UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PURSUING AMERICA'S GREATNESS,	)	
Plaintiff,	)	Civ. No. 15-1217 (TSC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	SUMMARY JUDGMENT MOTION
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

Defendant Federal Election Commission ("Commission") respectfully cross-moves this Court for an order (1) granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 7(h), (2) denying plaintiff's summary judgment motion (Docket No. 38), and (3) dissolving the preliminary injunction order (Docket No. 31). In support of this motion, the Commission is filing a Memorandum in Support of Its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, Responses to Plaintiff's Statement of Undisputed Facts and Defendant's Further Statement of Material Facts and accompanying Exhibits, and a Proposed Order. The Commission requests oral argument on this motion.

Respectfully submitted,

/s/ Tanya Senanayake

Tanya Senanayake (D.C. Bar No. 1006218)
Attorney
tsenanayake@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street N.W.
Washington, DC 20463
(202) 694-1650

October 23, 2017

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Charles Kitcher (D.C. Bar No. 986226)
Acting Assistant General Counsel
ckitcher@fec.gov

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FEDERAL ELECTION COMMISSION,	)	SUMMARY JUDGMENT MEMORANDUM
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FEDERAL ELECTION COMMISSION'S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Charles Kitcher (D.C. Bar No. 986226)
Acting Assistant General Counsel
ckitcher@fec.gov

Tanya Senanayake (D.C. Bar No. 1006218)
Attorney
tsenanayake@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street N.W.
Washington, DC 20463
(202) 694-1650

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INTRODUCTION

Pursuing America's Greatness ("PAG") challenges as unconstitutional under the First Amendment a longstanding regulation that the Federal Election Commission ("FEC" or "Commission") has narrowly crafted to implement the Federal Election Campaign Act's ("FECA" or "Act") requirement that unauthorized political committees not use any candidate's name in their own names. PAG, an unauthorized and largely defunct super PAC that supported Governor Mike Huckabee's 2016 presidential campaign, thus asks this Court to declare 11 C.F.R. § 102.14(a)-(b) unconstitutional so that it — and other committees — may conduct activities and receive donor contributions using confusing operating names like "Conservatives for Huckabee" without candidate authorization. PAG contends that the regulation impedes its First Amendment rights of expression.

The First Amendment is not a suicide pact, however, and even applying strict scrutiny, courts have upheld narrowly tailored regulations affecting First Amendment rights when those regulations serve compelling governmental interests. Just like restrictions on politicking in the immediate vicinity around polling places, or judges personally soliciting campaign contributions, section 102.14 is narrowly tailored to further the compelling interests of limiting confusion, fraud, and abuse resulting from political committees' use of candidate names in their operating names. Overwhelming evidence demonstrates how the use of names like "Reagan Political Victory Committee" by entities having nothing to do with the actual campaign causes harmful informational confusion, interception of donations, and even shameful scams inflicted on elderly supporters across the political spectrum. More recent examples, using modern modes of communication, are no less compelling. In addition, the record on the comparative effectiveness of alternative forms of regulation thoroughly demonstrates the correctness of the Commission's conclusion that other alternatives, including disclaimers, are inadequate to combat these harms.

As the D.C. Circuit itself indicated decades ago, PAG's proposal would lead to confusing and ineffective disclaimers such as a committee operating as "Reagan for President" but "not authorized by President Reagan." Particularly now, with the advent of online fundraising and heightened concerns about identifying the sources of political information on social media platforms, the concerns addressed by section 102.14 are as acute as ever. Because section 102.14 is constitutional, the Court should grant summary judgment to the Commission.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Election Commission

The FEC is an independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA, 52 U.S.C. §§ 30101-146. Congress authorized the Commission to "formulate policy" with respect to FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC has exclusive jurisdiction to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

B. The Enactment of the Name Requirement Provision in FECA

FECA has for decades contained a name identification requirement for political committees. This requires committees to disclose, within very broad boundaries, whether they speak on behalf of a particular candidate or group of 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). The name of each such "authorized" political committee "shall include the name of the candidate who authorized" it. *Id.* § 30102(e)(4). In contrast, "any political committee which is not an authorized committee . . . shall not include the name of any candidate in its name." *Id.* The names of the committees "Huckabee for President, Inc." and "Pursuing America's Greatness" accordingly convey that while the former was an authorized committee for Mike Huckabee's 2016 campaign that was permitted to receive contributions and make expenditures on his behalf, the latter was not.[1] Congress added the name identification provision to the Act in 1980. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 102, 93 Stat. 1339, 1346 (1980).

Congress enacted the provision in response to the Commission's experience. *See* FEC's Responses to Pl.'s Statement of Undisputed Facts and Defendant's Further Statement of Material Facts ¶¶ 27-32 (describing legislative history) ("SMF"). The Commission 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. In order to avoid confusion," the agency recommended that "the Act should require the name of the principal campaign committee to include in its name the name of the candidate which designated the committee." SMF ¶ 28.

Following passage of this amendment, the FEC codified the name identification requirement in a regulation that largely mirrored the statutory provision, but carved out

[1] Because Mr. Huckabee is not presently a candidate, his name may be used in any political committee's formal or operating names.

exceptions for "delegate" and "draft" committees in order to permit such groups to use the names of candidates in their committee names. 11 C.F.R. § 102.14(a)-(b) (1980).[2]

C. *Common Cause v. FEC*

In 1988, the D.C. Circuit considered whether the FEC had erred in declining to pursue allegations that several unauthorized political committees had violated section 30102(e)(4)'s name regulation. *Common Cause v. FEC*, 842 F.2d 436 (D.C. Cir. 1988). 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 the challengers' 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 D.C. Circuit 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. Consistent with the extremely deferential review required in connection with the FEC's decisions not to pursue enforcement, 52 U.S.C. § 30109(a)(8), the D.C. Circuit 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*

[2] 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); *see also* 11 C.F.R. § 102.14(b) (1980).

Defense Council, Inc., 467 U.S. 837 (1984). *Common Cause*, 842 F.2d 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 "[would] foster[] the very confusion Congress sought to prevent." *Id.* at 451 (R.B. Ginsburg, J., dissenting in part). 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.* She observed 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 451-52. Her opinion 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.* at 452.

D. The FEC's 1992 Revision of the Regulation

In 1991, two Republican national party committees requested an FEC advisory opinion regarding whether they could, through a proposed joint fundraising committee to be called the "Committee for a Republican Congress," use the name "Americans for Bush" as a title for a special fundraising project. SMF ¶ 195. During the deliberations about the request, FEC Commissioners expressed concern about the potential for confusion arising from an unauthorized committee's use of a candidate's name in the title of its operating name. *Id*. ¶ 196-97. For instance, Commissioner Trevor Potter expressed his "very serious concerns in this whole area about the potential for contributors being confused about who they're giving to. . . . I think a common understanding of what has gone on over the last ten years indicates that there are many committees that have solicited in ways that have left contributors confused." *Id*. ¶ 196. Another

Commissioner noted the "repugnance of the practice and the overwhelming public policy," and referenced then-Judge Ginsburg's *Common Cause* dissent about "how people were misled," including "a distinguished former member of the United States Senate, who was a member of our Oversight Committee." *Id.* Ultimately, the Commission did not issue an advisory opinion in the matter, instead concluding that exploring the use of a candidate's name in an unauthorized committee's project name should be addressed through a rulemaking, in which the Commission could develop and consult a record. *Id*. ¶ 197-98.

In 1992, the Commission accordingly promulgated a Notice of Proposed Rulemaking ("NPRM") regarding proposed amendments to 11 C.F.R. § 102.14, its regulation implementing section 30102(e)(4). FEC, *Special Fundraising Projects by Political Committees*, 57 Fed. Reg. 13,056 (Apr. 15, 1992). The Commission explained in the NPRM that it was "concerned about the potential for confusion or abuse" in "the situation where an unauthorized committee uses a candidate's name in the title of a special fundraising project." *Id.* at 13,057. "[A] person who receives the communication might not understand that it is made on behalf of the committee rather than the candidate whose name appears in the project's title." *Id.* Specifically noting that the "court in [*Common Cause*] indicated that this approach, as well as the Commission's current approach, would be valid under [52 U.S.C. § 30102(e)(4)]," the FEC "welcome[d] comments on whether this broader approach is now preferable." *Id.*

The Commission at this time considered substantial evidence of voter confusion, fraud, and abuse that resulted from unauthorized committees using candidate names in the names under which they conducted their affairs. For instance, the Commission included in the rulemaking record a television documentary that "discovered that thousands of Americans, most of them elderly, have been fooled" by committees using names of politicians and that raised more than $9 million. SMF ¶¶ 49, 124-27, 219, 235. The Commission also considered comments evidencing

this widespread problem, *see* SMF ¶¶ 45-49, 116-128, including one from an authorized committee that wrote about a group called the "National Security Political Action Committee" which had raised $10,277,264 in 1988 with its "Americans for Bush" fundraising program. *Id.* ¶¶ 46-47. The agency considered a statement from Senator Bob Dole and Representative Christopher Shays, who described direct experience with misleading committee project names and explained that they had "long been concerned" with the issue of "helping to ensure that the public is not misled by unauthorized fundraising solicitations," because "many Americans who thought they were contributing to legitimate campaigns were actually donating to an unauthorized committee. . . . [S]enior citizens on fixed incomes are especially vulnerable to unauthorized solicitations." *Id.* ¶ 121.

During the course of the rulemaking and over a series of meetings, the Commission discussed several avenues for addressing the problem of contributor and voter confusion. In particular, and as discussed in greater detail below, *see infra* pp. 30-35, the Commission considered (1) requiring checks to be payable to the reporting committee; (2) requiring a disclaimer that was "clearer on its face" than that required at the time; (3) requiring unauthorized committees to obtain consent from the candidate before using his or her name in a special project title; (4) allowing the use of candidate names only by party committees of the same party as the candidate, and (5) regulating the use of candidates' names in special project titles. SMF ¶ 204. The Commission found that all but the last of these alternatives would be insufficient or ineffective to respond to the concerns that had been documented in the record. *Id.* ¶¶ 204-235.

Consequently, in consideration of the comments received and "the entire rulemaking record," the agency decided to revise section 102.14 to regulate "the use of candidate names in the titles of all communications by unauthorized committees." FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees*, 57 Fed. Reg. 31,424,

31,425 (July 15, 1992) ("1992 Explanation & Justification"). The new rule provided that, subject to the same exceptions for delegate and draft committees, "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." *Id.* at 31,426.

E. The FEC's 1994 Revision of the Regulation

In 1993, the agency received a Petition for Rulemaking asking that the Commission reconsider the new regulation it had just passed. The agency published a Notice of Availability inviting public comments on the petition. FEC, *Rulemaking Petition: Citizens Against David Duke; Notice of Availability*, 58 Fed. Reg. 12,189 (Mar. 3, 1993).

After considering the rulemaking petition, the Commission issued a new NPRM concerning the name regulation. FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees*, 58 Fed. Reg. 65,559 (Dec. 15, 1993). Recognizing that "the focus of the earlier rulemaking was on titles that indicate support for a named candidate, and that the potential for fraud and abuse is significantly reduced in the case of those titles that indicate opposition," the Commission "decided to open a rulemaking on the narrow question of whether the current rules should be revised to permit the use of candidate names in titles that clearly indicate opposition to named candidates." *Id.*

The Commission received comments providing "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." FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees*, 59 Fed. Reg. 17,267, 17,268 (Apr. 12, 1994) ("1994 Explanation & Justification"). The record also indicated, however, "that the potential for

fraud and abuse is significantly reduced in the case of" the use of a candidate's name by a committee or project which opposes the candidate. *Id.* The FEC "accordingly revised its rules to permit" such names, promulgating a new exception to the regulation. *Id.* at 17,269. Adding to the longstanding delegate and draft exceptions, 11 C.F.R. § 102.14(b)(1)-(2), the agency added a third exception: "(3) An 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." *Id.* at 17,269. The language of 11 C.F.R. § 102.14(b)(3) remains the same today.

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

Since its revisions to the regulation in the early 1990s, the FEC has issued a number of advisory opinions and proceeded on various enforcement matters, called matters under review ("MURs"), applying the name identification requirement. In 1995, for example, the Commission held in response to an advisory opinion request that the use of the name "NewtWatch" for the "operation of a World Wide Web site" and in the uniform resource locator ("URL") for its website would constitute a special project within the clear and unambiguous opposition exception. FEC Advisory Op. 1995-09 (NewtWatch PAC), 1995 WL 247474, at *1, *5 (Apr. 21, 1995); *see also* FEC Advisory Opinion 2013-13 (Freshman Hold'em JFC), 2013 WL 6094229, at *1-2 (Nov. 14, 2013) (requiring a joint fundraising committee to include the names of the group of candidates who had authorized it); Conciliation Agreement, ¶¶ IV.4., V.1., Republicans for Trauner, MUR 5889 (2007) https://www.fec.gov/files/legal/murs/current/62337.pdf (finding use of the name of a candidate in a non-authorized committee's name a violation).

Most recently, in FEC Advisory Opinion 2015-04 (Collective Actions PAC) ("CAP Advisory Opinion"), the FEC unanimously concluded that the group making the request, Collective Actions PAC ("CAP"), an unauthorized political committee, was not permitted to use

the name of a candidate for federal office in the name of its proposed websites or social media pages such as RunBernieRun.com, ProBernie.com, the Facebook page Run Bernie Run, and the Twitter accounts @Bernie_Run and @ProBernie. 2015 WL 4480266, at *1 (July 16, 2015). The agency explained that "[b]ecause the names of the Committee's websites and social media accounts that include Senator [Bernie] Sanders's name do not clearly express opposition to him, those sites and accounts are impermissible under 11 C.F.R. § 102.14." *Id.* at *3. The Commission also reiterated, "however, that this restriction only applies to the titles of the Committee's projects. The Committee is free to promote Senator Sanders (or any other candidate) by name in the body of any website or other communication." *Id.*

II. PLAINTIFF'S CLAIMS AND ACTIVITIES

PAG is an independent-expenditure-only political committee (or "super PAC") that "independently advocate[d] for the election of Mike Huckabee as President of the United States" in 2015 and 2016. SMF ¶ 2. PAG is not authorized by any candidate or candidate's committee, and registered with the FEC as an "unauthorized" political committee. *Id.* ¶ 3.

In 2015, a company named Strategic Media 21 approached PAG about coordinating their efforts to support Mr. Huckabee. SMF ¶ 4. Specifically, Strategic Media 21 proposed associating PAG with an "I Like Mike Huckabee" Facebook page and website that Strategic Media 21 had created. *Id.* After a period of negotiations, PAG and Strategic Media 21 entered into a contract pursuant to which PAG "control[led] the operation and maintenance, including the content, of the website www.ilikemikehuckabee.com and Facebook page 'I Like Mike Huckabee.'" *Id.* ¶¶ 5-6. PAG began operating and maintaining the website and social media account around July 9, 2015. *Id.* ¶ 7.

Following the issuance of the CAP Advisory Opinion on July 16, 2015, instead of moving PAG's use of Mr. Huckabee's name to a subheading such as "America's Greatness: We

Like Mike Huckabee" and proceeding with PAG's claimed strategy of continuing to build on what it has characterized as the uniquely positive Facebook community Strategic Media 21 had built (Pl.'s Mem. in Supp. of Its Mot. for Summ J. at 4 (Docket No. 38-1) ("Pl.'s Mem.")), PAG chose to keep Mr. Huckabee's name in the title of the website and Facebook page and in the URLs. Strategic Media 21 questioned this decision, asking PAG's principals "whether we can use the name I Like Mike Huckabee or need to switch to another name," explaining that its team could "reach 82 million people using social media," and that with funding "[w]e can start a tidal wave using social media," including potentially if they "just switch to another name." SMF ¶¶ 8-9, 13-15. PAG instead ordered Strategic Media 21"to suspend and cease postings" on the "I Like Mike Huckabee" website and Facebook page. *Id*. ¶ 9. PAG and Strategic Media 21 thus ceased any further work on updating, maintaining, promoting or changing these pages. *Id*. However, they left the website and Facebook Page publicly accessible in largely the same form as they were left on July 17, 2015. *Id*. PAG and Strategic Media 21 later parted ways. *Id*. ¶ 16.

PAG initiated this lawsuit in July 2015. PAG's complaint asserts three claims: (1) that 11 C.F.R. § 102.14, the Commission's regulation implementing the statutory naming requirements for political committees, 52 U.S.C. § 30102(e)(4), and the agency's interpretation of that regulation in the CAP Advisory Opinion, are "arbitrary, capricious, an abuse of discretion, and contrary to law under the Administrative Procedure Act"; (2) that the FEC's interpretation of the statutory naming requirements for political committees acts as a "prior restraint on speech that violates the First Amendment"; and (3) that section 30102(e)(4) and its implementing regulation are "impermissibly content-based," because while "an unauthorized political committee is restricted in its ability to communicate with respect to federal candidates it supports," the "same unauthorized political committee is free to use the name of a federal candidate it opposes." Compl. ¶¶ 44-70.

III. PROCEDURAL HISTORY

Concurrent with the filing of its complaint in July 2015, PAG sought a preliminary injunction to prevent the Commission from enforcing the name regulation. (Docket No. 2.) This Court denied PAG's motion, finding that it was unlikely to succeed on the merits of its claims. *Pursuing America's Greatness v. FEC*, 132 F. Supp. 3d 23, 44 (D.D.C. 2015) ("*PAG I*").

On appeal, a panel of the D.C. Circuit Court of Appeals affirmed the Court's finding that PAG was not entitled to a preliminary injunction with respect to its Administrative Procedure Act ("APA") claim, finding that "the FEC reasonably applied the naming requirements of section 102.14 to an unauthorized committee's websites and social media pages," including "more than just fundraising activities." *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 506 (D.C. Cir. 2016) ("*PAG II*"). The D.C. Circuit panel reversed, however, with respect to PAG's First Amendment claim. *Id.* at 505-512. In evaluating the name regulation under strict scrutiny, although it could be assumed that the FEC has a compelling interest "in avoiding the type of voter confusion" it had identified, the panel found "a substantial likelihood" that the regulation "is not the least restrictive means to achieve the government's interest." *Id.* at 507-10. The panel found that the record at the preliminary injunction stage was insufficient with respect to the FEC's determination that a disclaimer approach — which the panel believed could be less "burdensome" — would not be as effective as the challenged approach of regulating committees' use of candidate names directly. *Id.* at 510-11. Thus, based on what the Court concluded was the "silen[ce]" of the preliminary-injunction record "as to the comparative effectiveness of . . . two alternatives," *id.* at 511 (internal quotation marks omitted), the panel found that PAG was likely to succeed on the merits and was entitled to a preliminary injunction, *id.* at 512.

The preliminary injunction order permitted PAG to establish websites and social media pages, including on the Facebook and Twitter platforms, using the names of federal candidates in

the titles of the pages. (Order (Docket No. 31).) PAG has since launched no new Facebook pages and no Twitter accounts. SMF ¶ 24. Despite its view of the limited value of websites, due to their "static" nature and relative lack of "effective[ness]" vis-à-vis "other forms of communication[]," *id*. ¶ 187, PAG's only present exercise of the rights the preliminary injunction provided has been to establish and maintain one website, *id*. ¶¶ 23-24. This website, ilikedavidyoung.com, consists of a single webpage duplicating a mailer that PAG created. *Id*. ¶ 25. It has only been accessed by a total of 8 users as of March 2017, most or all of them counsel and persons associated with PAG or this case. *Id*. Of the nearly $5 million PAG raised in 2016, it has spent almost everything. *Id*. ¶ 21. It has collected $0 in new contributions in the present election cycle and may exist only to pursue this litigation with its remaining cash on hand of less than $50,000. *Id*.

On September 11, 2017, PAG filed its motion for summary judgment, pressing only its First Amendment claim.

ARGUMENT

The FEC's committee name regulation, 11 C.F.R. § 102.14(a)-(b), is constitutional. Even if reviewed under strict scrutiny, the rule passes muster because it is narrowly tailored to serve the government's compelling interests in limiting confusion, fraud, and abuse. Section 102.14 clarifies for donors and supporters whether a political committee is part of a candidate's authorized campaign machinery. It does so by regulating committees' use of candidate names in the names under which they communicate information to, and receive funds from, the public. The record abundantly demonstrates that the dangers section 102.14 directly targets include everything from harmful informational confusion and interception of donations intended for candidates to outright fraudulent profiteering. The regulation is also exceptionally narrowly tailored. The record that the Court of Appeals panel found to be lacking when it issued its

preliminary *PAG II* opinion has been supplemented by the more substantial record the Commission is presenting at this merits stage. This more fulsome record demonstrates that when the Commission revised its regulations, it explicitly considered many past instances of abuse and the agency's experience with the regulated community objecting to increased space and time for disclaimers in communications. The Commission evaluated alternatives, including larger, or differently-worded disclaimers, and concluded that enhanced disclaimers would be more burdensome and not effective in addressing the problems that had been raised. Considerable evidence and technological developments from the intervening years confirms that disclaimers and other alternatives would not be sufficient to address concerns of confusion and diversion of funds. Furthermore, by carefully calibrating section 102.14 to regulate as minimally as possible, the Commission chose the least restrictive, effective approach. In contrast, PAG's other proposed alternatives are manifestly flawed, and it has waived the other claims asserted in its complaint. The Court should grant summary judgment to the FEC and dissolve the preliminary injunction order PAG does not need. And even if the Court were to find some constitutional infirmity in the name identification regulation, the proper course would be to strike only any severable portions of it found to be problematic.

I. STANDARD OF REVIEW

A. Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Standard of Scrutiny

The Court of Appeals panel in *PAG II* concluded that PAG's First Amendment challenge to section 102.14 should be reviewed using "strict scrutiny" because the panel viewed the

challenged regulation as a content-based restriction on speech. 831 F.3d at 510 (citing *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015)). This determination, including the panel's finding that section 102.14 is "not a disclosure requirement," contrary to the conclusion of this Court, *PAG I*, 132 F. Supp. 3d at 38, is arguably in tension with the D.C. Circuit's decisions in *Common Cause*, 842 F.2d at 442 and *Galliano v. U.S. Postal Service*, 836 F.2d 1362, 1367-68 (D.C. Cir. 1988), both of which described the name regulation, including the statutory provision section 102.14 implements, 52 U.S.C. § 30102(e)(4), as a disclosure provision.

The panel's analysis in distinguishing *Common Cause* and *Galliano*, on the basis that these earlier decisions concerned only the constitutionality of the statutory provision, *PAG II*, 831 F.3d at 508 n.4, appears to have overlooked the fact that the predecessor version of regulatory section 102.14 was at issue in *Common Cause*, *see* 842 F.2d at 440 (explaining that the analysis that was subject to the Court's review was the FEC's interpretation of the language of section 30102(e)(4) "and the Commission's implementing regulation"). The panel's analysis is also arguably inconsistent with the lengthy *Chevron* analysis in *Common Cause* — in which the question was whether the statutory provision mandated that the name regulation apply to all of a political committee's operating names — and the Court's indication that such an approach would survive *Chevron* review. *Common Cause*, 842 F.2d at 440-41. The panel's conclusion is also in tension with the Congressional drafting committee's statement of its "intent" that "the average contributor or voter be able to determine, by reading the committee's name, on whose behalf the committee is operating." SMF ¶ 30.

The Commission incorporates by reference and preserves its argument that the regulation is a disclosure provision that "is reviewed for 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest" (*see* FEC's Opp. to Mot. for Prelim. Inj. at 25 (Docket No. 13) (quoting *Citizens United*

v. FEC, 558 U.S. 310, 366-67 (2010))), until such time as the Court of Appeals has an opportunity to consider the question on full merits review. In any event, the name regulation also passes review under strict scrutiny, as shown below.

In *PAG II*, the panel stated that strict scrutiny here requires the Commission to "show [that] the restriction is narrowly tailored to a compelling governmental interest." 831 F.3d at 510. But even under strict scrutiny, "[t]he First Amendment requires that [the regulation] be narrowly tailored, not that it be 'perfectly tailored.'" *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015) (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (plurality op.). Importantly, the "First Amendment imposes no freestanding 'underinclusiveness limitation,'" because "[a] State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws — even under strict scrutiny — that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id.* at 1668 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)). And although PAG treats the application of strict scrutiny as dispositive, there are cases in which "a speech restriction" is upheld as "narrowly tailored to serve a compelling interest." *Id.* at 1666; *see also Burson*, 504 U.S. at 211 (citing cases in which the Court upheld rules under strict scrutiny); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (citation omitted)); *McConnell v. FEC*, 540 U.S. 93, 314 (2003), *overruled in part by Citizens United*, 558 U.S. 310 (opinion of Kennedy, J.) (explaining that Justice Kennedy would have applied strict scrutiny to portions of the Bipartisan Campaign Finance Reform Act ("BCRA") and upheld them). Such cases "do arise," *Williams-Yulee*, 135 S. Ct. at 1666, and this is one of them.

II. THE NAME REGULATION IS CONSTITUTIONAL BECAUSE IT IS NARROWLY TAILORED TO SERVE THE COMPELLING INTERESTS OF LIMITING CONFUSION, FRAUD, AND ABUSE

Section 102.14 passes constitutional review under strict scrutiny because the FEC has compelling interests in limiting confusion, fraud, and abuse, and section 102.14 is narrowly tailored to further those interests. The requirement clarifies 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. PAG does not directly contend that the interests served by section 102.14 are not compelling. Rather, it erroneously argues that the record lacks such evidence.

A. Limiting Confusion, Fraud, and Abuse Are Compelling Governmental Interests

The Supreme Court has already "concluded that a State has a compelling interest in protecting voters from confusion and undue influence." *Burson*, 504 U.S. at 199; *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."); *PAG I*, 132 F. Supp. 3d at 40 (explaining why *Burson* is "instructive here"). These interests are consistent with the Supreme Court's reiterations of the importance of "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); *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)); *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 . . . so that the

people will be able to evaluate the arguments to which they are being subjected."); *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (per curiam) (holding that the Act's reporting requirements for political committees "directly serve substantial governmental interests"). "'At the very least,' the [regulation] 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.'" *PAG I*, 132 F. Supp. 3d at 41-42 (quoting *Citizens United*, 558 U.S. at 368). In accordance with this precedent, the *PAG II* panel "assume[d] that the government has a compelling interest in avoiding the type of voter confusion identified by the FEC." *PAG II*, 831 F.3d at 510 (citing *Burson*, 504 U.S. at 199). It explained: "[h]ere, the FEC reasonably fears that voters might mistakenly believe an unauthorized committee's activities are actually approved by a candidate if the committee uses the candidate's name in its title." *Id.* The *PAG II* panel was correct that the evidence demonstrates that the interests in limiting confusion, fraud, and abuse are compelling.

1. The Record Contains Substantial Evidence of Confusion, Fraud, and Abuse Resulting from Political Committees' Use of Candidate Names in the Names They Use to Conduct Their Affairs

Congress enacted 52 U.S.C. § 30102(e)(4) based on the FEC's informed opinion that committee names should be regulated in order "to avoid confusion," as well as the drafting committee's expressly stated goal that "*the average contributor or voter* be able to determine, by reading the committee's name, on whose behalf the committee is operating." SMF ¶¶ 30 (emphasis added), ¶¶ 28-31. In the early 1990s, the Commission revised section 102.14 in response to its "increasing[] concern[s] over the possibility for confusion or abuse" under the original (1980) version of the regulation upheld by the D.C. Circuit in *Common Cause*. 1994 Explanation & Justification, 59 Fed. Reg. at 17,268.

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." *Id.* This evidence was not subtle. Confusion arising from an unauthorized committee's use of a candidate name — in this case then-Governor Ronald Reagan — arose in the same year Congress enacted section 30102(e)(4). In 1980, after the unauthorized committee Americans for Change sent a telegram to individuals under the banner title "American's [sic] for Reagan," seeking volunteers for a steering committee, a United States Senator first responded to the telegram in the affirmative, and then retracted his response once he realized that this group was organized independently of Reagan's presidential campaign. SMF ¶¶ 43-44.[3] The principal campaign committee of President George Bush reported that, in 1988, the unauthorized National Security Political Action Committee created a program named "Americans for Bush" that raised $10,277,264, and that the candidate's authorized George Bush for President Committee made numerous efforts to prevent the unauthorized committee from using the name "Americans for Bush." *Id.* ¶ 47. The committee emphasized to the Commission its "concern [] that these projects have the potential to mislead contributors into believing that the money raised will go directly to the candidate for whom they are named." *Id*. The committee also reported that another unauthorized group, Presidential Victory Committee, had created a project called "Citizens for Bush," through which it raised $251,626. *Id.* ¶ 48. The committee explained that it had not authorized this group's activity and that in fact it had demanded that the group cease all activities undertaken in the name of "'Citizens for Bush,'

[3] Hence then-Judge-Ginsburg's observation that "[e]ven the politically astute missed the 'project'/'committee' distinction. Former Senator Robert Griffin of Michigan, for example, initially agreed to join [Americans for Change] not realizing it was 'an 'independent' fundraising committee,' and believing it to be part of the Reagan campaign." *Common Cause*, 842 F.2d at 452.

'Presidential Victory Committee,' or any similar designation that raises the possibility of confusing their efforts with those of Bush-Quayle 92." *Id*. A similar effort made use of 1988 presidential candidate Jack Kemp's name. *Id*. ¶ 45; *see also id*. ¶¶ 45-49, 116-128 (examples).

A 1992 NBC Dateline report included in the rulemaking record further revealed "that thousands of Americans, most of them elderly, ha[d] been fooled" by a man named Robert E. Dolan who established committees using candidate names and that raised more than $9 million. SMF ¶ 49. For example, program investigators found that 79-year-old Ruth Heaton sent the Reagan Political Victory Fund almost $25,000 after receiving "[a]ppeals for money to help keep the legacy of Ronald Reagan alive," signed by Dolan. *Id*. As Dateline reported, "[o]ver the last two years, Mrs. Heaton, a lifelong Republican, who thinks the world of Ronald Reagan, has sent Chairman Dolan and the Reagan Political Victory Fund *much of her life savings*, almost $25,000." *Id*. (emphasis added). But "[i]n a . . . statement to 'Dateline NBC,' Mr. Reagan said Dolan had no authorization to use Reagan's name and that he has been ordered to stop it." *Id*. Dolan also received contributions from 95-year-old Dana Chatlin of Iowa, who was "proud to be helping Republican causes," and "sent the Reagan Political Victory Fund *all the money she had put aside for a nursing home*." *Id*. ¶ 125 (emphasis added). The fund also "got more than $3,000 out of Mrs. Dagmar Cantola of Lantana, Florida, after [Dolan] sent her letters claiming he might be forced to resign from his Reagan fund unless he got more money." *Id*. ¶ 126. As Senator Bob Dole stated, summarizing the actions of another one of Dolan's committees: "Americans for Dole was really an effort to deceive Americans for someone else's gain. I have seen heartbreaking videotapes of elderly people, convinced they were giving to someone they respected, only to learn that they had fallen into a fundraising fraud." *Id*. ¶ 260; *id*. ¶ 121 (comment of Senator Dole and Representative Christopher Shays seeking that the FEC "ensure that the public is not misled by unauthorized fundraising solicitations" because "many

Americans who thought they were contributing to legitimate campaigns were actually donating to an unauthorized committee").

Discussing "[s]uch cases" in its explanation for revising the regulation, the Commission concluded that they "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." 1994 Explanation & Justification, 59 Fed. Reg. at 17,268 (discussing these examples).

Even in the period after the FEC revised section 102.14 to curb such abuses, the record contains substantial evidence demonstrating that these interests remain as compelling as ever. This is despite the Supreme Court's recognition of the difficulty of providing evidence from "the counterfactual world in which" the regulation PAG challenges "do[es] not exist." *McCutcheon*, 134 S. Ct. at 1457; *Burson*, 504 U.S. at 208 ("The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them."); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) (noting the "difficulty of mustering evidence to support long-enforced statutes" because "there is no recent experience" without them).

Contrary to PAG's inaccurate claim of a lack of evidence (*e.g.*, Pl.'s Mem. at 2-3, 25-29),[4] the record demonstrates that confusion, fraud, and abuse resulting from political

[4] PAG is also wrong in arguing that the Commission must provide "evidence that 'an actual problem in need of solving' *existed at the time*" that the FEC revised the rule. (Pl.'s Mem. at 25-26 (emphasis added).) Neither of PAG's cited cases supports the contention that the only evidence relevant to a constitutional strict scrutiny inquiry is that from the time of rulemaking. In fact, in both *U.S. v. Playboy Entm't Grp.*, 529 U.S. 803, 820-22 (2000), and *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 800-04 (2011), which PAG cites for this proposition, the Court considered evidence that post-dated, respectively, the regulation and state law at issue in these cases. In any event, the record reflects ample evidence of voter confusion, fraud, and abuse motivating the Commission to promulgate the rule at issue. *See supra* p. 6-7, 18-21; SMF ¶¶ 45-49, 116-128.

committees' use of candidate names remains a problem today. In 2014, Dr. Raymond Bellamy was confused by the National Republican Congressional Committee's website using the name of a Democratic candidate ("Alex Sink for Congress"). SMF ¶ 50-52. Dr. Bellamy's declaration attests: "[t]ogether, the website address, using Alex Sink's name ('sinkforcongress2014'), the name of the page 'Alex Sink for Congress,' displayed prominently at the top of the page, the words 'Alex Sink' and 'Congress' in large blue and green text, and the smiling photo of Alex Sink made me think that the website was Alex Sink's campaign website, or that it was done with her approval." *Id*. ¶ 51. In September 2015, President Trump's campaign sent cease and desist letters to "Patriots for Trump" and "Great America PAC" (formerly "TrumPAC"), specifically noting that "[p]otential supporters could be easily confused that when they make a contribution to your organization, they are supporting Donald J. Trump for President's campaign, or that your efforts have been sanctioned or otherwise authorized by him, whereas in reality they are supporting your independent effort." *Id*. ¶¶ 59-60, 64, 66. In response to this letter, Scott MacKenzie, the treasurer for "Patriots for Trump," noted that he had worked on five presidential campaigns and, "[h]aving that experience," conceded "that donors may be confused when making a contribution to Patriots for Trump, thinking that they may be donating directly to Donald J. Trump for President." *Id*. ¶ 61. The Trump campaign identified numerous other entities that used the Trump name in potentially misleading ways, writing to the FEC that "we must ensure our supporters are protected and there is no confusion about the unauthorized nature of such efforts (from which we have received no money, goods or services), especially when they use Mr. Trump's name, slogan, or likeness in their name or solicitation materials." *Id.* ¶ 56.

Additionally, in 2015, the unauthorized committee Americans Socially United created and maintained websites containing Bernie Sanders's name in the URL, such as www.BetonBernie.com and www.VoteBernieSanders2016.com. SMF ¶ 70-72. Several

supporters of Senator Sanders have attested that they donated to Americans Socially United thinking the money was going to the Sanders campaign. *Id*. ¶ 73-75, 77-78. For example, Mark Sherman, who "decided to contribute to the Bernie Sanders campaign with a financial contribution," conducted a search on Google for "Bernie Sanders," and then he "clicked on the website that looked like his [Sanders's] official campaign website," which was located at www.VoteBernieSanders2016.com. *Id*. ¶ 78. Mr. Sherman "assumed this website was the Bernie Sanders campaign website because the URL had Bernie Sanders's name in it and looked like a campaign address, and there was a logo at the top of the page that said 'Ready for Bernie Sanders 2016' with Senator Sanders's photo that looked like an official campaign logo." *Id*. Only after making his contribution did Mr. Sherman realize that the website was not that of the Bernie Sanders campaign, and subsequently struggled to obtain a refund from Americans Socially United. *Id*. Kostas Panagopoulos was another supporter of Senator Sanders who was confused by Americans Socially United's "Bet on Bernie" website. *Id*. ¶ 77. At the "time [he] made the contribution to 'BetonBernie.com,'" Mr. Panagopoulos "thought [he] was contributing to Bernie directly." *Id*. Mr. Panagopoulos further attested: "If I had thought that the group wasn't actually him, I wouldn't have given this money. 'BetonBernie.com' was using Bernie's name to create access to me and my funds." *Id*. As counsel for Senator Sanders's campaign wrote to Americans Socially United and at least two other similar organizations, these activities "creat[ed] supporter confusion because they appear to be official pages for the Bernie Sanders 2016 U.S. presidential campaign, and are therefore intercepting donations which are likely intended for the official campaign." SMF ¶¶ 71, 81, 83.

An unauthorized political committee's use of a candidate's name can result in big donations. As detailed in a 2016 insider account published by Politico, committees use "names and images of political figures the prospects [*i.e.*, recipients] admire (or detest)" to "accompany

. . . solicitation[s], giving the illusion of imprimatur. Those people are almost never actually involved and little money ends up supporting candidates." SMF ¶ 150. Because committees have wide discretion in how funds are spent, *id*. ¶¶ 147-49, 151, there have been articles and analyses how such groups — often referred to as "scam PACs" — may imply association with a candidate but do not necessarily use the donations they receive on activities supporting the candidate, instead using it for self-enrichment, *id*. ¶¶ 150-64. According to the former employee who in Politico described his old firm as associated with such operations, the aggregated efforts by national political committees "[k]illed the Tea Party" by "dunn[ing] the movement's true believers endlessly for money to support its candidates and causes. The PACs used that money first to enrich themselves and their vendors and then deployed most of the rest to search for more 'prospects.'" *Id*. ¶ 150. There is no prohibition on political committees spending funds they raise on entities in which the committee's principals have a financial stake. Here, for example, PAG spent funds it raised on at least two vendors that were businesses established by its principals. *Id*. ¶ 149. The record thus squarely demonstrates the danger of unauthorized committees raising funds using the names of galvanizing candidates such as Donald Trump and Bernie Sanders as "brand[s]" and then using the donations collected for the enrichment of the committees' principals and not on any bona fide political activity.[5]

2. The FEC's Compelling Interests Underlying the Name Regulation Are Not Confined to the Context of Solicitations

Contrary to PAG's claims that section 102.14 is "a solution to a problem that does not exist" and that the FEC is "without a compelling interest" here (Pl.'s Mem. at 3, 29), the Court

[5] In its deposition, PAG offered a telling example about the power of branding and names, observing that "this cup of coffee is more valuable because it says Dunkin Donuts than if it was just in a styrofoam cup because of the brand." SMF ¶ 181. Here, PAG agrees with the Commission that the "I Like Mike Huckabee" Facebook page derives value from its appropriation of Mr. Huckabee's name.

has already observed that the record evidence "belie[s] PAG's arguments that clarifying the authorization status of an unauthorized committee's special projects could constitute a legitimate government interest only in the fundraising context," *PAG I*, 132 F. Supp. 3d at 42. The *PAG II* panel similarly refused to confine the governmental interest to the fundraising context, as PAG had urged in claiming that its challenge is as-applied, noting that "[h]ere, the substantive law requires us to look at what the regulation says" on its "face." 831 F.3d at 509 n.5.

In any event, PAG's claim that there are no "examples of confusion or fraud not connected to fundraising" (Pl.'s Mem. at 27) is untrue. The record contains numerous examples of supporters who were not responding to any solicitation but who still became confused when they attempted to locate the website of a candidate or the candidate's authorized committee and instead found a candidate-named website of an unauthorized committee. For instance, none of the examples of Dr. Bellamy's contribution to the "Alex Sink for Congress" website, or the contributions to Americans Socially United by Mr. Sherman and Mr. Panagopoulos, were in response to solicitations — each one of these supporters decided to engage politically prior to encountering any fundraising pleas by the unauthorized committees. *Id*. ¶¶ 142-47.[6] Thus, as the Court already found, "permitting unauthorized committees to include a candidate's name in the name of their special projects may allow those committees to exploit ambiguity about their candidate authorization status" — *i.e.*, whether they are in fact the actual campaign — "and take advantage of confusion created by their project names, with the result that a contributor [may] think [ ] that a $50,000 contribution to a project such as 'I Like Mike Huckabee' is a contribution

[6] PAG's own reference to articles discussing a contribution made by Daniel Craig to a super PAC (Pl.'s Mem. at 27-28) include evidence of confusion in a non-solicitation context. The referenced article observed that "many people have given to [the] super PAC [operating the Bet on Bernie website] by c*oming across it online and thinking it was the official way to donate to Mr. Sanders*." SMF ¶ 75 (emphasis added).

to Mr. Huckabee, even though it is not, . . . even in the absence of any solicitation." *PAG I*, 132 F. Supp. 3d at 34 (citation and internal quotation marks omitted).

Even in the purely informational context, a political committee's unauthorized use of a candidate's name in its operating name can create informational harm. As the Court observed, "hundreds of comments on the ["I Like Mike Huckabee"] Facebook page . . . appear to be directed to Governor Huckabee himself." *PAG I*, 132 F. Supp. 3d at 35.[7] Such comments demonstrate that those viewers mistakenly believed that the messaging on the page was on behalf of the candidate Mike Huckabee and not independent of his campaign. PAG's response to this evidence is to protest that it does not know if these commenters "were actually confused" (Pl.'s Mem. at 28), but the nature and extent of the comments does not require the Court to see into the minds of the commentators. The comments themselves plainly reveal that such posters believed the "I Like Mike Huckabee" Facebook page to be part of Mr. Huckabee's authorized campaign. And as PAG itself observes (*see id.*), the *PAG II* panel did not disturb this Court's conclusions regarding these comments, which is consistent with an appellate court's deference to a district court's factual findings. *E.g.*, *Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010) (explaining that a trial court's factual findings are reviewed for "clear error" and are not reversed even if the Court of Appeals "would have weighed the evidence differently" if it "had been sitting as the trier of fact" (citation and internal quotation marks omitted)).

Moreover, the confusion created by PAG's unauthorized use of Mike Huckabee's name is not unique, and a review of similar Facebook pages — those pages named after a candidate but which appear to be operated without that candidate's authorization — reveals that they contain

[7] Viewers left 779 comments "to" Mike Huckabee on the "I Like Mike Huckabee" page that PAG operated, including: "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!!!!!"; and "Mike we would have been better off years ago with you in the White House." SMF ¶ 95.

the same kinds of comments directed "to" the candidate after which the page is named throughout those pages. SMF ¶¶ 96-101. For example, a "Gowdy Now" Facebook Page received more than 2,220 comments in a span of six months that indicated confusion about whether the page was the candidate's. *Id*. ¶ 96. Twitter appears to present the same issue, with at least one example of an account holder whose user name includes a candidate's name engaging in Twitter conversations with viewers without ever disabusing them of the misimpression that the account holder is the candidate. *Id*. ¶¶ 114-15. A Twitter user tweeted to the unauthorized "Donald Trump" account @RealTrump2016, "Congratz Mr. President. I knew you are the chosen one. Like King Cyrus.[] Proud of you." *Id*. The @RealTrump2016 account holder responded, "Thank you. Only chosen by the American people though . . . ." *Id*.

Messaging that does not center on solicitations — for instance, in 1980, when American's for Reagan distributed its call for members for its steering committee — still can confuse the public when recipients of the message form the misimpression that it is the candidate or his or her authorized campaign speaking. SMF ¶ 165. President Bush was "improperly linked to the 'Americans for Bush' group in the popular media" due to that entity's actions. *Id.* ¶ 166. More recently, when "Patriots for Trump" and "TrumPAC" solicited contributions despite Trump's statements that he was not relying on super PAC money, it understandably caused confusion about his stance. *Id.* ¶¶ 167-68. Indeed, when "Patriots for Trump" acceded to the campaign's request to shut down, its treasurer acknowledged that the super PAC's actions had been inconsistent with statements the campaign had made opposing super PAC assistance. *Id*. ¶ 168. Recent ads aired by the "Committee to Defend the President" have caused similar confusion. *Id*. ¶ 171 (observing that "[m]any outraged commenters believe that Trump himself — or those within Trump's inner circle — were responsible for the ad"). As the Coalition Against Domain Name Abuse found in a 2012 study, "identity squatting," or the "act of

registering domain names containing famous individuals' names in bad faith with the intention of profiting from them," may be "extremely damaging to an individual's reputation and can lead to confusion and distrust on the part of Internet users." *Id.* ¶ 176. In particular, "[g]overnment representatives have a great deal at stake," as "[m]any of them use the Internet to make information about themselves, their work, and their promises available to the public, as well as to maintain an accurate and accessible source of information" about their candidacies. *Id.*

Regardless of any money exchanged, the FEC's name regulation "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." *PAG I*, 132 F. Supp. 3d at 41-42 (citation and internal quotation marks omitted). Members of the public and candidates also have rights of association and expression under the First Amendment, *e.g.*, *Buckley*, 424 U.S. at 20-23, and when political committees intercept donations and confuse voters by speaking in a candidate's voice without authorization, they interfere with those rights. *Accord PAG I*, 132 F. Supp. 3d at 42 (agreeing that "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 would disserve the public" (internal quotation marks omitted)). As PAG itself admitted, it is undesirable for a political committee to speak in a way that makes it seem like the political committee is the candidate, and it is undesirable for donors to be confused in giving money to a political committee when they think they are giving to the candidate. *See* SMF ¶¶ 145-46, 177. Yet that would be the effect were PAG to succeed in this lawsuit.

3. The Potential for Confusion, Fraud, and Abuse are Amplified in Today's Political and Technological Landscape

The dangers addressed by section 102.14 are heightened in current times. The ubiquity of Internet and social media usage amplifies the potential harm resulting from voter confusion.

SMF ¶¶ 182-94. Candidates now publicize domain names "with the hope that voters will type that name directly into their Internet browsers in order to access more information about the candidate and his or her views." *Id.* ¶ 185. When candidate names are appropriated as the operational names of unauthorized committees, "websites that visitors assumed were endorsed by candidates can create an environment where misinformation and misdirection abound." *Id.* This threat is especially true today, as many internet and social media platforms operate character- and space-limited means of communication, and there has been considerable public concern that the sources of messaging in connection with the 2016 presidential election may not have been sufficiently apparent earlier, including in particular some that were perpetuated and amplified in web-based and social media platforms. *Id.* ¶ 194.

Furthermore, research suggests that people rely on cues to facilitate their political decision-making. SMF ¶ 178. Well-documented social science has shown that voters behave as "cognitive misers" when they politically engage, wherein they minimize the time and effort that they spend on evaluating information while perceiving that their decisions are still accurate. *Id.* ¶ 179. Thus, voters can make decisions about which candidates to support based on perceptions of the candidates' character or messaging, or in the candidates' association with a party or platform. *Id.* ¶¶ 178-81. When unauthorized committees use candidates' names in their public-facing titles, creating the impression that they act on behalf of the candidate when they do not, these unauthorized committees can create widespread confusion and undermine the determinations that voters make about candidates.

B. Section 102.14 is Narrowly Tailored to Limit Confusion, Fraud, and Abuse

Not only does section 102.14 directly serve compelling interests in limiting confusion, fraud, and abuse in connection with U.S. elections, but it is also narrowly tailored to those interests. In the early 1990s, the Commission modified the regulation to better respond to the

problems of confusion, fraud, and abuse. It considered and rejected alternatives that would not have been as effective. It further revised the regulation to be as least restrictive as possible, allowing maximum freedoms for political committees. In contrast, PAG's principally proposed alternative of a disclaimer would not be sufficiently effective in preventing the harm Congress and the Commission has identified. Its other proposals — third-party signifiers and relying on inapposite verification systems used by for-profit entities such as Facebook and Twitter — are unserious and meritless.

1. The Record Demonstrates that Section 102.14 is Narrowly Tailored

In proving that the regulation furthers the government's interest, the Commission may rely on "common sense" and need not "empirically" prove that the regulation advances its compelling interest. *See, e.g.*, *Burson*, 504 U.S. at 211 (relying on "[a] long history, a substantial consensus, and simple common sense" to find a regulation sufficiently narrowly tailored to survive strict scrutiny). Here, both common sense and the evidentiary record demonstrate that, just as regulation of personal solicitations by judges and certain kinds of activities around polling places can be constitutional, *Williams-Yulee*, 135 S. Ct. at 1673; *Burson*, 504 U.S. at 211, the same is true with respect to an unauthorized political committee's use of a candidate's name in its operating name.

In supposing otherwise, the Court of Appeals grounded its preliminary decision on the silence of the record before it at the time as to the comparative effectiveness of disclaimers. *PAG II*, 831 F.3d at 510-11. The record before this Court is no longer silent, however. It demonstrates that the Commission carefully considered several alternatives to the current rule but rejected each proposal after applying the Commissioners' "practical . . . expertise," which is the basis for judicial deference to agency decision-making. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990). In addition to the current regulation, the FEC discussed

(1) requiring checks to be payable to the reporting committee; (2) requiring a different disclaimer than that required at the time; (3) requiring unauthorized committees to obtain consent from the candidate before using his or her name in a special project title; and (4) allowing the use of candidate names only by party committees of the same party as the candidate. SMF ¶¶ 204-35.

The Commission found that the check payee proposal was less "responsive to the problem at issue," 1992 Explanation & Justification, 57 Fed. Reg. at 31,425 — confusion resulting from the unauthorized use of a candidate's name — and would pose administrative challenges because "nothing on the public record reflects who the payee is on a contributor's check," 1994 Explanation & Justification, 59 Fed. Reg. at 17,268. Thus, "[t]he requirement that checks be made only to the sponsoring committee's registered name would . . . not ensure that the contributor did not erroneously believe the money would be used to support the candidate(s) named in the project's title." *Id.* The Commission rejected the authorization proposal as unresponsive to the problem at issue, explaining that "if a candidate authorizes the use of his or her name in a fundraising project, the committee becomes an authorized committee, and this rule would not apply." *Id.* at 17,269. And, as to the party/non-party distinction, it "agree[d]that the potential for confusion in this context is not significantly different whether a party or a non-party committee is involved." 1992 Explanation & Justification, 57 Fed. Reg. at 31,425.

The Commissioners also specifically considered and addressed information in the record regarding whether a disclaimer, including with respect to "size and/or location requirements," 1992 Explanation & Justification, 57 Fed. Reg. at 31,424, or simply "stronger, or larger, disclaimers," 1994 Explanation & Justification, 59 Fed. Reg. at 17,268, would be an adequate alternative. SMF ¶ 219. In the "American's [sic] for Reagan" mailgram, discussed above, the committee had included the disclaimer "Paid for by Americans for Change not authorized by any candidate," but that did not stop Senator Griffin from being confused. *Id.* ¶ 259. Similarly, the

"Americans for Dole" effort had at the bottom of a mailing "a disclaimer saying that Americans for Dole was 'not authorized by any candidate or candidates' committee'" that was "no doubt unnoticed by the addressee, many of whom are elderly." *Id*. ¶ 260.

There was a recognition by a commenter and Commissioners that a large disclaimer would help reduce confusion but only in some circumstances, and a further recognition that the regulated community would view such an approach as taking control over their communications to too great of an extent. A national party committee commented that, "the disclaimer must be highly visible to the potential contributor" in order for a revised disclaimer rule to have some effect. SMF ¶ 218. As the Commission deliberated whether it should "enact[] specific rules that would regulate the disclaimers that are required on solicitations by nonauthorized committees using a candidate's name," Commissioner Trevor Potter expressed a concern that such communications can be "pages" long and "it is possible to bury" a disclaimer "where the average reader isn't going to find it," in contrast with the "Americans for Smith in huge letters at the top." *Id.* ¶¶ 210, 252. Regarding the possibility of requiring a larger disclaimer, Commission staff noted that in their experience that approach would be viewed by the regulated community as "really affecting the way we put our letters together. 'You are telling us how to draft our letters.'" *Id*. ¶ 253. The Court of Appeals did not have these comments and exchanges or the other parts of the administrative record outside of the *Federal Register* in the court record when rendering its preliminary decision.

The Commission ultimately agreed with its staff that "such a [larger disclaimer] approach could be more burdensome" than the adopted approach by dictating how communications must be constructed, "while still not solving the potential for fraud and abuse in this area." 1994 Explanation & Justification, 59 Fed. Reg. at 17,268. Requiring the minority of committees focused on a single candidate to avoid titles with the candidate's name is far less of a regulatory

imposition than requiring all unauthorized committees, from the National Rifle Association of America Political Victory Fund to the League of Conservation Voters Action Fund, to employ additional, more noticeable disclaimers. Disclaimers have been upheld by the Supreme Court against repeated challenges where Congress had sufficiently confined the required time and space. *Buckley*, 424 U.S. at 75-76 (upholding disclosure requirement for independent expenditures), *McConnell*, 540 U.S. at 321 (opinion of Kennedy, J., joined by Rehnquist, C.J., and Scalia, J.) (three Justices who believed 52 U.S.C. § 30118 to be unconstitutional upheld BCRA's disclosure and disclaimer requirements); *Citizens United*, 558 U.S. at 366-71 (upholding BCRA's disclaimer and disclosure provisions as applied to movie and advertisements at issue). An enhanced disclaimer requirement via regulation could face First Amendment challenges of its own.

The Commission also explained that a disclaimer requirement would "still not solv[e] the potential for fraud and abuse in this area" and "is not, in and of itself, sufficient to deal with this situation." 1992 Explanation & Justification, 57 Fed. Reg. at 31,424. As the Commission elaborated:

> [A]ssume that the "XYZ Committee," a committee registered under that name with the Commission, establishes a special fundraising project called "Americans for Q." Although Q is a federal candidate, he has not authorized the XYZ Committee to use his name in this manner; and the committee plans to use contributions received from the special project for purposes other than the support of Q. Even if the solicitation contains the proper disclaimer, a potential donor might believe he or she was contributing to Q's campaign, when this was not so.

Id. The Commission's explanation also referenced the Dateline Report that was included in the record, *see supra* p. 20, explaining that "[p]rogram investigators found that elderly people are particularly vulnerable to being misled in this manner, *since they may not notice or fail to fully*

comprehend the disclaimers included with the solicitations," 1992 Explanation & Justification, 57 Fed. Reg. at 31,425 (emphasis added). Thus, even the use of a different disclaimer such as that proposed by the *PAG II* panel would "still not solv[e] the potential for fraud and abuse in this area." 1994 Explanation & Justification, 59 Fed. Reg. at 17,268. Based on the substantial evidence before it, the Commission thus concluded that "a stronger disclaimer requirement would not be sufficient in and of itself to meet this concern." *Id.* at 17,269; *accord* SMF ¶ 232 (one comment noted that "[t]here is little potential for misleading a contributor when a political committee solicits contributions using [sic] its own name, and a much higher risk when an unauthorized committee solicits in the name of a candidate").

Not only does the rulemaking record establish that a disclaimer was insufficient, but the record following the revisions of the regulation continues to demonstrate that it was correct, despite the absence of direct experience with the counterfactual scenario in which a disclaimer requirement was adopted. *See supra* p. 21. Indeed, the very recent record demonstrates that viewers of websites often fail to perceive disclaimers. For example, in Dr. Bellamy's case, the disclaimer on the webpage and the large text "Make a Contribution Today to Help Defeat Alex Sink and candidates like her" was still insufficient to clarify that the website was not operated by the candidate — the disclaimer was not enough to overcome the initial impression that, in part, "the website address, using Alex Sink's name ('sinkforcongress2014')," left with Dr. Bellamy. SMF ¶¶ 263-64. The same was true of disclaimers on the "Bet on Bernie" website ("This website was paid for by Americans Socially United . . . and is not authorized by any political candidate or party") that failed to convey to Mr. Sherman and Mr. Panagopoulos that the website was not authorized by Senator Sanders. *Id*. ¶¶ 265-66. In yet another example, Ken Cuccinelli supporter Lucille Maloney failed to notice Conservative StrikeForce's disclaimer ("We are not raising funds in conjunction with any campaign") when she received an ad from the committee

with Mr. Cuccinelli's "name and picture on it," and contributed $500 in response, thinking that it was "directly to Ken's campaign." *Id.* ¶ 262. Most critically, the inadequacy of disclaimers in this context is all too apparent even with PAG's own "I Like Mike Huckabee" Facebook page. The hundreds of comments directed "to" the candidate on the page reflect that those commenters never perceived PAG's disclaimer, despite its placement at the top of the page in the banner. *Id.* ¶¶ 10-11, 267.

2. Section 102.14 Has Been Refined to be as Least Restrictive as Possible

Section 102.14 is also narrowly tailored because the Commission modified the rule subsequent to the 1992 revision to restrict even less speech than initially revised, by including an exception in the rule for those instances that do not implicate the voter confusion, fraud, and abuse that motivated the rule in the first place. As the Commission recognized, "the focus of the earlier rulemaking was on titles that indicate support for a named candidate, and that the potential for fraud and abuse is significantly reduced in the case of those titles that indicate opposition." SMF ¶ 240; 11 C.F.R. § 102.14(b)(3). This revision maintains the effectiveness of section 102.14 by making it clear to "the average contributor or voter" who is speaking, SMF ¶ 30, while allowing political committees like PAG as much flexibility as possible. PAG contends that the opposition exception makes the regulation an impermissible content-based restriction (Pl.'s Mem. at 10), but by removing the constraint of the name identification requirement in circumstances where the compelling interest was not implicated, the Commission did precisely what is required to satisfy strict scrutiny.

In addition, section 102.14 restricts only the titles of communications, but it leaves untouched the content of those communications. As the Court has explained, "[t]he parallel between *Burson* and the instant case is readily evident. . . . Here, just as in *Burson*, PAG can say whatever it wants about Governor Huckabee in the body of its" Facebook page, "including

referring to him by name and using the 'I Like Mike Huckabee' slogan. It just cannot do so in the names or titles of those communications. Thus, to use counsel for PAG's own words," section 102.14 "'doesn't prohibit the speech at all[,] . . . [i]t just prohibits where you can make the speech.'" *PAG I*, 132 F. Supp. 3d at 40. The parallel in *Williams-Yulee* is similarly evident. As Chief Justice Roberts explained, the challenged judicial solicitation rule "restricts a narrow slice of speech." 135 S. Ct. at 1670.

> [It] leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." They can, however, direct their campaign committees to do so. Whatever else may be said of the [challenged law], it is surely not a "wildly disproportionate restriction upon speech."

Id.[8] Indeed, in *Buckley*, the Court found that the availability of avenues for "independent political expression" in the analogous context of the Act's contribution limits were evidence of a close fit, explaining that the contribution limits "focus[] precisely on the problem of large campaign contributions" but "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." 424 U.S. 28-29.

Here, too, PAG's own actions demonstrate the correctness of the Commission's observation that the regulation leaves committees free to "discuss any number of candidates, by name, in the body of a communication." 1992 Explanation & Justification, 57 Fed. Reg. at

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[8] The Court of Appeals concluded in its preliminary review that "the availability of alternative avenues of expression" is not relevant to determining whether a law is content-based, *PAG II*, 831 F.3d at 509, but this discussion in *Williams-Yulee* illustrates that alternatives are relevant to determining whether a law subject to strict scrutiny is narrowly tailored.

31,425. PAG admitted that it could communicate the "I Like Mike Huckabee" message on its Pursuing America's Greatness Facebook page. SMF ¶ 249 (describing how PAG repeatedly posted an "I Like Mike Huckabee" button on the Pursuing America's Greatness Facebook page that it believed communicated that message). PAG not only communicated through this other Facebook page, it availed itself of many other modes of communication, including $3.5 million in independent expenditures, digital and mail advertising, television advertising, generalized online marketing, and a tele-town hall meeting. *Id.* ¶ 245. Its manifest failure to avail itself of the injunction it claimed it needed demonstrates that section 102.14 is "surely not a wildly disproportionate restriction upon speech."[9] *Williams-Yulee*, 135 S. Ct. at 1670 (internal quotation marks omitted). Strategic Media 21 itself simply suggested that PAG just change the name. SMF ¶ 15.

Moreover, as the record reflects, unauthorized committees do not require the use of a candidate's name to effectively build large followings. Unauthorized committees such as Right to Rise, Priorities USA, and Restore Our Future have successfully identified themselves with a candidate even while abiding by the name regulation, and they have been described as advancing the candidacies and platforms of those candidates to varying degrees of effectiveness, none of which relate to their ability to become associated with the supported candidate. SMF ¶ 244. PAG itself "believed that the Pursuing America's Greatness Facebook page . . . was effective in communicating PAG's messages," despite not using Mike Huckabee's name in the title of the page. *Id.* ¶ 245.

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[9] Despite the conclusion of the candidacy to which PAG had been devoted, the Court of Appeals held that PAG maintained an interest in the case because its "intent to continue violating section 102.14(a) keeps this case alive." *PAG II*, 831 F.3d at 505. For purposes of assessing PAG's as applied challenge, however, the absence of activity by the group under the preliminary injunction order indicates that section 102.14 has placed only very limited burdens on PAG's First Amendment rights. *See supra* p. 12-13.

Section 102.14 restricts the least amount of speech while effectively furthering the government's interest in limiting confusion, fraud, and abuse. *Cf. PAG I*, 132 F. Supp. 3d at 42 (agreeing that "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" (internal quotation marks omitted)); *STOP Hillary PAC v. FEC*, 166 F. Supp. 3d 643, 653 (E.D. Va. 2015) (concluding that "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."). In sum, because section 102.14 is narrowly tailored to serve compelling government interests, "the First Amendment poses no obstacle to its enforcement in this case." *Cf. Williams-Yulee*, 135 S. Ct. at 1672.

3. The Alternatives that PAG Proposes Would Be Ineffective at Addressing Voter Confusion

Despite having conceded in oral argument before this Court that "'there is no disclosure that we could make that would make this permissible,'" *PAG I*, 132 F. Supp. 3d at 39, PAG now offers three allegedly less restrictive alternatives: (1) "larger disclaimers," (2) third-party signifiers, and (3) relying on the voluntary but ever-changing authentication marks Facebook and Twitter have used (Pl.'s Mem. at 31-33.). PAG was right the first time. There is no less restrictive alternative because none of these suggestions would be sufficiently effective. *Burson*, 504 U.S. at 208-09 (explaining that the 100-foot boundary was well tailored and that the "government has such a compelling interest in securing the right to vote freely and effectively"); *accord PAG II*, 831 F.3d at 510-11 (recognizing that alternative means of regulation must be equally effective); Pl.'s Mem. at 29.

PAG mainly argues that "larger disclaimers" would be a less restrictive alternative to the regulation at issue. (Pl.'s Mem. at 31.) As explained above, however, the Commission was amply justified in considering and rejecting this alternative for the record demonstrates that disclaimers of varying sizes and types are insufficient in this context. SMF ¶¶ 259-67 (examples of confusion despite disclaimer). PAG's own disclaimer was insufficient. *Id*. ¶ 267.

PAG's proposal is fundamentally ineffective because it requires that the viewer receive conflicting signals. *See Burson*, 504 U.S. at 211 (relying on "common sense" to evaluate regulation). A regulatory system premised on the idea of allowing for the use of a misleading committee name, but then contradicting that name in a disclaimer, is unlikely to be successful. As the D.C. Circuit observed decades ago, regulating through the name, as in section 102.14, "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. Yet this is precisely the confusing regime PAG now suggests. A Facebook page entitled "The Official Trump for President Page" accompanied by a large disclaimer stating that "This is not President Trump's Official Facebook Page" (*e.g.*, Pl.'s Mem. at 31) presents obviously conflicting signals to a viewer of the page. On the one hand, the name "Trump for President" conveys that the page is authorized by Trump, and a viewer could reasonably conclude that use of the name signals authorization. That is the way the law currently works. On the other hand, the disclaimer conveys that there is another, more relevant Facebook page for the viewer to see (the "official" one).[10] The result would be confusion and

[10] The *PAG II* panel's reference to whether a page is "official," 831 F.3d at 510, would also fail to alleviate all confusion. Indeed, FECA's statutory and regulatory regime uses the term "authorized," while "official" in ethics, bribery, and other similar contexts is indicated to connote a connection to officeholder duties, *in contrast with* an officeholder's capacity as a candidate. *See, e.g.*, U.S. House of Representatives Committee on Ethics, *House Ethics Manual* 121-84 (2008 ed.) (distinguishing actions taken in an "official" capacity with those taken in a campaign

opportunities for fraud and abuse, precisely the opposite of the interests that are intended to be served by the regulation.

PAG's disclaimer proposal is also ineffective for technological reasons. Disclaimers in social media and internet contexts can be unlike those in print or television advertisements, where, like a committee's operating name, a disclaimer is contiguous in time or space with the content of the advertisement. But PAG's disclaimer proposal would in many instances require viewers of social media to further engage by clicking or scrolling in order to access any disclaimer, which viewers often fail to do.[11] For example, if a Facebook user engages with a page by "liking" the page or commenting on a page post, that activity may be shared on the feeds

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or political capacity). And Members of Congress are required to keep their campaign websites distinct from websites associated with their office and thus maintain both, further clouding the meaning of "official." *See, e.g., id.* at 131.

[11] Disclaimers on each post or news item would be insufficient in many internet and social media contexts that are character-limited. For example, the FEC permitted Google advertisements that were limited to 95 characters, including the headline, to not themselves carry a disclaimer, with the ads containing a URL to another page that did contain a disclaimer. FEC Advisory Op. 2010-19 (Google, Inc.), https://www.fec.gov/files/legal/aos/76083.pdf. An attempt to require disclaimer language in similarly character-limited social media contexts would restrict more language than regulating the use of the candidate's name in the title of such a social media account. And titles typically travel throughout social media environments with posts, reposts, and replies. Twitter has been character limited to 140 characters until recently, when it has experimented with some users being permitted to use 280 characters. SMF ¶ 102. No matter the ultimate limit, space- and character-limited views will undoubtedly be a feature of web and social media platforms making difficult contemporaneous viewing of any disclaimer with much content. Additionally, Twitter confounds the placement of disclaimer language on the underlying Twitter account. A Twitter profile page contains a "bio," which is a "personal description" up to only 160 characters in length that would presumably contain the disclaimer language. *Id*. ¶ 104. If the Commission were to require a disclaimer on Twitter accounts, that disclaimer could consume much of the character-limited "bio" section. *Id*. With regard to Facebook, the Commission evenly split regarding whether the size of ads permitted in 2011 permitted a disclaimer. FEC Advisory Op. Request 2011-09 (Facebook), https://www.fec.gov/data/legal/advisory-opinions/2011-09/. The manner in which Facebook typically displays posts does not permit space to accommodate a disclaimer that is viewable and effective as users scroll through their timeline. PAG takes the position that Facebook would not currently allow for disclaimer text to be placed effectively in a sponsored post because Facebook staffers may deem the post to have "excessive text" and that a disclaimer could unduly fill the allotment of text on some sponsored posts. SMF ¶ 256.

of the user's Facebook friends, "increasing the Page's exposure and reach." SMF ¶ 89. Facebook and Twitter also allow for promoted or "boost[ed]" content, another way that posts can appears on the feeds of other users. *Id*. ¶ 90. In such instances, viewers only see the name of the Facebook page or Twitter user (such as "I Like Mike Huckabee") and the thumbnail photo selected for the organization's profile photo, which, for many unauthorized committees who attempt to identify with a candidate, is a photo of the candidate. *Id*. ¶¶ 91-92, 108-12. An online marketing company found that the average "click-through" rate, or "the number of clicks advertisers receive on their ads per number of impressions," for eighteen industries with Facebook advertisements was 0.90%, ranging from 0.47% to 1.61%. *Id*. ¶ 93. The average click-through rate for Twitter advertisements ranges from one to three percent. *Id.* ¶ 113. That data suggests that the vast majority of users would never see the type of disclaimer PAG proposes. And the FEC found during the rulemaking more than 20 years ago that even disclaimers that are within a person's visual field may not be noticed or understood by viewers, particularly the elderly. The result of PAG's proposal would be an explosion of the kind of confusion and profiteering fraud and abuse that is well documented in the record.[12]

PAG's other proposed alternatives merit little consideration. PAG's proposal (Pl.'s Mem. at 31) that the Commission could require unauthorized committees to use third-party designations in the titles of their activities (*i.e.*, "'Conservatives Who Like Mike Huckabee'"), rather than regulating the use of the candidate's name, is directly contrary to the *hundreds* of

[12] PAG inappositely argues that "[n]ot one of the six Commissioners even suggested prohibiting Facebook sponsored ads." (Pl.'s Mem. at 34.) This diversion mischaracterizes the Commission's deliberations about disclaimers in Internet communications. The Commission has never considered banning the use of Facebook sponsored posts or websites by unauthorized committees. The issue here is the name regulation's effectiveness at clarifying candidate-status authorization for the activities of unauthorized committees, and its narrow tailoring to the nuanced technology of platforms that committees utilize. The rule does not restrict speech in the content of communications. *See supra* pp. 35-37.

authorized committees using such third-party designations this way. *See* SMF ¶¶ 268-70 (listing examples). According to FEC records, 624 principal campaign committees and other authorized committees that are registered with the Commission and have been active between 2011 and 2017 contain the words "friends of" in their official names, and include the name of the candidate by whom they are authorized. *Id*. ¶ 268. PAG does not explain how all of these authorized committees would fit within its proposed rule, which plainly would not serve the intended purposes in contrast with the current rule.

PAG's other idea of outsourcing campaign finance disclosure to the for-profit internet and social media platforms of the day (Pl.'s Mem. at 32-33) is poorly timed, coming at a moment when concerns about foreign interference in the 2016 election — in the context of political advertising on those platforms — are so substantial that multiple Congressional committees have been holding hearings on the subject. SMF ¶ 194. It would also be plainly ineffective because the verification marks on those platforms do not mean what PAG suggests they do. Unlike section 102.14, which serves to clarify a committee's candidate-authorization status through the committee's operating name, the verification marks offered by Facebook and Twitter appear to be obtainable simply by demonstrating that one's page is authentic or legitimate, neither of which is the same as being authorized by a candidate. *See id*. ¶¶ 272-88. Hence, an unauthorized Twitter account named "Students for Trump" ("@TrumpStudents") *has* a blue verification badge. *Id.* ¶ 274. An unauthorized Facebook page named "The People for Bernie Sanders" *has* a blue verification badge. *Id.* ¶ 285. PAG's "I Like Mike Huckabee" Facebook page could probably have had a verification badge. *Id.* ¶ 288. Additionally, both of these platforms' verification systems are voluntary and may be changed at any time without notice to the public. In fact, Twitter has modified its verification system repeatedly since 2009, when it first instituted a version of the system. *Id.* ¶¶ 275-79. And finally, despite PAG's focus on

Facebook and Twitter, unauthorized committees use other platforms such as Instagram and Snapchat and may use others in the future as they become popular. PAG's suggestion that the Commission rely on a third party to "verify" accounts is wholly unworkable.

III. UPHOLDING THE CONSTITUTIONALITY OF SECTION 102.14 IS CONSISTENT WITH THE D.C. CIRCUIT'S ANALYSIS OF PAG'S REQUEST FOR A PRELIMINARY INJUNCTION

For the reasons explained above, the Court should uphold the constitutionality of the name regulation and, contrary to PAG's argument (Pl.'s Mem. at 22-25), such action would be consistent with the *PAG II* panel's analysis of PAG's request for a preliminary injunction. To reiterate, the panel itself recognized that the preliminary injunction posture precluded a complete analysis of PAG's constitutional claim because the record was "'silent'" as to the comparative effectiveness of alternatives, and that the Commission had not yet "offered . . . evidence that larger or differently worded disclosures would be less effective." *PAG II*, 831 F.3d at 510-11. Following the Court's entry of a schedule allowing the Commission to prepare this needed record, the Commission has now presented the complete rulemaking record and other evidence that was not available when the case was at the expedited preliminary injunction stage. *See supra* pp. 17-43. This evidence fully demonstrates that the tailoring in section 102.14 is "narrowly tailored," about as "'perfectly'" as is possible. *Williams-Yulee*, 135 S. Ct. at 1661 (quoting *Burson*, 504 U.S. at 209).

Upholding the regulation would also be consistent with the purpose of a preliminary injunction, which is to "preserve the relative positions of the parties until a trial on the merits," and courts' recognition that, "[g]iven this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on

the merits." *Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1022-23 (D.C. Cir. 1998) (quoting *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). Indeed, the Court now looks to the record afresh because "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Camenisch*, 451 U.S. at 395. This is because, where a court has granted a preliminary injunction, "the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy." *Id*. at 396. Second, the postures of a request for a preliminary injunction and summary judgment diverge in material respects: "'In the former, a court considers whether there is a reasonable likelihood that the moving party will prevail on the merits; in the latter a court'" applies the familiar summary judgment standard. *Nat. Res. Def. Council*, 147 F.3d at 1023 (quoting *Commc'ns Maint., Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1205 (7th Cir. 1985)); *see also Conax Fla. Corp. v. U.S.*, 824 F.2d 1124 (D.C. Cir. 1987) (affirming grant of summary judgment to government defendant that was preceded by entry of plaintiff's requested preliminary injunction); *Citizens for Responsibility and Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194 (D.D.C. 2009) (ruling in defendants' favor on summary judgment after having granted plaintiffs' request for a preliminary injunction).

IV. EVEN IF SECTION 102.14 POSSESSED A CONSTITUTIONAL INFIRMITY, THE APPROPRIATE REMEDY WOULD BE TO STRIKE 102.14(B)(3) AND AFFIRM THE SEVERED PORTION

PAG's challenge is premised on the notion that 11 C.F.R. § 102.14 is "content-based" because its application varies depending on whether the group's operating name "unambiguously expresses opposition" to the candidate. (Pl.'s Mem. at 2.) But even if that challenge were successful, the remedy to PAG's claim would be for the Court to simply strike subsection 102.14(b)(3). Section 102.14 is severable in that way since there is no doubt the agency would

have adopted the rest of the regulation on its own. *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 71 (2017). Indeed it did, having separately added 102.14(b)(3) to the previously functioning version of the regulation. Striking that subsection would remove the supportive vs. oppositional element of the name rule and cure any constitutional defect. Valid portions of administrative regulations that would have been enacted independently are affirmed after being severed from the struck portions. *Id.* Striking section 102.14(b)(3) would not enable PAG to use candidate names in its operating names because such use would still violate subsection 102.14(a)'s requirement that committees not use candidate names in their project titles. But that limited relief is a result of PAG's theory and black letter law regarding remedies. PAG's challenge to the name identification requirement was broad enough to obtain standing, *PAG II*, 831 F.3d at 505, but that does not entitle it to a remedy departing from severability principles.

V. PAG HAS FAILED TO ADVANCE ITS APA AND "PRIOR RESTRAINT" CLAIMS AND HAS THEREFORE WAIVED THESE CLAIMS

PAG's summary judgment motion focuses exclusively on its claim that section 102.14 is an impermissible "content-based speech ban." (*E.g.*, Pl.'s Mem. at 2.) Accordingly, PAG has waived its APA and prior restraint claims by making no effort to advance them. *Evans v. Sebelius*, 716 F.3d 617, 619 (D.C. Cir. 2013) (citing *Ark. Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108 n.4 (D.C. Cir. 2003) (noting that arguments not raised in briefs are waived)).

CONCLUSION

For the foregoing reasons, the Court should grant the FEC's motion for summary judgment, deny PAG's motion for summary judgment, and dissolve the preliminary injunction.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

/s/ Tanya Senanayake
Tanya Senanayake (D.C. Bar No. 1006218)
Attorney
tsenanayake@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Charles Kitcher (D.C. Bar No. 986226)
Acting Assistant General Counsel
ckitcher@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street N.W.
Washington, DC 20463
(202) 694-1650

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