UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PURSUING AMERICA'S GREATNESS 1130 Cantrell Road, Suite 301 Little Rock, Arkansas 72212, Plaintiff, v. FEDERAL ELECTION COMMISSION 999 E Street, NW Washington, DC 20463, Defendant.	Civil Case No.

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65 and Local Rules 7 and 65.1, Plaintiff Pursuing America's Greatness ("Plaintiff") hereby moves for a preliminary injunction in this case enjoining enforcement of 52 U.S.C. § 30102(e)(4) and 11 C.F.R. § 102.14(a), as interpreted and applied by Defendant in Advisory Opinion 2015-04 (collectively, the "PAC Naming Prohibition"), against Plaintiff with respect to Plaintiff's website URLs, Facebook page, and Twitter handles, as described in Plaintiff's Complaint and Memorandum of Points and Authorities in Support of Plaintiff's Motion for Preliminary Injunction.

As more fully set forth in the accompanying Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction and the Verified Complaint, preliminary relief enjoining enforcement of the PAC Naming Prohibition is necessary to allow Plaintiff to exercise its First Amendment freedoms of speech and association.

Plaintiffs seek a declaration that: (1) the FEC's application of the PAC Naming

Prohibition in Advisory Opinion 2015-04 to Plaintiff's proposed communications is void under 5 U.S.C. § 706 and is unconstitutional under the First Amendment.

Plaintiffs are entitled to a preliminary injunction because: (1) Plaintiff "is likely to succeed on the merits" in proving that the naming prohibition violates the Administrative Procedures Act and the First Amendment; (2) Plaintiff is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in [Plaintiffs'] favor"; and (4) "an injunction is in the public interest." *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Plaintiffs have established likely success on the merits, demonstrated that they will be irreparably harmed, that an injunction will not substantially harm the Defendant, the Federal Election Commission, that an injunction serves the public interest and there is no adequate remedy at law. Because a preliminary injunction sets forth no monetary risk to the FEC, Plaintiff requests that any bond requirement should be waived. In accord with Local Rule of Civil Procedure 65.1(c), Plaintiffs have filed a Verified Complaint contemporaneously with this request for injunctive relief. Verified Complaints are the legal equivalent of an affidavit. *See Neal v. Kelly*, 963 F.2d 453 (D.C. Cir. 1992); *Mallick v. lnt'l Broth. of Elec. Workers*, 814 F.2d 674, 680 (D.C. Cir. l 987).

Pursuant to Local Rule 7(m), Plaintiffs hereby state that their counsel conferred with counsel for the Defendant, who indicated that Defendants intend to oppose Plaintiffs' Motion for a Preliminary Injunction.

As detailed in the accompanying Memorandum, Plaintiffs request that this Court grant its preliminary injunction motion and preliminarily enjoin the FEC from enforcing the PAC Naming Prohibition to Plaintiff's current and proposed activities until a final hearing on the merits of this matter.

Request for oral argument

Pursuant to Local Rule 7(f), Plaintiffs respectfully submit that oral argument will assist the Court's resolution of these issues.

Respectfully submitted,

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Dated: July 27, 2015

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PURSUING AMERICA'S GREATNESS 11300 Cantrell Road, Suite 301 Little Rock, Arkansas 72212, Plaintiff, v. FEDERAL ELECTION COMMISSION 999 E Street, NW Washington, DC 20463, Defendant.	)	Case No.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Pursuing America's Greatness ("PAG") requests that this Court issue a preliminary injunction enjoining Defendant Federal Election Commission (the "FEC") from applying its political committee naming prohibition at 52 U.S.C. § 30102(e)(4) and 11 C.F.R. § 102.14 (the "PAC Naming Prohibition") to PAG's use of a website Uniform Resource Locator ("URL") and social media accounts in a manner that restricts PAG's ability to communicate with its supporters about matters related to the election of candidates to federal office. The FEC's regulation is a complete ban on speech that inhibits the ability of certain political committees to engage in constitutionally-protected independent expenditures. The FEC's recent Advisory Opinion interpreting and applying the PAC Naming Prohibition violates the Administrative Procedures Act (APA), as well as the First Amendment insofar as it is a prior restraint and a content-based speech restriction. Because Plaintiffs are likely to prevail on the merits, and the other requirements for preliminary relief are satisfied, this Court should preliminarily enjoin application of the PAC Naming Prohibition to PAG's activities, as set forth herein.

STATEMENT OF FACTS

I. BACKGROUND

Pursuing America's Greatness (PAG) is a non-profit organization that operates pursuant to Section 527 of the Internal Revenue Code of 1986, as amended. PAG filed Articles of Incorporation in the State of Arkansas on March 5, 2015, and registered with the FEC as an independent expenditure-only committee on March 11, 2015, when it filed FEC Form 1 (Statement of Organization). PAG is not authorized by any candidate or candidate's committee, and is considered an "unauthorized" political committee by the

FEC.

The Federal Election Commission (FEC) is the independent federal regulatory agency charged with civil enforcement of the Federal Election Campaign Act of 1971, as amended. The FEC is located in Washington, D.C.

An independent political committee's independent expenditure activities are constitutionally protected under *Buckley v. Valeo*, 424 U.S. 1 (1976), *Citizens United v. FEC*, 558 U.S. 310 (2010), and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). The First Amendment protects PAG's right to make independent expenditures, engage in independent political activities, and otherwise exercise its rights to free speech and association. PAG wishes to exercise its First Amendment rights by engaging in certain speech activity with the advance knowledge that its activities comply with the requirements of FECA and that the FEC will not pursue enforcement action against PAG.

II. THE PAC NAMING PROHIBITION REGULATION

FECA provides: "In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name." 52 U.S.C. § 30102(e)(4).[1] This statutory language is implemented by FEC regulation at 11 C.F.R. §§ 102.14. Specifically,

> Except as provided in paragraph (b) of this section, no unauthorized committee shall include the name of any candidate in its name. For purposes of this paragraph, 'name' includes any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation.

11 C.F.R. § 102.14(a). Under paragraph (b), so-called "draft committees" are exempt from this prohibition.[2] 11 C.F.R. § 102.14(b)(2). In addition, the FEC's regulations

[1] This provision was adopted as part of the 1979 amendments to FECA.
[2] A "draft committee" is "[a] political committee established solely to draft an individual or to encourage

create an exception for certain uses of candidate names where opposition to that candidate is demonstrated: "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." 11 C.F.R. § 102.14(b)(3).

A. The FEC's Original View of the PAC Naming Prohibition (1980-1992)

From 1980 to 1992, the FEC took the position that the PAC Naming Prohibition meant what it said. That is, the FEC interpreted the provision to prohibit an unauthorized political committee from including a federal candidate's name in the committee's actual name under which its registers.[3] *See* Federal Election Commission Final Rule on Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 59 Fed. Reg. 17,267 (April 12, 1994) (the "1994 Final Rule") ("Prior to the 1992 revision, the Commission had construed this prohibition as applying only to the name under which a committee registers with the Commission."). As the D.C. Circuit explained,

> The Commission interprets "name" in § [30102](e)(4) to refer only to the official or formal name under which a political committee must register. Following this interpretation, a political committee has only one "name," even though it may rely on various "project" names to help collect money and achieve its other goals. This view obviously comports with the plain language of § [30102](e)(4), which refers to *the* "name" of a political committee in the singular. It is also consistent with the avowed purpose of § [30102](e)(4), to eliminate confusion; each committee has only one official name, which identifies it immediately either as an authorized or unauthorized committee, and which it must use in disclosing its sponsorship of all paid advertisements.

Common Cause v. FEC, 842 F.2d 436, 440 (D.C. Cir. 1988).

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him or her to become a candidate." 11 C.F.R. § 102.14(b)(2).

[3] For example, in 2012, unauthorized political committees could not register themselves with the FEC as "Americans for Obama PAC" or "United for Romney PAC."

In 1988, the D.C. Circuit upheld the FEC's original understanding of the PAC Naming Prohibition against a challenge brought by Common Cause, which argued that the provision must be read to extend beyond the PAC's formal (registration) name and also include "any title under which such a committee holds itself out to the public for solicitation or propagandizing purposes." *Common Cause v. FEC*, 842 F.2d 436, 441 (D.C. Cir. 1988). The D.C. Circuit determined that Common Cause's preferred construction was "not a totally implausible interpretation of the statute's language," but after extensively reviewing the legislative history of the relevant statutory provision, ultimately concluded that "[i]t seems downright unlikely that Congress would have enacted so broad a reform affecting the projects of unauthorized committees without a single word of explanation or debate," and the FEC's interpretation "is the better interpretation." *Id*. at 444, 448.

B. The FEC's 1992 Rulemaking Expanded The Scope of the PAC Naming Prohibition

In 1992, the FEC conducted a rulemaking and adopted the position it litigated against in *Common Cause v. FEC*, despite having been told by the D.C. Circuit in 1988 that the agency's longstanding interpretation of the PAC naming provision was "the better interpretation." *See* Federal Election Commission Final Rule on Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 57 Fed. Reg. 31,424 (July 15, 1992) (the "1992 Final Rule"). The FEC claimed that since the 1988 decision, "the Commission has become increasingly concerned over the possibility for confusion or abuse inherent in [the agency's original] interpretation." *Id*. at 31,424.

The FEC acknowledged that the *Common Cause* "court noted that the Commission has a responsibility to 'allow the maximum of first amendment freedom of expression in political campaigns commensurate with Congress' regulatory authority.'" *Id*. *citing Common Cause*, 842 F.2d at 448. Nevertheless, the FEC's 1992 rule added new language to 11 C.F.R. § 102.14, indicating that "'name' for the purpose of the 2 U.S.C. 432(e)(4) [now 52 U.S.C. § 30102(e)(4)] prohibition [] include[s] 'any name' under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation." *Id*. at 31,425. The FEC explained that since "the early 1980's … the use of candidate names in the titles of projects or other unauthorized communications has increasingly become a device for unauthorized committees to raise funds or disseminate information," and "a candidate who objected to the use of his or her name in this manner … or who disagreed with the views expressed in the communication, was largely powerless to stop it." *Id*. "For this reason, the Commission has become more concerned about the potential for confusion or abuse when unauthorized committee uses a candidate's name in the title of a special fundraising project. . . . It is possible in these instances that potential donors think they are giving money to the candidate named in the project's title, when this is not the case." *Id*. Accordingly, the FEC explained that it "has decided to adopt in its final rule a *ban* on the use of candidate names in the titles of *all* communications by unauthorized committees." *Id*. at 31,425 (emphasis added).

The 1992 Final Rule's ban applied not only to the fundraising scenarios that the FEC found troubling, but to "*all* communications by unauthorized committees." *Id*. (emphasis added). As the agency explained, "[t]he Commission believes the potential for

confusion is equally great in all types of committee communications. . . . A *total ban* is also more directly responsive to the problem at issue, and easier to monitor and enforce" than other, less restrictive options considered. *Id*. at 31,425 (emphasis added). While the FEC's rule extended beyond fundraising appeals, nearly every rationale and example presented in the Final Rule involved potential fraud and confusion *in the specific context of fundraising*.

The FEC dismissed comments that raised First Amendment objections, noting that "it is well established that First Amendment rights are not absolute when balanced against the government's interest in protecting the integrity of the electoral process." *Id*. The FEC asserted that its new ban was "narrowly designed to further the legitimate governmental interest in minimizing the possibility of fraud and abuse in this situation." *Id*. As the FEC put it, "[c]ommittees are not barred from establishing specially designated projects: they are free to choose whatever project title they desire, as long as it does not include the name of a federal candidate." *Id*. Thus, committees were free to speak to their supporters, and free to title their projects as they wished, so long as they respected the FEC's ban on certain content.

C. The FEC's 1994 Rulemaking Recognized The Overbreadth of the 1992 Rule

In 1994, the FEC reconsidered its 1992 regulation, and adopted the exemption now found at 11 C.F.R. § 102.14(b)(3), which allows an unauthorized committee to "include the name of a candidate in the title of a special project name or other communication if the title clearly and unambiguously shows opposition to the named candidate." *See* 1994 Final Rule, 59 Fed. Reg. 17,267; 11 C.F.R. § 102.14(b)(3). The "opposition" exemption to the ban was adopted after the Commission received a request

to which it was sympathetic in the form of a Petition for Rulemaking from "Citizens Against David Duke," a proposed project of the American Ideas Foundation. *Id*. at 17,267. The FEC "acceded to the petitioner's main concern, amending the rules to permit the American Ideas Foundation to use the names of federal candidates in titles that clearly indicate opposition to such candidates." *Id*. at 17,269.[4] Less than two years after insisting that a "total ban" was necessary, the Commission changed its mind and "recognize[d] that the potential for fraud and abuse is significantly reduced in the case of such titles [that clearly indicate opposition]." *Id*.

As was the case in the 1992 rulemaking, the 1994 rulemaking focused on the possibility of fraud and confusion in the context of fundraising. *See id*. at 17,268 ("The rulemaking record contains substantial evidence that potential contributors often confuse an unauthorized committee's registered name with the names of its fundraising projects, and wrongly believe that their contributions will be used in support of the candidate(s) named in the project titles."). The FEC once again claimed that its general ban, which now included an exemption where opposition to a candidate is evident in a committee's speech, was "narrowly designed to further the legitimate governmental interest in minimizing the possibility of fraud and abuse." *Id*. at 17,268.

Neither FECA, nor the FEC's ban, nor the explanations and justifications contained in the FEC's Final Rules referenced above contain any mention of the use of a candidate's name in a website URL or social media platform.

[4] The FEC acknowledged that petitioners' request had become moot because "David Duke is not currently a candidate for federal office, so the use of his name in a project title is not prohibited by these rules." The rule was adopted anyway, and the FEC noted that "[s]hould [David Duke] again become a federal candidate, such use of his name would be governed by these revised rules." 1994 Final Rule, 59 Fed. Reg. at 17,269.

D. FEC Application of PAC Naming Prohibition to Website URLs

In 1995, NewtWatch PAC requested an advisory opinion from the FEC regarding the operation of a website and fundraising operations conducted on that website. NewtWatch PAC operated a website located at www.cais.com/newtwatch. NewtWatch PAC did *not* ask the FEC for its opinion on the application of 11 C.F.R. § 102.14(a) – (b) to its activities.[5] The FEC nevertheless addressed the application of 11 C.F.R. § 102.14(a) – (b)'s ban to the requestor in the agency's response, and concluded that NewtWatch's activities were permissible under the FEC's PAC Naming Prohibition. The FEC wrote:

> In contrast to the committee name restrictions, a candidate's name may be used in the title of a special project operated by an unauthorized committee if the project title clearly and unambiguously shows opposition to the named candidate. 11 CFR 102.14(b)(3). The operation of a World Wide Web site would be considered a project of the Committee. Here, the Commission notes that under the regulations, phrases showing clear and unambiguous opposition to a candidate are not limited to specific words such as "defeat" or "oppose." The use of the term "watch," when coupled with a candidate's name, conveys clear and unambiguous opposition to the candidate being watched. "NewtWatch" connotes the view that Speaker Gingrich needs to be kept under careful and constant close scrutiny, and your view that users need to be on the alert or to be on their guard with respect to Speaker Gingrich. Accordingly, the Act and Commission regulations do not prohibit the Committee from using the name "NewtWatch" as a project name.

Advisory Opinion 1995-09 (NewtWatch PAC).

The FEC did not issue another advisory opinion considering the application of the PAC Naming Prohibition to an unauthorized committee's activities until 2015. To the best of our knowledge, the FEC has never undertaken enforcement action against a political committee for using the name of a political candidate in a website URL or other Internet-based platform, including social media accounts, on the grounds that the use

[5] *See* Advisory Opinion Request 1995-09 (NewtWatch PAC), http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=908.

does not adequately demonstrate opposition to the named candidate.[6] Moreover, in the years following 1995, the Commission explicitly adopted a "hands off" approach to the Internet. For example, in 2002, the Commission adopted new regulations that interpreted the term "public communication," and excluded the Internet from its definition. The FEC explained:

> [T]he Internet is excluded from the list of media that constitute public communication under the statute. . . . Perhaps most important, there are significant policy reasons to exclude the Internet as a public communication. The Commission fails to see the threat of corruption that is present in a medium that allows almost limitless, inexpensive communication across the broadest possible cross-section of the American population. Unlike media such as television and radio, where the constraints of the medium make access financially prohibitive for the general population, the Internet is by definition a bastion of free political speech, where any individual has access to almost limitless political expression with minimal cost. As one public interest group who favors campaign finance reform argued: "There are good policy reasons for leaving the Internet out of the definition, as it is cheap and widely available. Internet communications are not part of the campaign finance problem, and should not be regulated as such unless Congress specifically mandates it."

FEC Final Rule on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,072 (July 29, 2002). In response to a decision of this court, the FEC revised its regulations slightly in 2006 to include paid Internet advertising within the scope of its regulation, but maintained its general policy of not regulating Internet communications.[7] Generally speaking, "social media" remains unregulated.[8]

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[6] The FEC has issued "Requests for Additional Information" to political committees about their names. Examples include Stop Hillary PAC which received this letter from the FEC: http://docquery.fec.gov/pdf/454/15330081454/15330081454.pdf and CARLY for America which received this letter from the FEC: http://docquery.fec.gov/pdf/011/15330083011/15330083011.pdf. CARLY for America subsequently changed its name to Conservative, Authentic, Responsive, Leadership for You and for America (CARLY FOR AMERICA). These letters were issued by the FEC's Reports Analysis Division, which cannot take further enforcement action on its own. The Reports Analysis Division may refer potential violations to the Office of General Counsel, which may then consider enforcement action that the Commissioners must approve.

[7] *See* FEC Final Rules on Internet Communications, 71 Fed. Reg. 18,589 (April 12, 2006) ("Through this

In 2011, in Matter Under Review 6399 (Yoder), the FEC considered the application of the PAC Naming Prohibition to an authorized campaign committee. The FEC's Office of General Counsel and three Commissioners supported applying the PAC Naming Prohibition to an authorized campaign committee, Yoder for Congress, that operated a website located at www.StepheneMoore.com. (Stephene Moore was Kevin Yoder's general election opponent.) Three Commissioners rejected this view on the grounds that the PAC Naming Prohibition, by its own terms, applies only to unauthorized political committees. *See* MUR 6399 (Yoder), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen (June 23, 2011). These three Commissioners concluded that "neither the Act nor Commission regulations prohibit an unauthorized committee from using an opponent's name in its website's URL." *Id*. at 5. In a footnote, these Commissioners added:

> No Commission precedent supports the notion that an unauthorized committee's web address constitutes the *title* of a special project. Advisory Opinion 1995-09 (NewtWatch), which OGC cites in its analysis, merely establishes that a website operated by an unauthorized committee can be considered a committee special project that is subject to the naming requirements in 11 C.F.R. § 102.14(b)(3). This opinion makes no statement that the site's web address is the project's title. (And even if it did, an advisory opinion cannot establish a new rule but only provides protection to a requester against potential liability.

Id. at 4 n.16. Two of the Commissioners who produced this Statement of Reasons subsequently voted in favor of Advisory Opinion 2015-04.

Thus, until 2015, the only FEC statement regarding the application of the PAC Naming Prohibition to an Internet communication that reflected majority support was the

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rulemaking, the Commission recognizes the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach.").

[8] *See*, *e.g.*, Advisory Opinion 2010-19 (Google) (concluding that Google search ads are not required to comply with full FECA disclaimer requirements); Advisory Opinion Request 2011-09 (Facebook) (FEC unable to reach decision on question of whether FECA-mandated disclaimers are required on Facebook advertising).

unrequested dicta regarding website URLs found at the end of Advisory Opinion 1995-09, which was subsequently placed in question by the FEC's later rulemaking decisions regarding regulation of Internet activities. Then, in 2011, three Commissioners expressed the view that a website URL was *not* the "title of a special project," and read Advisory Opinion 1995-09 in a way that did not apply to a website's URL, but to the website as a whole. Following this sequence of events, it was entirely unclear how a *majority* of the FEC would apply the PAC Naming Prohibition in the future.

III. FEC ADVISORY OPINION 2015-04 (COLLECTIVE ACTIONS PAC)

Collective Actions PAC is an unauthorized, independent expenditure-only political committee whose goal is "to help Sen. Bernie Sanders in his bid to win the Democratic nomination for President." Advisory Opinion Request of Collection Actions PAC (June 3, 2015) at 1, Complaint Exhibit 1.[9] On or about June 3, 2015, Collective Actions PAC filed a written advisory opinion request with the FEC asking if the PAC's inclusion of the word "Bernie" in certain website URLs and in the titles of two social media accounts it operates is permissible under the PAC Naming Prohibition. *See* Advisory Opinion Request of Collective Actions PAC (June 3, 2015). Specifically, Collective Actions PAC's request inquired about its operation of three websites, "RunBernieRun.com," "ProBernie.com," "BelieveInBernie.com," the Facebook page "Run Bernie Run," and the Twitter accounts ("handles") "@Bernie_Run" and "@ProBernie." Advisory Opinion Request of Collective Actions PAC (June 3, 2015) at 1. Collective Actions PAC specified that it did not wish to use these platforms to raise money or solicit contributions. Rather, the PAC "hope[d] to reach millions of voters and

[9] United States Senator Bernard ("Bernie") Sanders is a declared candidate for President of the United States in the 2016 election.

believe[d] being active online is the way to achieve our goal." Advisory Opinion Request of Collective Actions PAC (June 3, 2015) at 1.

The FEC accepted the Advisory Opinion Request for review, designated the matter Advisory Opinion Request 2015-04, and posted it to the FEC's website for public comment. On July 13, 2015, the FEC's Office of General Counsel issued a draft Advisory Opinion in response to Collective Action PAC's Advisory Opinion Request. The draft Advisory Opinion, labeled Draft A, concluded that Collective Action PAC's use of website URLs, a Facebook page, and Twitter handles that include the word "Bernie" violate the PAC Naming Prohibition. *See* Advisory Opinion 2015-04, Draft A, attached as Exhibit 3.

The FEC considered the draft advisory opinion in an open session public meeting on July 16, 2015. At that meeting, FEC Commissioner Goodman asked:

> The use of the name of a candidate in a URL website, that's not in our regulation, is it? That's the creation of a former advisory opinion applying the regulation. Am I right about that? As a general rule, treating a URL of a website as an activity … the regulation speaks of programs, activities, and what have you. The application of these terms that our regulation prohibits to the use of a URL that has the name "Newt" in it, or "Bernie," was an application out of an advisory opinion, right?

A representative from the FEC's Office of General Counsel responded, "The first time that came up was in the NewtWatch advisory opinion."

Commissioner Goodman then indicated that he would support the Advisory Opinion because it was "based on the precedents of the Commission," but also added:

> I do think however that every reference in a URL website where you might land on a website that makes it very clear that you are not Bernie [Sanders], you're a third party group that supports Bernie [Sanders], avoids the fundamental reason why we have this rule in the first instance, which is to avoid fraud and confusion. And so if there is no fraud or confusion once you land on that website, I'm concerned that we may have applied this rule and restriction in an overbroad way.

> . . . I would support looking again at this restriction and tailoring it to situations that apply directly to fraud and confusion.

(Audio of the FEC's consideration of Advisory Opinion 2015-04, Draft A, is available at http://www.fec.gov/audio/2015/2015071604.mp3.) No Commissioner mentioned MUR 6399 (Yoder).

Following Commissioner Goodman's statements, the FEC voted 6 to 0 to adopt Advisory Opinion 2015-04, Draft A, Agenda Document No. 15-39-A (Complaint Exhibit 3). Advisory Opinion 2015-04 (Complaint Exhibit 2) concludes that Collective Actions PAC "may not use Senator Sanders's name in the names of [Collective Actions PAC's] websites or social media pages." FEC Advisory Opinion 2015-04 at 2. Citing Advisory Opinion 1995-09, the FEC asserts that "[a] committee's online activities are 'projects' that fall within the scope of section 102.14." *Id*. at 3. Accordingly, "[b]ecause the names of [Collective Action PAC's] websites and social media accounts that include Senator Sanders's name do not clearly express opposition to him, those sites and accounts are impermissible under 11 C.F.R. § 102.14." Advisory Opinion 2015-04 at 4.

While the FEC asserts in Advisory Opinion 2015-04 that Advisory Opinion 1995-09 determined that "[a] committee's *online activities* are 'projects' that fall within the scope of section 102.14" (emphasis added), this reading is debatable, as Advisory Opinion 1995-09 specifically addressed a website in terms of its URL. Advisory Opinion 1995-09 did not address "online activities" as that term is understood today. Facebook, Twitter, and other forms of "social media" did not exist in 1995.[10] Advisory Opinion 2015-04 is a significant expansion of Advisory Opinion 1995-09, and is, in fact, the first instance in which the FEC has considered the application of the PAC Naming Prohibition

[10] The earliest version of Facebook was created in 2004, while Twitter dates to 2006. Advisory Opinion 1995-09 could not have considered either one.

to "online activities" other than a website URL. As noted above, the FEC has generally declined in recent years to apply heavy-handed regulation to political activity on the Internet. Advisory Opinion 2015-04 is at odds with this general trend.

As a result of Advisory Opinion 2015-04, the FEC has now formally opined that its regulations ban Collective Actions PAC from communicating with supporters through websites with URLs of www.RunBernieRun.com, www.ProBernie.com, www.BelieveInBernie.com, or speak via a Facebook page titled "Run Bernie Run," or Twitter accounts with the handles of "@Bernie_Run" and "@ProBernie." Under Advisory Opinion 2015-04, it makes no difference whether Collective Actions PAC utilizes these online assets for advocacy purposes, fundraising efforts, or some other purpose; rather, it is simply the inclusion of the word "Bernie" in the titles or headings of these webpages and social media accounts that is deemed offensive and therefore banned under FEC regulations, which impose a "total ban" on Collective Actions PAC's proposed uses of the word "Bernie."[11]

IV. APPLICATION OF ADVISORY OPINION 2015-04 TO PLAINTIFF

Under FECA,

> Any advisory opinion rendered by the Commission … may be relied upon by – (A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and (B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

52 U.S.C. § 30108(c)(1). Any person who relies upon an advisory opinion in this manner, "and who acts in good faith in accordance with the provisions and findings of

[11] Advisory Opinion 2015-04 emphasizes that the 1992 version of the PAC Naming Prohibition was "a 'total ban' on the use of candidate names in committee names." Advisory Opinion 2015-04 at 3.

such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act …." 52 U.S.C. § 30108(c)(2).

Strategic Media 21, of San Jose, California, registered the website URL www.ilikemikehuckabee.com and created a Facebook page titled "I Like Mike Huckabee," which is accessed on the social media platform Facebook and located at www.facebook.com/ilikemikehuckabee. On or about July 9, 2015, PAG entered into a contract with Strategic Media 21 whereby PAG controls the operation and maintenance of the aforementioned website URL and Facebook page as part of PAG's independent efforts in support of former Arkansas Governor Mike Huckabee, who is now a candidate for President of the United States in 2016. By operating and maintaining www.ilikemikehuckabee.com and the Facebook page "I Like Mike Huckabee," available at facebook.com/ilikemikehuckabee, PAG is able to communicate with large numbers of individual, grassroots supporters of Governor Huckabee. As of July 24, 2015, the "I Like Mike Huckabee" Facebook page had received 181,679 "likes," which means that those persons visited the Facebook page and indicated they "liked" its contents.

Pursuant to its contract with Strategic Media 21, PAG began operating www.ilikemikehuckabee.com and the Facebook page "I Like Mike Huckabee" on or about July 9, 2015. PAG wishes to develop a related Twitter account that utilizes and incorporates the "I Like Mike Huckabee" branding of the website and Facebook page into a Twitter "handle" (such handle would include the name "Mike Huckabee" or "Huckabee"). PAG has not, and does not intend to use any of these platforms to solicit contributions or to otherwise engage in fundraising activities. PAG wishes to use these platforms solely as a means of communicating with supporters to advocate the election of

Mike Huckabee.

For purposes of 11 C.F.R. § 102.14(a) – (b), the website www.ilikemikehuckabee.com is materially indistinguishable from www.RunBernieRune.com, www.ProBernie.com, and www.BelieveInBernie.com. The Facebook page "I Like Mike Huckabee" is materially indistinguishable from the Facebook page "Run Bernie Run" for purposes of 11 C.F.R. § 102.14(a) – (b). A Twitter account that utilizes the "I Like Mike Huckabee" branding of the website and Facebook page in its "handle" would be materially indistinguishable from the Twitter accounts "@Bernie_Run" and "@ProBernie" for purposes of 11 C.F.R. § 102.14(a) – (b). Thus, under Advisory Opinion 2015-04, the PAG activities discussed above are impermissible under the FEC's current interpretation of the PAC Naming Prohibition. As a result, and while pursuing this litigation, PAG has ceased any further work on updating, maintaining, promoting, or otherwise changing or altering these online pages and communications.

STANDARD OF REVIEW

This Court recently explained that "[a] preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 38 (D.D.C. 2014) *citing Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "To demonstrate entitlement to a preliminary injunction, a litigant must show: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that the balance of equities tips in its favor; and (4) that the public interest would be furthered by the injunction." *Wash. Metro. Area Transit Auth. v. Local 689,*

Amalgamated Transit Union, 2015 U.S. Dist. LEXIS 83838, *11-12 (D.D.C. June 29, 2015) citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

"In conducting an inquiry into these four factors, '[a] district court must 'balance the strengths of the requesting party's arguments in each of the four required areas.'" *Elec. Privacy Info. Ctr*, 15 F. Supp. 3d at 38 (internal citation omitted). "The District of Columbia Circuit applies a 'sliding-scale' approach to the preliminary injunction factors, meaning that 'a strong showing on one factor could make up for a weaker showing on another.'" *Indian River Cnty. v. Rogoff*, 2015 U.S. Dist. LEXIS 74895, *17 (D.D.C. June 10, 2015) (citation omitted).[12]

The PAC Naming Prohibition infringes on First Amendment rights, meaning the burden shifts to the FEC to justify its regulatory actions. *See U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). When the government bears the ultimate burden of proof demonstrating a statute's constitutionality, a movant in a preliminary injunction setting must be deemed likely to succeed on the merits unless the government is able to demonstrate the statute's constitutionality. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

[12] The D.C. Circuit noted that *Winter* may be read "at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) *citing Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (concurring opinion).

ARGUMENT

I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

Plaintiff is likely to succeed on the merits on its claim under the Administrative Procedure Act that the PAC Naming Prohibition, as interpreted and applied in Advisory Opinion 2015-04, exceeds the agency's statutory authority. Plaintiff is also likely to succeed on the merits of its claim that the PAC Naming Prohibition, as interpreted and applied in Advisory Opinion 2015-04, violates the First Amendment of the U.S. Constitution. "Plaintiff's probability of success on the merits is the most critical of the criteria when considering a motion for preliminary injunction." *Carey v. FEC*, 791 F. Supp. 2d 121, 128 (D.D.C. 2011). The Supreme Court explained,

> political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny" which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."

Citizens United v. FEC, 130 S. Ct. 876, 898 (U.S. 2010) *citing FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 464 (2007) (opinion of Roberts, C. J.).

A. Plaintiff's Administrative Procedure Act Challenge to the PAC Naming Prohibition

1. Advisory Opinion 2015-04 is a Final Agency Action Upon Which PAG May Legally Rely

FEC Advisory Opinion 2015-04 is a final agency action, and the agency's interpretation of the PAC Naming Prohibition prevents Plaintiff from engaging in the speech activities detailed herein. Advisory Opinion 2015-04 deprives PAG of the legal right to rely upon an advisory opinion creating a "safe harbor" for Collective Action PAC's materially indistinguishable activities. *See* 52 U.S.C. § 30108(c)(1)(B) ("Any

advisory opinion rendered by the Commission . . . may be relied upon by . . . any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.").

The D.C. Circuit has previously determined that a FEC advisory opinion is "final agency action" for purposes of the APA. *See Unity08 v. FEC*, 596 F.3d 861, 864-865 (D.C. Cir. 2009); *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001) ("advisory opinions have binding legal effect on the Commission"). "[A]gency advisory opinions are final agency action where they 'constitute[] final and authoritative statements of position by the agencies to which Congress ha[s] entrusted the full task of administering and interpreting the underlying statutes.'" *Unity08*, 596 F.3d at 865 *quoting Am. Federation of Gov't Employees, AFL-CIO v. O'Connor*, 747 F.2d 748, 753 n.10 (D.C. Cir. 1984). "Administrative orders are final when 'they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.'" *Id. citing Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.,* 333 U.S. 103, 113 (1948)) and *Bennett v. Spear,* 520 U.S. 154, 177-178 (1997); *Franklin v. Massachusetts,* 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.").

The advisory opinion procedure in this matter is complete. "The fact that the advisory opinion procedure is complete and deprives the plaintiff of a legal right – [52 U.S.C. § 30108(c)(1)]'s reliance defense, which it would enjoy if it had obtained a favorable resolution in the advisory opinion process – 'denies a right with consequences

sufficient to warrant review.'" *Unity08*, 596 F.3d at 865 *quoting Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 589 n.8 (D.C. Cir. 1971).

A pre-enforcement action is permitted because a credible threat of prosecution or civil enforcement action against PAG exists. As the D.C. Circuit explained, "parties are commonly not required to violate an agency's legal position and risk an enforcement proceeding before they may seek judicial review." *Unity08*, 596 F.3d at 865. There is no bar to a similarly-situated third party bringing suit to challenge an advisory opinion of the FEC. *See National Conservative Political Action Committee v. FEC,* 626 F.2d 953, 958 (D.C. Cir. 1980); *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407 (E.D.Va. 2012) (upholding standing and ripeness where third party that planned to engage in identical activity challenged FEC advisory opinion).

2. The FEC's Interpretation and Application of the PAC Naming Prohibition in Advisory Opinion 2015-04 is Arbitrary, Capricious, and in Excess of the FEC's Statutory Authority

The FEC impermissibly interpreted and applied the PAC Naming Prohibition in Advisory Opinion 2015-04 when it determined that Collective Actions PAC may not operate websites with URLs of www.RunBernieRun.com, www.ProBernie.com, www.BelieveInBernie.com, or a Facebook page titled "Run Bernie Run," or Twitter accounts with the handles of "@Bernie_Run" and "@ProBernie." Advisory Opinion 2015-04 applies the PAC Naming Prohibition to a context not contemplated in the FEC's 1992 and 1994 rulemakings, and in a manner that goes far beyond the FEC's asserted justification for those rulemakings.

In Advisory Opinion 2015-04, the FEC explained: "To limit 'the potential for confusion' and 'minimize[e] [sic] the possibility of fraud and abuse,' the Act and

Commission regulations generally prohibit an unauthorized committee from including the name of a candidate in the name of the committee." Advisory Opinion 2015-04 at 3.

In the 1992 and 1994 rulemakings, the FEC identified an interest in preventing fraud, abuse, and confusion among "potential donors [who] think they are giving money to the candidate named in the project's title, when this is not the case." 1992 Final Rule, 57 Fed. Reg. at 31,424. The title of the FEC's 1992 and 1994 rulemakings ("Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees") reinforces this focus on fundraising, as does every example included in the two Final Rules.[13]

The FEC's application of the PAC Naming Prohibition in Advisory Opinion 2015-04, in a context where there is no potential for fundraising fraud, abuse or confusion, is arbitrary, capricious, an abuse of discretion, and contrary to law under the Administrative Procedure Act (5 U.S.C. §§ 551-706).

There is no dispute that PAG may engage in unlimited independent expenditures in support of Mike Huckabee's candidacy for President of the United States. *See Buckley v. Valeo*, 424 U.S. 1 (1976), *Citizens United v. FEC*, 558 U.S. 310 (2010), and

[13] *See* 1992 Final Rule, 57 Fed. Reg. at 31,424 ("For example, in 1984 a United States Senator requested, and received, permission to obtain from Commission records the names and addresses of those who had responded to unauthorized solicitations made in his name, to inform those contributors that he had not authorized the solicitation."); *id*. ("For example, assume that the 'XYZ Committee,' a committee registered under that name with the Commission, establishes a special fundraising project called 'Americans for 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*. at 31,425 ("For example, a comment from an authorized committee of a major party presidential candidate stated that an unauthorized project using that candidate's name raised over $10,000,000 during the 1988 presidential election cycle, despite the candidate's disavowal of and efforts to stop these activities."); *id*. ("two other unauthorized projects by that same committee raised over $4,000,000 and nearly $400,000 in the name of two other presidential candidates in the 1988 election cycle"); *id*. ("[A]n authorized Political Action Committee has, over several election cycles, established numerous projects whose titles included the names of federal candidates. The named candidates … received no money from the $9 million raised in response to these appeals."); 1994 Final Rule, 59 Fed. Reg. at 17,267 ("The rulemaking record contains 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.").

SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010). PAG may, among other activities, produce and distribute television advertisements that include the words "I Like Mike Huckabee" in text across the top of the screen for the duration of the advertisement, produce and distribute radio advertisements that include the message "I Like Mike Huckabee", and send mailers that say "I Like Mike Huckabee" across the front – subject to the FEC's reporting and disclaimer requirements.

The FEC's application of the PAC Naming Prohibition in Advisory Opinion 2015-04 goes far beyond the FEC's justifications for that rule. The FEC previously claimed that the PAC Naming Prohibition was "narrowly designed to further the legitimate governmental interest in minimizing the possibility of fraud and abuse." 1994 Final Rule, 59 Fed. Reg. at 17,268. There is no evidence or "possibility of fraud and abuse" in the scenarios presented in Advisory Opinion 2015-04. PAG wishes to independently advocate in support of a candidate for U.S. President and does not propose to engage in any fundraising solicitations through use of the website URL, Facebook page, or planned Twitter account at issue in this manner. There is no possibility of fraud and abuse that the PAC Naming Prohibition might prevent under the interpretation and application supplied in Advisory Opinion 2015-04.

B. The FEC's PAC Naming Prohibition is an Impermissible Prior Restraint on Speech and an Impermissible Content-Based Speech Restriction

While this matter involves the FEC and FECA, this is not a campaign finance case that involves speech and/or associational limitations in the form of contribution limits or expenditures restrictions. Rather, the PAC Naming Prohibition is a ban on pure political speech that is imposed on the basis of the content of that speech. Under

Advisory Opinion 2015-04, Plaintiff is prohibited by the FEC from incorporating certain crucial terms (*i.e.*, a candidate's name) in its website URLs or social media efforts (such as the title of a Facebook page) because PAG supports that candidate. This prohibition infringes on PAG's unquestioned right to communicate with the public on matters of public importance. Namely, PAG is an independent expenditure-only committee that exercises its constitutional right to make independent expenditures, yet the FEC's PAC Naming Prohibition restricts PAG's ability to utilize the name of a candidate it supports in a website URL and on a Facebook page. The FEC's PAC Naming Prohibition functions both as a prior restraint on PAG's speech, and as an impermissible content-based speech restriction.

1. The PAC Naming Prohibition Is An Unconstitutional Prior Restraint

a. The Law of Prior Restraints

A "prior restraint" is a government prohibition - statutory, administrative, judicial, or otherwise - that forecloses speech before it takes place. *Alexander v. United States*, 509 U.S. 544, 550 (1993) *citing* M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4-14 (1984) ("The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'"); *Alliance for Community Media v. FCC*, 56 F.3d 105, 128 (D.C. Cir. 1995) ("A prior restraint is an administrative or judicial order restraining future speech."); *Fischer* v. *City of St. Paul*, 894 F. Supp. 1318, 1325 (D. Minn. 1995) ("A prior restraint is generally any governmental action that would prevent a communication from reaching the public."). The Supreme Court Reporter is replete with

decisions invalidating prior restraints.[14]

The Supreme Court has also warned of the dangers of functional prior restraints in the context of complex FEC regulations that afford significant discretion to the FEC. In *Citizens United v. FEC*, the Court wrote:

> This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. . . . As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. . . . ***These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.*** . . . Because the FEC's "business is to censor, there inheres the danger that [it] may well be less responsive than a court--part of an independent branch of government--to the constitutionally protected interests in free expression." . . . When the FEC issues advisory opinions that prohibit speech, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."

Citizens United v. FEC, 558 U.S. 310, 335 (2010) (internal citations omitted) (emphasis added).

[14] *See*, *e.g.*, *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (striking down a statute authorizing courts to indefinitely enjoin exhibition of films that had not yet been found to be obscene); *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 390 (1973) (holding city ordinance, as construed to forbid newspapers from publishing sex-designated help wanted ads for jobs where gender was not a bona fide occupational qualification, did not violate the First Amendment, but unequivocally reaffirming the protection afforded to editorial judgment and to the free expression of views, however controversial.); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (vacating an order enjoining petitioners from distributing leaflets anywhere in their town); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (reiterating the heavy presumption against Constitutional validity of prior restraint and holding that the government had not met its heavy burden to justify a prior restraint against publication of classified information); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (invalidating a state anti-obscenity commission that only had the authority to issue informal sanctions because the record demonstrated that the Commission set about to suppress publication of materials it deemed objectionable, with no safeguards to prevent suppression of constitutionally protected materials); *Near v. Minnesota*, 283 U.S. 697 (1931) (holding that a state may punish "abuses" of the freedom of the press-such as the illegal publication of malicious or defamatory material-but that a permanent injunction prohibiting all future publication of a newspaper was an unconstitutional prior restraint on the freedom of the press).

"Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, 372 U.S. 58,* 70. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

b. Application to PAC Naming Prohibition

Both the FEC's 1992 and 1994 rulemakings premise the PAC Naming Prohibition on "the *legitimate* governmental interest in minimizing the possibility of fraud and abuse in this situation." *See* 1992 Final Rule, 57 Fed. Reg. at 31,425; 1994 Final Rule, 59 Fed. Reg. at 17,268 (emphasis added). The 1994 rulemakings indicates that "this situation" is the situation in which "potential contributors often confuse an authorized committee's registered name with the names of its fundraising projects and wrongly believe that their contributions will be used in support of the candidate(s) named in the project titles." 1994 Final Rule, 59 Fed. Reg. at 17,268. The reference to "this situation" in the 1992 rulemaking is less clear. Other language in the 1992 and 1994 rulemakings suggest the FEC rule is somehow related to "the government's interest in protecting the integrity of the electoral process." 1992 Final Rule, 57 Fed. Reg. at 31,425; 1994 Final Rule, 59 Fed. Reg. at 17,267.

In Advisory Opinion 2015-04, the FEC explained: "To limit 'the potential for confusion' and 'minimize[e] [sic] the possibility of fraud and abuse,' the Act and Commission regulations generally prohibit an unauthorized committee from including the name of a candidate in the name of the committee." Advisory Opinion 2015-04 at 3.

To the extent that the FEC has clearly identified the government interest that allegedly justifies the PAC Naming Prohibition, it appears to have expressed and

identified an interest solely in preventing of fraud, abuse, and confusion among "potential donors [who] think they are giving money to the candidate named in the project's title, when this is not the case." 1992 Final Rule, 57 Fed. Reg. at 31,424. The title of the FEC's 1992 and 1994 rulemakings ("Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees") reinforces this focus on fundraising, as do the examples included in the two Final Rules.[15] In spite of this emphasis on fundraising fraud, the Commission nevertheless,

> decided to adopt in its final rule a ban on the use of candidate names in the titles of all communications by unauthorized committees. The Commission believes the potential for confusion is equally great in all types of committee communications. . . . ***A total ban*** is also more directly responsive to the problem at issue, and easier to monitor and enforce than the restrictions on check payees proposed in the NPRM.

1992 Final Rule, 57 Fed. Reg. at 31,425 (emphasis added). There is simply nothing in the 1992 or 1994 rulemakings, other than the FEC's conclusory assertions, about "confusion" beyond the fundraising context. In the context of regulating charitable solicitations, the Supreme Court recently noted that its cases draw a line "'between regulation aimed at fraud and regulation aimed at something else in the hope that it would

[15] *See* 1992 Final Rule, 57 Fed. Reg. at 31,424 ("For example, in 1984 a United States Senator requested, and received, permission to obtain from Commission records the names and addresses of those who had responded to unauthorized solicitations made in his name, to inform those contributors that he had not authorized the solicitation."); *id*. ("For example, assume that the 'XYZ Committee,' a committee registered under that name with the Commission, establishes a special fundraising project called 'Americans for 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*. at 31,425 ("For example, a comment from an authorized committee of a major party presidential candidate stated that an unauthorized project using that candidate's name raised over $10,000,000 during the 1988 presidential election cycle, despite the candidate's disavowal of and efforts to stop these activities."); id. ("two other unauthorized projects by that same committee raised over $4,000,000 and nearly $400,000 in the name of two other presidential candidates in the 1988 election cycle"); *id*. ("[A]n authorized Political Action Committee has, over several election cycles, established numerous projects whose titles included the names of federal candidates. The named candidates … received no money from the $9 million raised in response to these appeals."); 59 Fed. Reg. at 17,267 ("The rulemaking record contains 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.").

sweep fraud in during the process.'" *Illinois ex rel. Madigan v. Telemarketing Assocs*., 538 U.S. 600, 619-620 (2003) *citing Secretary of Maryland v. Joseph H. Munson Co*., 467 U.S. 947, 969-970 (1984). The FEC's PAC Naming Prohibition appears to be latter.

The 1992 rulemaking contains two justifications for expanding the PAC Naming Prohibition beyond the fundraising context. First, the FEC explained that under its original interpretation of the PAC Naming Prohibition, "a candidate who objected to the use of his or her name in this manner . . . or who disagreed with the views expressed in the communication was largely powerless to stop it." 1992 Final Rule, 57 Fed. Reg. at 31,424. This concern plainly cannot justify a speech ban. An independent expenditure, of course, cannot be limited or banned because a candidate disagrees with the message. Second, the FEC cited administrative convenience. *Id*. at 31, 425 ("A total ban is … easier to monitor and enforce…."). "Administrative convenience" is not a valid justification for a ban on speech. *See, e.g., U.S. v. National Treasury Employee Union*, 513 U.S. 454, 473 (1995) ("A blanket burden on the speech of nearly 1.7 million federal employees requires a much stronger justification than the Government's dubious claim of administrative convenience."); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 n. 9 (1972) ("This attenuated interest, at best a claim of small administrative convenience and perhaps merely a confession of legislative laziness, cannot justify the blanket permission given to labor picketing and the blanket prohibition applicable to others."); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 267-269 (1974) (concluding that convenient prevention of fraud did not justify denying health care benefits to all out of state immigrants in the first year of residency); *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1545 (11th Cir. 1993) ("any City interest in the

administrative convenience of dispensing with an individualized determination concerning the sincerity of particular religious beliefs is not compelling").

Advisory Opinion 2015-04 applies the PAC Naming Prohibition to Collective Actions PAC's activities even though the PAC explained that it would not use its websites and social media accounts "to solicit donations for itself." Advisory Opinion 2015-04 at 2. The FEC's asserted interest in preventing fraud, abuse, and confusion in the context of unauthorized political committee fundraising was not present in in Advisory Opinion 2015-04, yet the FEC applied the PAC Naming Prohibition anyway.

In this matter, the FEC's asserted governmental interest is not present. PAG does not wish to use the website www.ilikemikehuckabee.com, the Facebook page "I Like Mike Huckabee," or any associated Twitter handles to solicit funds. In the absence of any identified governmental interest, the FEC's ban on PAG's speech cannot withstand scrutiny. The PAC Naming Prohibition is a prior restraint that cannot be constitutionally applied to website URLs and social media identifiers that incorporate the name of a candidate but that do not solicit funds or money of any type. PAG is entitled to a preliminary injunction on this count.

2. The PAC Naming Prohibition Is An Impermissible Content-Based Speech Restriction

a. Content-Based Speech Regulation

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). "Content-based laws … target speech based on its communicative content." *Id*. at 2226. As the Court explained,

> This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Sorrell*, *supra,* at ___, 131 S. Ct. 2653, 2663, 180 L. Ed. 2d 544 555. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Id. at 2227. A statute or regulation is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) *citing FCC v. League of Women Voters of California*, 468 U.S. 364, 383, 377 (1984). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

"Content-based laws … are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226; *see also American Freedom Defense Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 80 (D.D.C. 2012) *citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("A content-based restriction must meet strict constitutional scrutiny to stand, *i.e.,* the restriction must be 'necessary to serve a compelling state interest . . . [and be] narrowly drawn to achieve that end.'").

b. Application to PAC Naming Prohibition

The FEC's PAC Naming Prohibition is a content-based speech regulation. Very simply, the FEC permits an unauthorized political committee to "include the name of a candidate in the title of a special project name or other communication if the title clearly

and unambiguously shows opposition to the named candidate," but not if the title demonstrates support for (or even neutrality toward) that candidate. Advisory Opinion 2015-04 has eliminated any doubt that the FEC would apply the PAC Naming Prohibition to PAG's activities, as described herein, on the basis of the content of PAG's speech. That is, the PAC Naming Prohibition bars PAG's activities PAG's speech demonstrates support for Governor Mike Huckabee. The PAC Naming Prohibition restricts PAG's speech on the sole basis of the message expressed.

In *Reed v. Town of Gilbert*, the Town of Gilbert created various sign categories, including "ideological," "political," and "temporary directional" signs, and applied different regulatory standards to these different types of signs, based on their content. *See Reed*, 135 S. Ct. at 2224-2225. Here, the FEC has created two categories of speech: (1) speech that shows opposition; and (2) speech that does not show opposition. Oppositional speech is permitted, while non-oppositional speech is prohibited. In Reed, "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." *Reed*, 135 S. Ct. at 2227. The same is true of the FEC's PAC Naming Prohibition – restrictions apply based "entirely on the communicative content of the" political committee's speech.

PAG wishes to communicate with supporters using a website with a URL of www.ilikemikehuckabee.com. The phrase "I Like Mike Huckabee" expresses support for Mike Huckabee, and consequently, it is prohibited by the PAC Naming Prohibition. If PAG's website URL incorporated the words "I Don't Like Mike Huckabee," PAG's speech would be permissible. The FEC regulates PAG's speech on the basis of "the idea or message expressed." *Reed*, 135 S. Ct. at 2227.

Similarly, PAG wishes to communicate with supporters via a Facebook page titled "I Like Mike Huckabee." The FEC prohibits this because the phrase "I Like Mike Huckabee" expresses support for Mike Huckabee. Under the PAC Naming Prohibition, PAG is free to create a Facebook page titled "I Don't Like Mike Huckabee." The PAC Naming Prohibition regulates PAG's speech on the basis of "the idea or message expressed." *Reed*, 135 S. Ct. at 2227.

Lastly, PAG wishes to communicate with supporters via Twitter using a "handle" that incorporates the "I Like Mike Huckabee" phrasing. The FEC prohibits this because the phrase "I Like Mike Huckabee" expresses support for Mike Huckabee. Under the PAC Naming Prohibition, PAG is free to create and use a Twitter handle that expresses opposition to Mike Huckabee. The PAC Naming Prohibition regulates PAG's speech on the basis of "the idea or message expressed." *Reed*, 135 S. Ct. at 2227.

As explained above, the FEC's purported governmental interest is inapplicable here. PAG does not wish to use the website www.ilikemikehuckabee.com, the Facebook page "I Like Mike Huckabee," or any associated Twitter handles to solicit funds. In the absence of any identified governmental interest, the FEC's content-based ban on PAG's speech cannot withstand scrutiny. The PAC Naming Prohibition is a content-based ban on speech that cannot be constitutionally applied to website URLs and social media identifiers that incorporate the name of a candidate but that do not solicit funds or money of any type. PAG is entitled to a preliminary injunction on this count.

II. THREAT OF IRREPARABLE HARM

In First Amendment challenges, once likelihood of success on the merits is established, the other preliminary injunction elements follow as a result. "When a party

seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determinative factor." *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004); *see also N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("Consideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive, factor.").

The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The D.C. Circuit applies *Elrod v. Burns* with the understanding that "[t]he Supreme Court has instructed that injunctive relief is not appropriate unless the party seeking it can demonstrate that 'First Amendment interests [are] either threatened or in fact being impaired at the time relief [is] sought.'" *Wagner v. Taylor*, 836 F.2d 566, 576 (D.C. Cir. 1987) *citing Elrod v. Burns*, 427 U.S. 347, 373-374 (1976); *see also Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'"); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed."); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) *citing Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) ("The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and a delay of even a day or two may be intolerable.").

In addition, "[a]ny alleged irreparable harm 'must be both certain and great; it must be actual and not theoretical,' and be 'of such imminence that there is a clear and present need for equitable relief.'" *Davis v. Billington*, 2014 U.S. Dist. LEXIS 175213, *10 (D.D.C. Dec. 19, 2014) (internal citation omitted); *see also Sierra Club v. United States Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 38 (D.D.C. 2013) (discussing "irreparable harm" standard).

The Plaintiff faces irreparable harm – actual and not merely theoretical harm – each and every day that it is threatened by the FEC's unconstitutional speech ban.

III. BALANCE OF HARMS

"In evaluating whether a preliminary injunction should issue, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Wash. Metro. Area Transit Auth. v. Local 689, Amalgamated Transit Union*, 2015 U.S. Dist. LEXIS 83838, *18-19 (D.D.C. June 29, 2015) *citing Winter*, 555 U.S. at 24.

"[S]ecuring First Amendment rights is in the public interest." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. N.Y. 2013); *see also Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("[T]he Government does not have an interest in the enforcement of an unconstitutional law.") (internal quotation marks omitted).

The Plaintiff seeks to exercise its First Amendments; the Defendant has no interest in the enforcement of an unconstitutional law. Accordingly, the balance of harms favors the Plaintiff.

IV. PUBLIC INTEREST

The public interest favors Plaintiffs. "[S]ecuring First Amendment rights is in the public interest." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). "The public interest is supported by protecting the right to speak, both individually and collectively." *Carey v. FEC*, 791 F. Supp.2d 121, 136 (D.D.C. 2011). "It is in the public interest not to perpetuate the unconstitutional application of a statute." *Martin–Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982). "To assess speech in a public forum some balancing may be necessary, but the 'thumb of the court should always be on the speech side of the scales.'" *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp.2d 73, 84 (D.D.C. 2012) *quoting Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 898 (D.C. Cir. 1984). "[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]" *U.S. v. Raines*, 362 U.S. 17, 27 (1960).

There can be no public interest in prohibiting certain speakers from referencing candidates for public office in website URLs or on social media platforms in a manner that expresses support for those candidates, and where no solicitation of funds is involved. The public interest favors entry of a preliminary injunction.

PLAINTIFF SATISFIES THE REQUIREMENTS OF STANDING

To establish standing, plaintiffs must demonstrate three elements: an injury in fact, a causal connection between the injury and the defendant's conduct, and a likelihood that the injury will be redressed by a decision favorable to the plaintiff. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact is satisfied when plaintiffs make a showing of an "an invasion of a legally protected interest which is (a)

concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. at 560. (internal quotation marks and citations omitted). Plaintiffs have established an injury in fact capable of relief issued by this court. Moreover, there exists a causal connection between the PAC Naming Prohibition and the Plaintiffs' injuries, and a decision issued by this court will redress those injuries.

Within the context of the First Amendment, the Supreme Court has announced relaxed standing requirements for pre-enforcement challenges. *See*, *e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (detailing expanded standing principles for pre-enforcement First Amendment challenges); *Virginia v. American Booksellers Ass'n, Inc*., 484 U.S. 383, 393 (1988) (self-censorship is a harm that can be alleged without actual prosecution); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) ("A party has standing to challenge, pre-enforcement, even the constitutionality of a statute if First Amendment rights are arguably chilled, so long as there is a credible threat of prosecution"). Would-be speakers bringing pre-enforcement challenges must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest," and illustrate that there exists a "credible threat of prosecution" under the law in question. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). In the First Amendment, where a challenged action on its face "restricts a party from engaging in expressive activity, there is a presumption of a credible threat of prosecution." *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 388 (4th Cir. 2001).

Here, PAG has alleged an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed" by the PAC Naming Prohibition. *Babbitt*, 442 U.S. at 298. Specifically, PAG owns and would like to operate and update

websites at the specified URLs, Facebook pages at the specified URL, and certain other social media properties it has yet to acquire. PAG cannot engage in these activities due to the operation of the PAC Naming Prohibition.

PAG suffers injuries against its First Amendment protected interests that are imminent as well since it obtained the website and Facebook pages prior to the issuance of Advisory Opinion 2015-04 and now cannot operate them for fear of civil and criminal enforcement. By operation of the PAC Naming Prohibition, PAG must refrain exercising its speech and associational rights until this court can act to protect those rights. Because ballots are approximately 150 days from being mailed to voters in elections PAG seeks to influence, its injuries are ongoing. *See Virginia Soc'y for Human Life, Inc.*, 263 F.3d at 389 (First Amendment injury is ongoing where it relates to proscribed speech concerning federal elections). PAG has established concrete plans to engage in constitutionally protected conduct that is subject to the reach of the challenged laws. PAG's speech and association are chilled due to fear of prosecution by the Federal Election Commission.

Most recently, the Commission reinforced and expanded the reach of the PAC Naming Prohibition in Advisory Opinion 2015-04. The FEC's decision to issue this advisory opinion deprives PAG of a legal reliance defense which it could otherwise receive under 2 U.S.C. § 437f(c) if the outcome of the advisory opinion request had been different. *See FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001) (noting that "advisory opinions have binding legal effect on the Commission"). Because of this, and as the D.C. Circuit recognized in *Unity '08 v. FEC*, this matter is ripe for review. PAG's only other course of action is to risk enforcement penalties—a jeopardy never required by the First Amendment.

REQUEST FOR NOMINAL BOND UNDER RULE 65(c)

Federal Rule of Civil Procedure 65(c) provides that no preliminary injunction shall issue without the giving of security by the applicant in an amount determined by the court. However, "[i]t is within the Court's discretion to waive Rule 65(c)'s security requirement where it finds such a waiver to be appropriate in the circumstances." *Cobell v. Norton*, 225 F.R.D. 41, 50 n.4 (D.D.C. 2004). In non-commercial cases, courts often waive the bond requirement where the likelihood of harm to the non-moving party is slight and the bond requirements would impose a significant burden on the moving party. *See, e.g., Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991); *Comm. on Jobs Candidate Advocacy Fund v. Herrera*, 2007 U.S. Dist. LEXIS 73736, at * 17-* 18 (N.D. Cal. Sept. 20, 2007). Cases raising constitutional issues are particularly appropriate for a waiver of the bond requirement. *See Odgen v. Marendt*, 264 F. Supp. 2d 785, 795 (S.D. Ind. 2003); *Smith v. Bd. of Election Comm'rs*, 591 F. Supp. 70, 71 (N.D. Ill. 1984). Accordingly, Plaintiffs respectfully request that the court waive the bond requirement in the event that it grants Plaintiffs' motion for preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for preliminary injunction should be granted.

Respectfully submitted,

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Counsel for Plaintiff Pursuing America's Greatness

Dated: July 27, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PURSUING AMERICA'S GREATNESS 11300 Cantrell Road, Suite 301 Little Rock, Arkansas, 72212, Plaintiff, v. FEDERAL ELECTION COMMISSION 999 E Street, NW Washington, DC 20463, Defendant.	Civil Case No.

[PROPOSED] ORDER GRANTING PRELIMINARY INJUNCTION

Based upon the pleadings, motions, and evidence received by the Court, the Court hereby GRANTS the motion filed by Plaintiff Pursuing America's Greatness seeking a preliminary injunction and ORDERS as follows:

1. The Federal Election Commission is hereby enjoined from enforcing 52 U.S.C. § 30102(e)(4) and 11 C.F.R. § 102.14(a), as interpreted and applied in FEC Advisory Opinion 2015-04, to Plaintiff with respect to Plaintiff's website www.ilikemikehuckabee.com, Plaintiff's Facebook page "I Like Mike Huckabee," and to any Twitter account created by Plaintiff that incorporates the name "Mike Huckabee" into its account name ("handle"), so long as these webpages and social media accounts are not used for fundraising purposes.

2. This Order shall remain in effect through the remainder of these proceedings until such time as the Court enters a subsequent Order dissolving the preliminary injunction and/or awarding permanent relief.

Date: _____

_____
United States District Judge