statutorily mandating that "any political committee which is *not* a [candidate's]

authorized committee . . . shall *not* include the name of any candidate in its name." *See Id.* This amendment to §30102(e)(4), requiring that only authorized committees bear the name of a candidate, (hereinafter "Name Prohibition,") was enacted in1980 and has remained settled law ever since. *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 102, 93 Stat. 1339, 1346 (1980). Following §30102(e)(4), the FEC *implemented* the name identification requirement in a regulation largely echoing the statutory provision. 11 C.F.R. § 102.14(a)-(b) (1980).

The purpose of §30102(e)(4), including its Name Prohibition, is simple: to alleviate the constant public confusion surrounding Political Action Committees ("PACs"). Senate Rules and Admin. Comm., Hrg. on Amending the FECA of 1971, as Amended, 96th Cong., 1st Sess., 23 (July 13, 1979); *see also Common Cause v. FEC*, 842 F.2d 436, 447 n.31 (D.C. Cir. 1988) (recognizing that § 30102(e)(4) was enacted to "prevent confusion arising from misleading committee names"). As the FEC has consistently noted, prior to §30102(e)(4)'s enactment, in many cases, unauthorized PACs would contain the name of a candidate, yet not actually be authorized by—or even endorsed by—the named candidate. *See* Doc. 25 at 4-5. Nevertheless, given the candidate's name in the title of the PAC, the voting public would mistake such unauthorized PACs as a candidate's *official* authorized PAC, resulting in misdirected campaign contributions and increased voter confusion. *See* Doc. 25-1, Sadio Declaration, Ex. F) (reporting, from the Center for Public Integrity, "numerous instances" of donors "who believed they were giving to the Sanders campaign" when they actually contributed to an unauthorized PAC(s) because the respective PAC's websites contained titles such as "Ready for Bernie Sanders 2016," "Bet on Bernie 2016," and "BET ON BERNIE!";*see also* Doc. 25-1, Sadio Declaration, Ex. D (quoting Plaintiff Dan Backer's own recognition that a PAC who's official

title bore the name "Stand with Rand" presented "*a legitimate basis for confusion in the name*" and could "*interfere with Rand Paul's messaging*" and thus, deciding that "*a change was appropriate*."); *id.* ("Several Sanders supporters confirmed they donated to Americans Socially United thinking the money was going to Sanders' campaign.").

In 1992, prompted by concern about "the potential for confusion or abuse in . . . situation[s] where an unauthorized committee uses a candidate's name in the title of a special fundraising project," the FEC promulgated a Notice of Proposed Rulemaking ("NPRM") with proposed amendments to 11 C.F.R. § 102.14, the regulation implementing § 30102(e)(4). FEC, *Special Fundraising Projects by Political Committees,* 57 Fed. Reg. 13,056, 13,057 (Apr. 15, 1992) (the "1992 NPRM"). Following the receipt of comments responding to the 1992 NPRM, and consideration of "the entire rulemaking record," the FEC decided "to adopt in its final rule a *ban* on the use of candidate names in the titles of all communications by unauthorized committees" (the "Special Projects Name Regulation"). FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees,* 57 Fed. Reg. 31,424, 31,425 (July 15, 1992) (the "1992 Explanation and Justification").

The 1992 Explanation and Justification explained that, the Commission "ha[d] become more concerned about the potential for confusion or abuse when an unauthorized committee uses a candidate's name in the title of a special fundraising project" because "a person who receives such a communication may not understand that it is made on behalf of the *committee* rather than the *candidate* whose name appears in the project's title." *Id.* The Commission further stated that, in these instances, "it is possible . . . that potential donors think they are giving money to the candidate named in the project's title, when this is not the case." *Id.* at 31, 424. The FEC also pointed out that, in the years leading up to the promulgation of the Special Projects Name

Regulation, the use of candidate names in the titles of projects or other unauthorized communications ha[d] *increasingly become a device for unauthorized committees to raise funds or disseminate information. Id.*

Plaintiffs, acknowledging the purpose and background of §30102(e)(4), contend that the rationale behind the Name Prohibition does not apply to them because "[n]either the FEC nor the Clinton campaign has identified even a single individual anywhere in the nation who even momentarily suspected that Stop Hillary PAC might be Clinton's official authorized campaign committee, or that Stop Hillary PAC was trying to facilitate Clinton's effort to become President." (Doc. 3-1, Plts. Mem. in Support of Mtn. at 9). However, this argument fails because it does not address the fact that, even with an unambiguously opposed PAC title, the possibility of public confusion *still exists*. In other words, if §30102(e)(4)'s sole purpose is to prevent public confusion surrounding PACs, Plaintiffs' argument that an unambiguously opposed PAC title could not possibly be construed as *supportive* of the candidate named in the PAC's title, does nothing to address the possibility that members of the public would see the PAC unambiguously opposing one candidate—for example "Stop Hillary"—and mistakenly get the impression that the PAC was in fact an authorized PAC supporting one of Hillary Clinton's *opponents*. The very fact that such confusion is still likely, is exactly why §30102(e)(4)'s mandate should not be disturbed. Instead, Plaintiffs are free to express their opposition to Hillary Clinton, or any other candidate, by using her name in any of the various ways outlined by §30102(e)(4).

For example, in 1994, the FEC promulgated a new exception to the Special Projects Name Regulation. *See* FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees,* 59 Fed. Reg. 17, 267 (April 12, 1994) (the "1994 Explanation and

Justification"). This exception, which remains in place today, provides that "[a]n unauthorized political committee *may* include the name of a candidate in the title of a special project name or other communication if the title clearly and unambiguously shows opposition to the named candidate" (the "Opposition Exception" and, collectively with § 30102(e)(4) and the Special Projects Name Regulation, the "Name Identification Requirement"). *Id.* at 17, 269. Reiterating the same rationale for the 1992 Explanation and Justification for the Special Projects Name Regulation—"substantial evidence that potential contributors often confuse an unauthorized committee's registered name with the names of its fundraising projects, and wrongly believe that their contributions will be used in support of the candidate(s) named in the project titles,"—the FEC instituted the Opposition Exception, recognizing "*that the potential for fraud and abuse is significantly reduced in the case of" special project names clearly expressing opposition to the named candidate," Id.* at 17, 267–69.

Nevertheless, while considering the statute's purpose of reducing voter confusion, and simultaneously noting that such concern is lower in PACs that unambiguously oppose a candidate, the FEC did not push to have the Opposition Exception apply to unauthorized PAC *titles* as well. Instead, the Opposition Exception intentionally applies only to Special Projects. *See* 11 C.F.R. § 102.14. This affirms the Court's finding that, even for PACs whose titles unambiguously oppose a candidate, the Name Prohibition is still necessary to prevent public confusion that will inevitably result from seeing a candidate's name in the title of an unauthorized PAC. Given this clear and continued possibility of confusion with unauthorized PACs using candidate's names, the Court sees no justification for, right before an election, disrupting a law that is grounded in ensuring the political process is fair and easily understood by the voting public.

b) Section 30102(e)(4) is Not a Content Based Restriction on Speech and Thus is Not Reviewed Under a Strict Scrutiny Standard.

Plaintiffs are unlikely to succeed in their challenge to the constitutionality of §30102(e)(4) because the statute is not content based restriction on speech. A restriction is content based when it "target[s] speech based on its communicative content." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). In other words, if a law applies to particular speech because of the topic discussed or the idea or message expressed, the commonsense meaning of the phrase "content based" requires a court to consider whether the regulation of speech on its face draws distinctions based on the message a speaker conveys. *Id.* Such laws are "presumptively unconstitutional" and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *Id.*

Here no such restriction exists. Though Plaintiffs argue that §30102(e)(4)'s Name Prohibition is content based and thus requires strict scrutiny, the Court is not convinced. Section 30102(e)(4) "do[es] not prevent anyone from speaking," *See Citizens United*, 558 U.S. at 366 (quoting *McConnell*, 540 U.S. at 201). To the contrary, under §30102(e)(4) and its supporting regulation, Plaintiffs, and any other unauthorized PAC like it, are entirely free to discuss candidates—even by using a candidate's name—throughout their websites, solicitations, special projects, and various other communications, "if the title clearly and unambiguously shows opposition to the named candidate." 11 C.F.R. § 102.14(b)(3). In fact, the *only* area Plaintiffs are not allowed to use the name Hillary, or any other candidate's name, is in the official and registered *title* of the unauthorized PAC—a fact even Plaintiffs admit. (Doc. 3-1 at 8). This very narrow Name Prohibition is simply the inverse of §30102(e)(4)'s requirement that *candidates* avoid voter confusion, by including the candidate's name in the title of its authorized PAC, signifying to the public that the PAC is in fact, endorsed by the candidate. 52 U.S.C.

§30102(e)(4). This narrow and specific requirement of candidates does not prohibit speech, rather, it limits potential confusion about which person, group, or candidate the PAC represents, thus giving public voters to confidence to contribute, support, or oppose the PAC accordingly.[1] *Citizens United,* 558 U.S. at 310. The Name Prohibition exists solely to ensure that critical aspect of transparency is preserved.

Thus, contrary to *Reed*, §30102(e)(4) is not a content based restriction because it does not "target[] speech based on its communicative content." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). Rather, it allows *all* forms of a PAC's political speech, similar to the type of speech Plaintiffs are currently using to oppose a candidate, with a limited reiteration that candidates—and candidates alone—are required to disclose their names in the titles of their authorized PACs. Unauthorized PACs, on the other hand, though admittedly restricted from also using candidates' names in their titles, are not restricted from expressing the *very same speech* in *every other area of their PAC's methods of communication.* Here, Plaintiffs' use of "Stop Hillary" in *all* of its communications, with the exception of its use as a PAC title, demonstrate that PACs similarly opposing candidates have extensive freedom to express opposition to a candidate in nearly whatever form it desires.

In fact, § 30102(e)(4) and its subsequent regulation, § 102.14(b)(3), demonstrate the extent of § 30102(e)(4)'s statutory flexibility in a way that can only be interpreted as intentional. Section 30102(e)(4) grants unauthorized PACs, who unambiguously oppose candidates, the freedom to use almost *any* form of communication to express opposition to a candidate. As this

[1] "[S]ubsection (e)(4) is directed *solely* at disclosure of whether a political committee that solicits funds from the public is part of the authorized campaign machinery of a candidate," and that the committee corresponds with FECA's provision to "clarify[ ] for readers and potential contributors the candidate authorization status of the political committees who sponsor advertisements and fund solicitations." (noting that "the avowed purpose" of the statute is "to eliminate confusion"); *see also Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 2015 WL 5675428, at *3 (D.D.C. Sept. 24, 2015) (quoting *Common Cause*, 842 F.2d at 440-42).

Court has already noted, the 1994 the exception to subsection 102.14(b), granted unauthorized committees more flexibility to use the name of a candidate in the title of a special project name or other communication "if the title clearly and unambiguously shows opposition to the named candidate." *See supra* pp. 3-5; *see also* 11 C.F.R. § 102.14(b)(3). In addition to this large exception to §30102(e)(4) "[u]nauthorized committees remain free to discuss candidates throughout the[ir] communication[s] and to use Candidates' names as frequently, and as prominently (referencing characteristics such as size, typeface, and location that the candidates' name is placed) as they choose." 1994 Rule, 59 Fed. Reg. at 17, 268-69. Even more, in a 1995 advisory opinion, the Commission expanded the regulation's wide breadth by explaining that even a "committee's online activities" are considered one of the many "projects that fall within the scope of section 102.14," and thus can express a candidate's name. FEC Advisory Op. 1995-09 (NewtWatch PAC), 1995 WL 247474, at *5 (Apr. 21, 1995) ("NewtWatch Advisory Op.").

Put simply, the Commission explained that although a PAC titled "NewtWatch" could not be used as part of the PAC's official title—given the usage of then-House Speaker Newt Gingrich's name—"the Act and Commission regulations *do not prohibit the Committee from using the name 'NewtWatch' as a project name*." Thus, the PAC was allowed to use the term "NewtWatch," in *any* of their special projects and communications, in light of its "clear and unambiguous opposition to the candidate," *See id.* Specifically, this meant that §30102(e)(4)'s codified regulation, § 102.14(b)(3), permitted the Committee to use in the term "NewtWatch," containing a candidate's name, in the PAC's uniform resource locator ("URL") for its website, simply because "online activities are projects that fall within the scope of section 102.14." NewtWatch Advisory Op at *1, 5; *see also* FEC Advisory Op. 2015-04 (Collective Actions PAC), 2015 WL 4480266, at *1,3 (July 16, 2015) ("CAP Advisory Op.") (noting that the Name

Prohibition "only applies to the *titles* of [a] Committee's projects. [A] Committee is free to promote Senator Sanders (or any other candidate) by name in the body of *any* website or other communication."). These cases demonstrate that, by allowing only candidates to place their names in their authorized PAC titles, Plaintiffs' speech was not restricted at all, and certainly not on the basis of the content. Thus again, this Court finds that, based on the current facts, Plaintiffs have failed to prove they are likely to succeed on the merits.

c) Section 30102(e)(4) is a Disclosure Requirement and as Such, Only Requires "Exacting" Scrutiny.

The name identification requirement is an integral part of FECA's *disclosure regime*. Section 30102(e)(4) "require[s] political bodies to *disclose* the identity of persons associated with them." *See Common Cause*, 842 F.2d at 442 (emphasis added). Most notably, the Supreme Court has already found that disclosure requirements, *i.e.*, those laws that make up a disclosure regime—as §30102(e)(4) does, is "the less-restrictive alternative to more comprehensive speech regulations" because the disclosure requirement simply requires additional speech for clarity and information's sake, rather than restricting it all together. *See Citizens United*, 558 U.S. at 316.

This means, the requirement does not prohibit speech, but simply requires political committees to disclose their "candidate authorization status . . . *in a particular place*, just as do other disclosure and disclaimer regulations concerning publicly disseminated political committee communications." *See id.* Looking at §30102(e)(4) specifically, the D.C. Circuit noted that §30102(e)(4) "require[s] political bodies to *disclose* the identity of persons associated with them." *Common Cause*, 842 F. 2d at 442 (emphasis added); *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1367-68 (D.C. Cir. 1988) (characterizing §30102(e)(4) as part of the Act's "specific disclosure requirements" or "extensive disclosure requirements"). More telling, this rhetoric was reiterated by a D.C. district court this very year, in *Pursuing America's Greatness v FEC,* when

it stated that §30102(e)(4) is *"part and parcel of FECA's disclosure regime."* *See* 2015 WL 5675428, at *3, *11-12 (D.D.C. Sept. 24, 2015) (emphasis added).

As part of the disclosure regime, §30102(e)(4) requires "exacting" or intermediate scrutiny. *Citizens United*, 558 U.S. at 366-67. Therefore, the statute's restrictions on expression must be substantially related to important government interests. *Id.* (quoting *Buckley v. Valeo,* 424 U.S. 1, 64 (1976) (*per curiam*)); *McConnell v. FEC*, 540 U.S. 93, 231-32 (2003). The Supreme Court has already held that disclosure requirements, like §30102(e)(4), "are in part justified based on a governmental interest in *provid[ing] the electorate with information about the sources of election-related spending*." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (internal quotation marks omitted) (emphasis added). Continuing, the *McCutcheon* Court stated, "[w]ith modern technology, *disclosure now offers a particularly effective means of arming the voting public with information*," demonstrating the important governmental interest that comes from ensuring the public is armed with information about which PACs they are encountering, and can then make fully informed decisions about their contributions and support. *Id.* at 1445-46, 1460 (explaining that although government's anti-corruption interest needed to be only "sufficiently important" to satisfy the closely drawn scrutiny that applies to contribution limits, the Court had itself already stated that that "interest may properly be labeled 'compelling'"). Additionally, in *Burson v. Freeman,* the Supreme Court explicitly "concluded that a State has a *compelling interest in protecting voters from confusion and undue influence*." 504 U.S. 191, 199 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983).

In *Buckley*, the Court explained that disclosure could be justified with a valid governmental interest of providing "the electorate with information" about election-related spending sources). *Citizens United, 558 U.S. at 366-67*; *see also Buckley*, 424 U.S. 1. This was

further reinforced by the Fourth Circuit in *Real Truth About Abortion, Inc. v. FEC ("RTAA")* 681 F.3d 544, 549, 553 (4th Cir. 2012) (collecting cases), *cert. denied*, 133 S. Ct. 841 (2013); *see also Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650-51 (1985) (noting that "disclosure requirements trench much more narrowly on [one's] interests than do flat prohibitions on speech"). In *RTAA*, the Fourth Circuit categorized the Supreme Court's "routine[]" recognition that disclosure requirements as "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist" and are constitutionally permissible for a wide variety of speech. *Id.* That is precisely the purpose and application of §30102(e)(4) here.

Here, as the FEC adequately points out, §30102(e)(4)'s purpose is clear: to advance the governmental interest of ensuring the public voters are informed and understand which PAC they are encountering, and what that means for them going forward. *See supra*, section a. By doing so, the statute and its regulation are tailored to the governmental interest of limiting confusion, fraud, and abuse of the political process. *Id.* In fact, if all parties are compliant with the statute, §30102(e)(4)'s requirements enables a contributor to learn "by a glance" whether a particular political committee "is an authorized or unauthorized vehicle of the candidate." *Common Cause*, 842 F. 2d at 442. The name identification requirement "avoids the kind of confusing disclaimer previously possible, 'Paid for by Reagan for President. Not authorized by President Reagan,' and makes § [30120(a)'s] disclaimers more effective." *Id.* at 442; *cf. Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (explaining that other disclaimer and disclosure provisions in FECA similarly serve to "'insure that the voters are fully informed' about the person or group who is speaking" about a candidate and "avoid confusion by making clear that the ads are not funded by a candidate" (quoting *Buckley*, 424 U.S. at 76.).

In sum, the government's interest in protecting the public, by providing it with information that will safeguard it from PACs that are confusing, misleading, and even possibly fraudulent, is undeniably an important government interest. *See supra, pp. 11-12.* Further, the fact that the government's interest only impedes on Plaintiffs' ability to include a candidate's name in its *title* alone, further demonstrates that §30102(e)(4) is the least restrictive means of accomplishing the government's interest for transparency in PACs. *See RTAA,* 681 F. 3d at 549. As the FEC adequately explained, "[w]ithout both the positive requirement of including candidate names in authorized committee names, and the corresponding restriction for unauthorized committees, a candidate's authorized committee could be lost in a sea of other groups including the candidate's name. The rules mandate a floor level of disclosure about the relationship, or lack thereof, between the speaker and any candidate mentioned by the speaker in order to "limit 'the potential for confusion.'" *See* Doc. 25, Def's Opp. to Plts. Mtn. at 11 (citing CAP Advisory Op., 2015 WL 4480266, at *2). Because §30102(e)(4)'s restrictions are substantially related to important government interests, Plaintiffs have again, failed to demonstrate that they are likely to succeed on the merits of their claims. Given this, along with the Court's conclusion that §30102(e)(4) is well settled law and not content based restriction, Plaintiffs are unable to satisfy the first prong required for this Court to issue a preliminary injunction.

In light of this, the Court need not further evaluate the remaining three prongs Plaintiffs must satisfy for a preliminary injunction. However, the Court briefly notes that, given the remarkable breadth of §30102(e)(4) and Plaintiffs position as unambiguously opposing Hillary Clinton, §30102(e)(4) affords Plaintiffs the unique ability to retain the their official website, Facebook, and Twitter page. Armed with this knowledge, Plaintiffs still have not demonstrated

how they are substantially burdened in spite of 102.14(b)(3)'s allowances. Other than a reiteration that Plaintiff Stop Hillary PAC's name is essential to conveying the goals of the PAC, Plaintiffs have given no credibility to their argument that, having the ability to state "Stop Hillary" on their website, email address, Facebook page, and Twitter –as they currently do— without being able to use "Stop Hillary" as their official title, places a substantial burden on Plaintiffs. *See* §102.14(b)(3); *see also* Doc. 3-1 at 8-10. More precisely, the Court notes Plaintiffs, if the FEC enforces §30102(e)(4) will only be required to change the title of their PAC. In light of this, the Court is not convinced that Plaintiffs will suffer irreparable harm if the preliminary injunction is not granted, prong two, nor is the Court convinced that the balance of hardships tips in Plaintiffs favor, prong three. Finally, as this Court notes that the election is rapidly approaching, it holds that it is not in the public's interest to upend a statute that was created for the very purpose of ensuring the public are clearly informed. Thus this Court DENIES Plaintiffs STOP Hillary PAC and Dan Backer's Motion for Preliminary Injunction (Doc. 3). Therefore, it is hereby,

ORDERED that Plaintiffs STOP Hillary PAC and Dan Backer's Motion for Preliminary Injunction (Doc. 3) is **DENIED**.

ENTERED this 21st day of December, 2015.

Alexandria, Virginia
12/21/15

/s/
Gerald Bruce Lee
United States District Judge

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