UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Federal Election Campaign Act:

Other Authorities

The claims of plaintiff Pursuing America's Greatness ("PAG") do not warrant the extraordinary remedy of preliminary injunctive relief. PAG is unlikely to succeed on the merits of its Administrative Procedure Act and constitutional challenges to the Federal Election Commission's longstanding and carefully crafted regulation implementing the Federal Election Campaign Act's ("FECA" or "Act") requirement that unauthorized political committees not use any candidate's name in their own names. The challenged rule is clearly within the Commission's regulatory authority, as the Court of Appeals for the D.C. Circuit has previously held.

The regulation is also, at a minimum, substantially related to the government's important interests in limiting voter confusion, fraud, and abuse in elections. Far from acting as a prior restraint or content-based speech restriction, as PAG contends, the name identification requirement is constitutional and logical. And it is an integral part of FECA's important disclosure regime that limits the extent to which political committees can imply that they speak on behalf of candidates when they do not. PAG's challenge to a subprovision of the regulation that the FEC added in 1994 *to reduce its scope* is also non-justiciable because it requests relief that will not redress PAG's purported injury. Finally, PAG has made no real effort to demonstrate any irreparable harm, and the relief it seeks would harm the public interest by upsetting the status quo in advance of the upcoming presidential primary elections. Its motion should be denied.

BACKGROUND

I. RELEVANT STATUTORY AND REGULATORY PROVISIONS

A. The Federal Election Commission

The Federal Election Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce FECA, 52

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

B. FECA's Name Identification Requirement

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

[1] Effective September 1, 2014, the provisions of FECA formerly codified in Title 2 of the United States Code were recodified in Title 52.

President, Inc." and "Pursuing America's Greatness" accordingly convey that while the former is an authorized committee of presidential candidate Mike Huckabee that can receive contributions and make expenditures on his behalf, the latter is not.

Congress added FECA's 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). Its wording has remained unchanged for the past thirty-five years and provides in full: "The name of each authorized committee shall include the name of the candidate who authorized such committee under paragraph (1). In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name." 52 U.S.C. § 30102(e)(4).

Congress enacted the provision due to a problem identified by the FEC from experience. 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." *Federal Election Campaign Act Amendments, 1979: Hearing Before the Senate Comm. on Rules and Administration*, 96th Cong., 1st Sess. 23 (1979) (FEC's Legislative Recommendations) (Appendix to Statement of Robert Tiernan, Chairman of the FEC); *Common Cause v. FEC*, 842 F.2d 436, 445-46 (D.C. Cir. 1988).

Following passage of the 1979 Amendments to FECA, the FEC codified the name identification requirement in a regulation largely echoing the statutory provision, but carving out 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). 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).

C. *Common Cause v. FEC*

In 1980, two groups filed administrative complaints with the FEC alleging that several independent political committees had violated section 30102(e)(4)'s name identification requirement, among other things. *Common Cause*, 842 F.2d at 438 & n.2. Pursuant to its statutory enforcement process, *see generally* 52 U.S.C. § 30109, the Commission found "reason to believe" that four of the committees had violated the name identification provision and investigated the allegations. *Common Cause*, 842 F.2d at 438. "[T]he evidence showed that in several campaign communications the unauthorized committees included the name of candidate [Ronald] Reagan in letterheads and return addresses and, in some of the communications, asked for contributions with checks made payable to accounts bearing Reagan's name." *Id.* at 439. Nevertheless, the agency's general counsel recommended not pursuing the matter further because the committees had referred to Reagan "only in reference to fundraising projects, not in the names of the . . . committees themselves." *Id.* The Commission then voted to take no further action on the claims.

Pursuant to 52 U.S.C. § 30109(a)(8), Common Cause, one of the administrative complainants, sought judicial review of the agency's action and obtained a ruling from a court in this District holding that the agency's decision not to pursue the matter was "'contrary to law.'" *Id.* The district court concluded that "'[t]he political machinery is powered by names and what

those names symbolize and identify. Therefore, whatever names the committees presented to the public for identification must also constitute a "name" within the meaning of section [30102(e)(4)].'" *Id.*

On appeal, a panel of the Court of Appeals for the District of Columbia Circuit reversed. The court considered, on the one hand, the Commission's argument that "'name' in [§ 30102(e)(4)] . . . refer[s] only to the official or formal name under which a political committee must register," against Common Cause's interpretation, on the other hand, 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. Thus, . . . a single political committee may have several 'names.'" *Id.* at 440-41.

In analyzing the question, the Court of Appeals discussed in detail the purpose of the name identification provision. "[S]ubsection (e)(4)," the Court explained, "serves, in conjunction with § [30120]" — FECA's provision 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; *see also Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1367-68 (D.C. Cir. 1988) (sections 30102(e)(4) and 30120(a)(3) together form part of FECA's "disclosure requirements").

With respect to the plain meaning of the provision, the *Common Cause* court found that although the FEC's view "obviously comport[ed] with the plain language of § [30102(e)(4)]," Common Cause's interpretation "could also be accommodated within the provision's literal language." *Common Cause*, 842 F.2d at 440-41. It then analyzed the "sparse" legislative history of section 30102(e)(4), concluding that there was "little" in that history which "explicitly touches

on the precise scope of § [30102(e)(4)'s] candidate name provision." *Id.* at 447. Ultimately, the Court of Appeals 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 *Chevron* deference. *Id.* at 448 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, (1981)).

Then-Circuit Judge Ruth Bader Ginsburg dissented in part from the decision. In her view, a narrow interpretation of FECA's name identification provision "defie[d] common sense and [would] foster[] the very confusion Congress sought to prevent when it decreed" that a "'political committee which is not an authorized committee shall not include the name of any candidate in its name.'" *Id.* at 451 (R.B. Ginsburg, J., dissenting in part) (quoting section 30102(e)(4)). 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 contended that confusing naming practices by the subject committees and actual confusion by "[e]ven the politically astute" was "abundantly documented in the record." *Id.* at 452. Her opinion thus concluded that "[s]ensibly and purposively construed, the § [30102(e)(4)] prohibition covers not only the formal, registered name . . . , but also the name the committee actually uses to identify itself in communications with the public." *Id.*

D. The FEC's 1992 Revision of the Regulation

In 1992, a few years after *Common Cause* was decided, the Commission 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.* The Commission also sought further comment on a proposal to "bar the use of a candidate's name in the name or title of a fundraising project by an unauthorized committee, unless the candidate permits his or her name to be used in this manner." *Id.* at 13,057. 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.*

Following the receipt of comments responding to the NPRM, and consideration of "the entire rulemaking record," the agency decided "to adopt in its final rule a ban on 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 accordingly 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.

The Commission's explanation and justification for the revised rule described the agency's "increasing[] concern[] over the possibility for confusion or abuse inherent in [the]

interpretation" that the *Common Cause* court had upheld. *Id.* at 31,424. The FEC explained that "the use of candidate names by unauthorized committees" had been an agency concern "for many years." *Id.* It summarized the *Common Cause* decision, noting that although the Court of Appeals had "deferred to the Commission's judgment," it had also recognized "that an interpretation imposing a more extensive ban on the use of candidate names by unauthorized committees was also reasonable." *Id.* The agency then explained its view that "the situation today differs significantly from that of the early 1980's. In recent years 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." *Id.*

Given that experience, the Commission "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. In particular, it found that "the potential for confusion is equally great in all types of committee communications. While the focus of the *Common Cause* decision was on special fundraising projects, the decision equated solicitations with other committee communications for purposes of [52 U.S.C. § 30102(e)(4)]." *Id.* Because a "total ban is also more directly responsive to the problem at issue," the Commission amended the regulation "to define 'name' for the purpose of" section 30102(e)(4) "to include 'any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation.'" *Id.*

In response to comments that the proposed rulemaking raised First Amendment concerns, the Commission explained that the rule was "narrowly designed to further the legitimate governmental interest in minimizing the possibility of fraud and abuse in this situation." *Id.* at 31,425. It distinguished the cases cited in these comments, *Buckley v. Valeo*, 424 U.S. 1 (1976)

(per curiam) and *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), explaining that these cases involved total bans on independent expenditures or certain types of independent expenditures. *Id.* It also considered and rejected the idea of limiting the issue to the fundraising context by focusing only on "check payees" as "proposed in the NPRM." *Id.* Furthermore, it explained, "[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. Also, committees may freely discuss any number of candidates, by name, in the body of a communication." *Id.* And the "Commission note[d], again, that the Court of Appeals has specifically stated that this new approach is a reasonable interpretation of the statutory language." *Id.*

E. The FEC's 1994 Revision of the Regulation

In 1993, the agency received a Petition for Rulemaking from a group named "Citizens Against David Duke," asking that the FEC 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 identification regulation, 11 C.F.R. § 102.14. FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees*, 58 Fed. Reg. 65,559 (Dec. 15, 1993). This NPRM reiterated the constitutionality of the regulation, noting that the *Common Cause* court had "specifically stated that the Commission's approach is a reasonable interpretation of the statutory language," and explained that "the current rules do not impose such a burden on regulated entities as to infringe on protected First Amendment rights." *Id.*

Nevertheless, the Commission recognized 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." *Id.* Accordingly, it "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.*

Following receipt of comments and evaluation of the rulemaking record, the FEC promulgated a new exception to the regulation. FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees*, 59 Fed. Reg. 17,267 (Apr. 12, 1994) ("1994 Explanation & Justification"). 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.

In its explanation and justification for the new exception, the Commission once again discussed *Common Cause* and the agency's "increasing[] concern[s] over the possibility for confusion or abuse under the interpretation upheld in that case," which had led it to take the broader approach it had adopted in 1992. 1994 Explanation & Justification, 59 Fed. Reg. at 17,268. The Commission also discussed the "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.* at 17,268.

One example from the record in the 1992 rulemaking included "a comment from an authorized committee of a major party presidential candidate stat[ing] that an unauthorized project using that candidate's name raised over $10,000,000 during the 1988 presidential election cycle, despite the candidate's disavowal of and efforts to stop these activities." *Id.* A television documentary included in the record also detailed how an unauthorized committee "had, over several election cycles, established numerous projects whose titles included the names of federal candidates. The named candidates had no connection with the projects, had not authorized the use of their names in this manner, and received no money from the $9 million raised in response to these appeals." *Id.* "Such cases," the Commission concluded, "point up the potential for confusion or abuse when an unauthorized committee uses a candidate's name in the title of a special fundraising project, or other designation under which the committee operates." *Id.*

The agency also once again explained why the regulation was superior to alternate proposals, such as "stronger," "larger," and "bold typeface" disclaimers "in place of the overall ban." *Id.* The Commission thought that those requirements "could be more burdensome than the current ban, while still not solving the potential for fraud and abuse in this area." *Id.* It likewise rejected a proposal to create an exemption for groups "which will not actively mislead the public or injure the candidate," believing this standard to be vague. *Id.* at 17,269. The agency underscored that "[u]nauthorized committees remain free to discuss candidates throughout the communication; and to use candidates' names as frequently, and highlight them as prominently (in terms of size, typeface, location, and so forth) as they choose." *Id.* at 17,268-69. "In other words, while a committee could not establish a fundraising project called 'Citizens for Doe,' if Doe is a federal candidate, it could use a subheading such as 'Help Us Elect Doe to Federal Office,' and urge Doe's election, by name, in large, highlighted type, throughout the

communication." *Id.* at 17,269. By recognizing "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, and "accordingly revis[ing] its rules to permit" such names, the Commission's 1994 revision of the regulation permitted unauthorized committees more flexibility than the more restrictive, earlier version of the rule. *Id.*

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

In 1995, in response to an advisory opinion request made by a political committee named "NewtWatch PAC," the Commission explained that although "NewtWatch" could not be used as part of the committee's name because it clearly conveyed the identity of then-House Speaker Newt Gingrich, "the Act and Commission regulations do not prohibit the Committee from using the name 'NewtWatch' as a project name." FEC Advisory Op. 1995-09 (NewtWatch PAC), 1995 WL 247474, at *5 (Apr. 21, 1995). The committee had used NewtWatch in the name of the uniform resource locator ("URL") for its website. *Id.* at *1. In analyzing the use of the name, the agency relied upon the Supreme Court's observation in *Buckley v. Valeo* that a candidate may be identified solely by an identifiable name or his initials, like "Ike" or "FDR." *Id.* at *5 (citing *Buckley*, 424 U.S. at 43 n.51). However, based upon the new exception it had created in the 1994 revision of the regulation, 11 C.F.R. § 102.14(b)(3), the Commission further determined that "[t]he use of the term 'watch,' when coupled with a candidate's name, conveys clear and unambiguous opposition to the candidate being watched." 1995 WL 247474, at *5. The name NewtWatch connoted the committee's "view that Speaker Gingrich needs to be kept under careful and constant close scrutiny, and [its] view that users need to be on the alert or to be on their guard with respect to Speaker Gingrich." *Id.* For this reason, NewtWatch was acceptable as a project name such as the "operation of a World Wide Web site." *Id.*

Since the NewtWatch advisory opinion, the FEC has issued a number of other advisory opinions and proceeded on various enforcement matters, called matters under review ("MURs"), applying the name identification requirement. For example, in FEC Advisory Opinion 2013-13 (Freshman Hold'em JFC), the agency concluded that a joint fundraising committee could not use the name "Freshman Hold'em JFC" or the URL "www.FreshmanHoldem.com" due to the failure to include the names of the group of candidates who had authorized it. 2013 WL 6094229, at *1-2 (Nov. 14, 2013). In MUR 5889 (Republicans for Trauner), the FEC found "reason to believe" that an unauthorized committee had violated the name prohibition by including the name of Gary Trauner, a candidate for Congress, in its name. FEC, MUR 5889 (Republicans for Trauner), Factual & Legal Analysis at 2 (Aug. 13, 2007), http://eqs.fec.gov/eqsdocsMUR/00006778.pdf ("Republicans for Trauner, a non-authorized committee, uses the name of a candidate, Gary Trauner, in its name, and none of the exceptions set forth in 11 C.F.R. § 102.14(b) apply."). In MUR 6399 (Yoder for Congress), the Commission voted 2-3 on whether to find "reason to believe" on a matter in which an authorized candidate's committee used his *opponent's* name in the URL of its website. FEC, MUR 6399, Certification at 1 (Apr. 28, 2011), http://eqs.fec.gov/eqsdocsMUR/11044292473.pdf. Because the Commission lacked the required four votes to proceed, it dismissed the matter. *Id.* at 2.

Most recently, in FEC Advisory Opinion 2015-04 (Collective Actions PAC) ("CAP Advisory Opinion"), the FEC 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 a website or social media page that failed to clearly express opposition to the candidate. 2015 WL 4480266, at *1 (July 16, 2015). The Commission's vote was unanimous.

CAP had asked whether it could include the name of Senator Bernie Sanders in the name of a website or social media page through which CAP conducted activities if such website or social media page did not solicit any contributions to CAP. *Id.* CAP had established a number of websites and social media accounts, including RunBernieRun.com, ProBernie.com, BelieveInBernie.com, the Facebook page "Run Bernie Run," and the Twitter accounts @Bernie_Run and @ProBernie, to promote Senator Sanders. *Id.* Although CAP did not "use these websites or social media pages to solicit donations for itself," it did "use them to disseminate information about Senator Sanders and provide links to his campaign website, including his official donation page." *Id.*

As in the NewtWatch advisory opinion and intervening matters, the Commission concluded that Bernie Sanders was a candidate, identifiable by his first name, who had not authorized CAP to act on his behalf. *Id.* at *1-2. The Commission did not find persuasive CAP's point that the committee's non-solicitation of contributions to itself altered the application of the regulation. The Commission explained that, in fact, the agency had "specifically considered and rejected" CAP's proposed "distinction" in the 1992 rulemaking: "When the Commission revised the definition of 'name' in section 102.14 to include 'any name under which a committee conducts activities,' the Commission rejected a proposal to limit the restriction to fundraising projects; instead, the Commission noted that 'the potential for confusion is equally great in all types of committee communications.'" *Id.* at *2. The opinion noted that, "[b]ecause the names of the Committee'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." *Id.* at *3. Finally, the Commission 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. PAG

PAG is a recently formed, independent-expenditure-only political committee (also known as a "super PAC") that wishes to "independently advocate for the election of Mike Huckabee as President of the United States." (Verified Compl. for Declaratory and Injunctive Relief (Docket No. 1) ("Compl.") ¶¶ 6, 27.)[2] It describes itself as "*the* Super PAC supporting former Arkansas Governor Mike Huckabee in his candidacy for President." (*Id.*, Exh. 4 (Docket No. 1-4) at ECF page 28 (www.ilikemikehuckabee.com/about) (emphasis added).) PAG's brief states that it is "not authorized by any candidate or candidate's committee, and is considered an 'unauthorized' political committee by the FEC." (Pl.'s Mem. of Points and Authorities in Supp. of Pl.'s Mot. for Prelim. Inj. (Docket No. 2-1) ("PAG Prelim. Inj. Mem.") at 1-2; *see also* Compl. ¶ 6.) PAG "intends to make independent expenditures, and consistent with [*SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 553 (2010)], . . . therefore intends to raise funds in unlimited amounts. [It] will not use those funds to make contributions, whether direct, in-kind, or via coordinated communications, to federal candidates or committees." FEC, Statement of Organization (PAG) at 1, 2, 5 (Mar. 11, 2015), http://docquery.fec.gov/pdf/823/15950859823/15950859823.pdf.

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

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

both owned by Strategic Media 21. (Compl. ¶¶ 8, 10.) PAG states that it does not intend to use the website and Facebook page to solicit contributions to itself "or otherwise engage in fundraising activities." (*Id.* ¶ 12.) It also alleges that it intends to establish a Twitter account that includes "Mike Huckabee" or "Huckabee" in its name, or "handle," but has not yet done so. (*Id.* ¶ 13.) The Huckabee Facebook page PAG operates has more than 180,000 "likes." (*Id.* ¶ 9.) It is publicly available at https://www.facebook.com/ilikemikehuckabee. Hundreds of comments have been posted on the page's timeline. *See* https://www.facebook.com/ilikemikehuckabee.

PAG alleges that, as a result of the Commission's CAP Advisory Opinion, it is now at risk of prosecution because it views its activities with respect to the Huckabee website and Facebook page as materially indistinguishable from CAP's operation of the Sanders websites and social media accounts. (Compl. ¶¶ 31-34, 41-42.) PAG states that it has not "update[d]" the Huckabee website or Facebook page it operates since July 17, 2015. (*Id.* ¶ 38.)

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" (*id.* ¶¶ 44-54); (2) that the Commission's interpretation of the statutory naming requirements for political committees acts as a "prior restraint on speech that violates the First Amendment" (*id.* ¶¶ 55-61); and (3) that the regulation, particularly the exception in 11 C.F.R. § 102.14(b)(3), is "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" (*id.* ¶¶ 62-70). PAG asks the Court to declare that the CAP Advisory

Opinion "interpreting and applying 52 U.S.C. § 30102(e)(4) and 11 C.F.R. § 102.14 to [PAG's] proposed communications is void" under the Administrative Procedure Act ("APA") and unconstitutional under the First Amendment, and to preliminarily and permanently enjoin the agency from enforcing FECA's name identification requirement against it. (*Id.*, Prayer for Relief ¶¶ 1-2.) PAG states that its challenges are brought "as applied." (*Id.* ¶ 2.)

ARGUMENT

PAG's request for a preliminary injunction must be denied. The D.C. Circuit has already determined that a *more restrictive* interpretation of FECA's name identification requirement than the one PAG now challenges under the APA is within the agency's regulatory authority and reasonable. In addition, FECA's name identification provision and the FEC's carefully tailored regulation implementing it in 11 C.F.R. § 102.14 easily pass the intermediate scrutiny that applies to the Act's disclosure requirements. The requirement is not just substantially related to important government interests — it is also narrowly tailored to the government's compelling interests in limiting confusion, fraud, and abuse. PAG's claims are thus unlikely to succeed. And its generalized legal assertions fail to demonstrate irreparable harm or to meet the other requirements for the extraordinary remedy it seeks in this case.

I. REQUIREMENTS FOR A PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. . . . [It is] never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008) (citations omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. A plaintiff

must make a "clear showing" that the extraordinary remedy is necessary, and it cannot be "based only on a possibility of irreparable harm." *Id.* at 22. Moreover, the D.C. Circuit "has suggested, without deciding, that *Winter* should be read to abandon [any] sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Smith v. Henderson*, 944 F. Supp. 2d 89, 95-96 (D.D.C. 2013) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011)); *see also Holmes v. FEC*, 71 F. Supp. 3d 178, 183 n.4 (D.D.C. 2014).

PAG here shoulders a particularly heavy burden because its request is at odds with the purpose of a preliminary injunction, which "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Rather than seeking to preserve the status quo, PAG seeks to "upend" it by asking this Court, with the 2016 presidential "primary season well underway" (Compl. ¶ 40), to change the rules governing political committees' use of candidate names that have been in place for over two decades. *See Sherley*, 644 F.3d at 398.

II. PAG IS UNLIKELY TO SUCCEED ON THE MERITS

A. The Challenged Name Identification Requirement is a Proper and Reasonable Exercise of the Commission's Discretion Under FECA

PAG challenges the FEC's regulation implementing FECA's name identification requirement, 11 C.F.R. § 102.14, and the Commission's recent interpretation of that regulation in the CAP Advisory Opinion. PAG claims that these actions were in excess of the FEC's statutory authority and arbitrary and capricious. (PAG Prelim. Inj. Mem. at 20-22.) It appears to contend that the Court should review these challenges using strict scrutiny. (*Id.* at 18.) These contentions are all meritless.

To start, PAG's assertion that the FEC's name identification regulation and advisory opinion "exceed[] the agency's statutory authority" (*id.* at 18) is directly contradicted by the D.C. Circuit's opinion in *Common Cause*, 842 F.2d 436. Analyzing the question under the familiar two-step rubric of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which PAG nowhere mentions in its brief, the D.C. Circuit held that, as to the first prong of the analysis, section 30102(e)(4)'s name identification requirement is ambiguous with respect to whether the agency could regulate "only . . . the official or formal name under which a political committee must register" or "any title under which such a committee holds itself out to the public for solicitation or propagandizing purposes." *Common Cause*, 842 F.2d at 439-47. Either reading could fit within the provision's plain language. *Id.* at 440-41.

Under *Chevron*'s second prong, the D.C. Circuit in *Common Cause* found that the agency's interpretation was reasonable. *Id.* at 448; *see also Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). That conclusion was explicitly based upon on the "particular[]" deference the Supreme Court has said should apply to the FEC's interpretations of FECA. *Common Cause*, 842 F.2d at 448 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) ("*DSCC*"); *see also DSCC*, 454 U.S. at 37 ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded."); *Combat Veterans for Cong. Political Action Comm. v. FEC*, ___ F.3d ___, 2015 WL 4528190, at *2 (D.C. Cir. July 28, 2015) (explaining how Congress established the Commission to act in a bipartisan manner).

The FEC's decision to revise the regulation in 1992 and 1994 relied on *Common Cause*'s recognition "that an interpretation imposing a more extensive ban on the use of candidate names

by unauthorized committees was . . . reasonable." 1992 Explanation & Justification, 57 Fed. Reg. at 31,424; 1994 Explanation & Justification, 59 Fed. Reg. at 17,267.[3] In light of the deference owed to the FEC, the Commission plainly had the authority under *Chevron* to interpret "name" in section 30102(e)(4) to include "any title under which such a committee holds itself out to the public for solicitation *or propagandizing purposes*," *Common Cause*, 842 F.2d at 441 (emphasis added), such as those pursued by PAG through the Huckabee website and Facebook page.

PAG notes that the majority of the panel in *Common Cause* viewed the FEC's early 1980s interpretation of section 30102(e)(4) as "'better'" than the broader construction the agency adopted in the 1990s. (PAG Prelim. Inj. Mem. at 4.) But that dicta is irrelevant to PAG's APA challenge. The *Common Cause* panel still concluded that the broader interpretation of the statute was consistent with "the provision's literal language." 842 F.2d at 440-41. And even PAG does not suggest that a court's preference for one of two reasonable constructions of an ambiguous statute renders the alternative construction impermissible under *Chevron*. Nor could it. *Chevron* requires a federal court to accept an agency's reasonable construction of an ambiguous statute "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). As explained below, the regulation not only is consistent with the statutory language, it is a reasonable exercise of the Commission's discretion, and thus neither arbitrary nor capricious.

[3] The only disagreement among the panel was whether including all of a committee's titles was the *only* permissible construction of the statute, as then-Circuit-Judge Ruth Bader Ginsburg stated in her partial dissent. *Common Cause*, 842 F.2d at 451 (R.B. Ginsburg, J., dissenting in part) (concluding that "'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").

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The regulation reflects a considered, well-reasoned, and measured approach to implementing section 30102(e)(4). Consistent with its mandate to "protect[] the integrity of the electoral process," and to prevent confusion, fraud, and abuse, the FEC broadened its interpretation of section 30102(e)(4) in a deliberate, bipartisan manner that included, in addition to the lengthy *Common Cause* litigation, two rounds of full-bore notice-and-comment rulemaking in response to the agency's "increasing[] concern[s] over the possibility for confusion or abuse." 1994 Explanation & Justification, 59 Fed. Reg. at 17,267-68; *id.* at 17,268 (explaining that "the situation today differs significantly from that of the early 1980's"). The rule was revised based upon the "substantial evidence" in the record, which established both the increasing "use of candidate names in the titles of projects or other unauthorized communications . . . for unauthorized committees to raise funds *or disseminate information*" and actual instances in which contributors had apparently been confused by the use of candidate names in fundraising projects by unauthorized committees. *Id.* at 17,268 (emphasis added). Indeed, "[p]rogram investigators found that elderly people are particularly vulnerable to being misled in this manner." *Id.*

Moreover, the Commission specifically considered whether it could accomplish its goals through alternative means, and concluded not only that its approach was necessary, but also took

pains to note how limited the effect of the regulation would be in practice: "[W]hile a committee could not establish a fundraising project called 'Citizens for Doe,' if Doe is a federal candidate, it could use a subheading such as 'Help Us Elect Doe to Federal Office,' and urge Doe's election, by name, in large, highlighted type, throughout the communication." *Id.* at 17,268-69. PAG's conclusory contention that the regulation is arbitrary and capricious does not remotely come close to satisfying the "narrow" standard of review that applies under *State Farm*.

PAG also challenges the FEC's interpretation of 11 C.F.R. § 102.14 in the CAP Advisory Opinion as arbitrary and capricious, but fails to note "the basic principle that an agency's interpretation of one of its own regulations commands substantial judicial deference." *Drake v. F.A.A.*, 291 F.3d 59, 68 (D.C. Cir. 2002) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).[4] "When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) (internal quotation marks omitted); *see also Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 343 (D.C. Cir. 2011) (Brown, J., concurring) (noting that the deference an agency receives in interpreting its own regulation is

[4] PAG contends that the Huckabee website and Facebook page are "materially indistinguishable" from the pro-Sanders websites and social media accounts at issue in the CAP Advisory Opinion. (*See, e.g.*, PAG Prelim. Inj. Mem. at 16, 18.) In fact, there is at least one notable difference between CAP's online media pages and those that PAG operates — CAP *did* engage in fundraising through the Sanders pages, CAP Advisory Opinion, 2015 WL 4480266, at *1 & n.3, whereas PAG asserts that it "has not, and does not intend to . . . solicit contributions to PAG or otherwise engage in fundraising activities" (Compl. ¶ 12; PAG Prelim. Inj. Mem. at 15). Ironically, PAG's own arguments (*e.g.*, PAG Prelim. Inj. Mem. at 21-22) suggest that this distinction is a material one that could deprive PAG of standing to challenge the CAP Advisory Opinion directly. But PAG's arguments are wrong: the name identification requirement properly applies to unauthorized committees' special projects that do not concern fundraising and the CAP Advisory Opinion does not suggest otherwise. *See infra* pp. 22-24. The Commission thus does not dispute PAG's standing to bring a preenforcement challenge to the regulation as applied to the group's circumstances, and in the course of such a challenge the Court is permitted to take into account the fact that the Commission has formally endorsed the rationale reflected in the CAP Advisory Opinion.

"perhaps even more [significant] than [it] gets in interpreting a statute under *Chevron*" (internal quotation marks omitted)). PAG utterly fails to offer any suggestion of how the CAP Advisory Opinion's straightforward application of the name identification regulation is "plainly erroneous" or "inconsistent" with that regulation.

PAG instead claims that the advisory opinion "goes far beyond the FEC's justifications for th[e] rule," relying on its ipse dixit that there is no "'possibility of fraud or abuse' in the scenarios" presented by CAP and PAG. (PAG Prelim. Inj. Mem. at 22.) But even that claim is wrong. In fact, the FEC revised the regulation not only to "'minimize[e] the possibility of fraud and abuse'" but also to limit "'the potential for confusion.'" CAP Advisory Opinion, 2015 WL 4480266, at *2. Moreover, when the Commission revised the regulation, the agency "specifically considered and rejected" the distinction PAG now asks the Court to recognize — and it did so explicitly based on the anti-confusion rationale: "[w]hen the Commission revised . . . section 102.14 to include 'any name under which a committee conducts activities,' the Commission rejected a proposal to limit the restriction to fundraising projects; instead, the Commission noted that 'the potential for confusion is equally great in all types of committee communications.'" *Id.*

The Commission's commonsense anti-confusion rationale is easy to see. If political committees could imply or hold themselves out as agents of particular candidates, then opportunities for confusion, fraud, and abuse would increase. The Commission was reasonably concerned that voters may fail to distinguish between projects of the actually authorized "Huckabee for President, Inc." committee and an unauthorized committee's project that might be named, say, "Huckabee for America" or "Citizens for Huckabee." Furthermore, the messages that such committees disseminate directly implicate the government's anti-confusion interest

even if they merely present "information" and do not request money. In fact, the potential for confusion (and fraud and abuse) is amply borne out by even a cursory review of the comments on the Huckabee Facebook page PAG operates. Comments such as "Amen! You would really change some things, in Washington. God bless you."; "We just need a leader and you are the leader we need!!!!"; "You have my vote for President"; "You are a good man Mike, you have my vote!!!!!"; "Mike we would have been better off years ago with you in the White House" appear throughout the page, demonstrating that many viewers of the "I Like Mike Huckabee" Facebook page apparently believe that the advocacy on that page is not independent but rather on behalf of Mr. Huckabee himself. (*See* Declaration of Jayci A. Sadio, August 10, 2015 ("Sadio Decl.") ¶ 4 (identifying 779 separate comments directed "to" Mr. Huckabee himself on the Huckabee Facebook page); *see also id.* ¶ 5 & Exh. A.)

B. The Name Identification Requirement is an Important Part of FECA's Disclosure Regime That Easily Satisfies Constitutional Scrutiny

1. The Name Identification Requirement is a Disclosure Rule

The name identification requirement is an integral part of FECA's disclosure regime. As the D.C. Circuit has explained, section 30102(e)(4) is one of the places where FECA "require[s] political bodies to *disclose* the identity of persons associated with them." *Common Cause*, 842 F.2d at 442 (emphasis added); *Galliano*, 836 F.2d at 1367-68 (characterizing section 30102(e)(4) as part of the Act's "specific disclosure requirements" or "extensive disclosure requirements").

That the name identification provision and regulation are part of FECA's disclosure program is also apparent from the purpose of the provision. As the D.C. Circuit explained in *Common Cause*, "[s]ection [30102(e)(4)] *mainly* supplements § [30120(a)] by ensuring that once a contributor learns who is paying for the advertisements or who is to be the recipient of his funds, he simultaneously learns by a glance at the title whether that recipient is an authorized or

unauthorized vehicle of the candidate." 842 F.2d at 442 (emphasis added)); *see also* 52 U.S.C. § 30120(a). Recognizability at a glance is similar to the reason that players on opposing sports teams wear uniforms with contrasting colors. Section 30102(e)(4) "avoids the kind of confusing disclaimer previously possible, 'Paid for by Reagan for President. Not authorized by President Reagan,' and makes § [30120(a)'s] disclaimers more effective." *Common Cause*, 842 F.2d at 442; *cf. Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (explaining that other disclaimer and disclosure provisions in FECA similarly serve to "'insure that the voters are fully informed' about the person or group who is speaking" about a candidate and "avoid confusion by making clear that the ads are not funded by a candidate" (quoting *Buckley*, 424 U.S. at 76)). As the Commission recently reiterated, it is precisely to "limit '[such] potential for confusion'" that the rules mandate a floor level of disclosure about the relationship of the speaker to messages of candidates, including those it may be speaking about — independently, against, or on behalf of. CAP Advisory Opinion, 2015 WL 4480266, at *2.

2. The Name Identification Requirement is Substantially Related to the Government's Important Interests in Limiting Confusion, Fraud, and Abuse

Like FECA's other disclosure rules, the name identification requirement is reviewed for "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66; *McConnell v. FEC*, 540 U.S. 93, 231-32 (2003), *overruled in part by Citizens United*, 558 U.S. 310)). The name identification requirement easily satisfies this intermediate level of constitutional scrutiny.

Many courts, including the Supreme Court and the D.C. Circuit, have repeatedly embraced the important interests that FECA's disclosure provisions support. In *McCutcheon v. FEC*, the Supreme Court's plurality opinion generally explained that "[d]isclosure requirements

are in part justified based on a governmental interest in provid[ing] the electorate with information about the sources of election-related spending." 134 S. Ct. 1434, 1459 (2014) (internal quotation marks omitted). "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information." *Id.* at 1460. In *Citizens United*, eight Justices agreed that the challenged disclosure provisions were constitutional, observing that "the public has an interest in knowing who is speaking about a candidate shortly before an election," even when such speech occurs in communications that lack express candidate advocacy. 558 U.S. at 368-69; *see also Buckley*, 424 U.S. at 68 (holding that the Act's disclosure requirements for political committees "directly serve substantial governmental interests"). And in *SpeechNow.org v. FEC*, the en banc Court of Appeals likewise unanimously held that political committee disclosure requirements further the public's "interest in knowing who is speaking about a candidate and who is funding that speech," and "deter[] and help[] expose violations of other campaign finance restrictions." 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 553 (2010).

In promulgating the name identification regulation, the Commission emphasized that "[u]nauthorized committees remain free to discuss candidates throughout the communication." 1994 Explanation & Justification, 59 Fed. Reg. at 17,268-69. "[W]hile a committee could not establish a fundraising project called 'Citizens for Doe,' if Doe is a federal candidate, it could use a subheading such as 'Help Us Elect Doe to Federal Office,' and urge Doe's election, by name, in large, highlighted type, throughout the communication." *Id.* at 17,269. In this way, the requirement that special projects disclose their names "'do[es] not prevent anyone from speaking,'" *Citizens United*, 558 U.S. at 366 (quoting *McConnell*, 540 U.S. at 201), and PAG could bring the Huckabee website and Facebook page into compliance simply by moving its use

of Mr. Huckabee's name to a subheading. The Commission has targeted the regulation at the more acute situations of potential confusion and fraud, construing the statutory name requirement as permitting use of names in special project titles that are unambiguously in opposition to the named candidate. 11 C.F.R. § 102.14(b)(3).

The name identification requirement serves the government's interests now more than ever. There were no independent-expenditure-only political committees free of contribution limits like PAG when the FEC revised the regulation in 1992 and 1994. But following *SpeechNow.org*, such groups — of which there are currently more than 970[5] — may now receive unlimited contributions to finance their candidate advocacy precisely because of their independence from candidates and political parties, because "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." 599 F.3d at 694. As the Supreme Court said in *Citizens United*, "'[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.'" 558 U.S. at 357 (quoting *Buckley*, 424 U.S. at 47). The name identification requirement helps inform the public of the very independence upon which PAG's status is based.

The name identification requirement is substantially related to the government's interests in limiting confusion, fraud, and abuse. Section 30102(e)(4) and 11 C.F.R. § 102.14(a) serve to clarify the candidate-authorization status of political committees. As Congress recognized, the

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[5] *See* FEC, *PAC Count – 1974 to Present*, http://www.fec.gov/press/resources/paccount.shtml (listing, as of July 1, 2015, 978 independent-expenditure-only political committees and 100 "hybrid" political committees that have non-contribution accounts into which they may receive contributions of unlimited amounts to finance unlimited independent expenditures).

positive requirement of including candidate names in authorized committees cannot function without the corresponding restriction for unauthorized committees. Otherwise, the candidate's authorized committee could be lost in a sea of similarly titled groups — *e.g.*, "Huckabee for America," "We Want Huckabee," etc. Thus, section 30102(e)(4) both requires authorized committees to use the candidate's name and prohibits unauthorized committees from doing so. To permit unauthorized political committees to establish special projects that use candidate names under the shell of the actual committee would vitiate this provision. The Commission was presented with substantial evidence in its rulemaking that "potential contributors often confuse an unauthorized committee's registered name with the names of its fundraising projects, and wrongly believe that their contributions will be used in support of the candidate(s) named in the project titles." 1994 Explanation and Justification, 59 Fed. Reg. at 17,268.[6] PAG's own website — which currently includes one video of Mr. Huckabee, two news stories, and links for submitting reader contact information and donations — presents far less material than the Huckabee Facebook page it operates. *Compare* Sadio Decl. ¶ 6 & Exh. B, *with* https://www.facebook.com/ilikemikehuckabee.

Moreover, without the name identification requirement, the attractiveness of using large contributions to secure quid pro quos from candidates, *see, e.g.*, *McCutcheon*, 134 S. Ct. at 1450, could create similar opportunities for the projects of committees to exploit ambiguity about their identity. For example, unlike a candidate, an independent-expenditure-only committee like PAG can receive contributions of any size. Thus, if a contributor *thinks* that a $50,000 contribution to a project such as "I Like Mike Huckabee" *is* a contribution to Mr. Huckabee, even though it is

[6] As then-Circuit Judge Ginsburg observed almost three decades ago, "name" should cover "whatever name a committee presents to the public for identification." *Common Cause*, 842 F.2d at 451 (R.B. Ginsburg, J., dissenting in part).

not, that situation presents an opportunity for unauthorized committees to take advantage of confusion created by their project names — even in the absence of any solicitation.

And contrary to PAG's arguments (PAG Prelim. Inj. Mem. at 21-22), confusion, fraud, and abuse plainly can occur outside of the context of fundraising. That is why the regulation not only covers "[s]pecial [f]undraising [p]rojects" but also "[o]ther [u]se" of candidate names by unauthorized committees. 1994 Explanation & Justification, 59 Fed. Reg. at 17,267. Just as an unauthorized project that trades on a candidate's name in its title can divert dollars away from a candidate's message, it can also divert (or distort) information, confusing readers into believing, say, that PAG's message is Mr. Huckabee's. Mr. Huckabee may disagree with everything that appears on the Huckabee Facebook page PAG operates, and PAG is free to say whatever it wants about Mr. Huckabee. But permitting PAG to imply that its speech is Mr. Huckabee's by using the candidate's name in the title to present *PAG's* messages would disserve the public. *Cf. John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."). The Commission correctly determined that preventing the use of candidate names in the names of unauthorized political committee projects is thus "'responsive to the problem'" of confusion, CAP Advisory Opinion, 2015 WL 4480266, at *2, and therefore is substantially related to the government's important disclosure interests.

C. The Name Identification Requirement is Not a Prior Restraint

PAG argues (PAG Prelim. Inj. Mem. at 23-28) that the name identification requirement operates as a prior restraint on its speech. This is wrong. "The term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509

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

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

Citizens United, upon which PAG also relies (PAG Prelim. Inj. Mem. at 24), similarly fails to support PAG's characterization of the requirement and advisory opinion as a prior restraint. Indeed, the Court in *Citizens United* confirmed that the regulatory scheme under discussion was "*not* . . . a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place." 558 U.S. at 335 (emphasis added) (comparing *Near*, 283 U.S. at 712-13).

The Court did criticize an FEC "two-part, 11-factor balancing test" implementing another ruling, cited "the complexity of the regulations," and said that they (along with other aspects of regulation) "function[ed] as the equivalent of a prior restraint." *Id.* But here there is no complex, multi-factor balancing test, *id.*, or injunction against the publication of future "malicious, scandalous or defamatory" material, *Near*, 283 U.S. at 706. The rule the

Commission adopted is deliberately crystalline: subject to three bright-line exceptions, "no unauthorized committee shall include the name of any candidate in its name. For purposes of this paragraph, 'name' includes any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation." 11 C.F.R. § 102.14(a). The regulation applies only to the *name* of an unauthorized committee and its special projects; it does not restrain *any* content of such committees' activities or communications. 1994 Explanation & Justification, 59 Fed. Reg. at 17,268-69.

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

D. The Name Identification Requirement is Not a Content-Based Restriction on PAG's Speech

Likewise flawed is PAG's contention (PAG Prelim. Inj. Mem. at 28-31) that the name identification requirement operates as a content-based restriction on its speech. This claim not

only lacks merit, it is not even clear that PAG has standing to bring such a challenge, because striking the exception PAG complains about (*id.* at 29-31) would not redress its alleged injury.

1. PAG Appears to Lack Standing to Bring a Content-Based Challenge to 11 C.F.R. § 102.14(b)(3)

"[T]he irreducible constitutional minimum" of Article III standing contains three elements: (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). PAG's objection to 11 C.F.R. § 102.14(b)(3) — the exception the FEC added in 1994 — effectively requests *more* regulation. This means that, even if PAG could successfully demonstrate that the Commission's exception permitting "[a]n 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," 11 C.F.R. § 102.14(b)(3), runs afoul of the First Amendment, its alleged injury would remain unredressable. If subsection (b)(3) were struck, PAG would still not be permitted to use Mr. Huckabee's name in its project titles because that use would still violate subsection (a)'s requirement that committees not use candidate names in their project titles. *See McConnell*, 540 U.S. at 229 (concluding that even "if the Court were to strike" the challenged provisions, it would not remedy the plaintiffs' alleged injury; "[a] ruling in the . . . plaintiffs' favor, therefore, would not redress their alleged injury, and they accordingly lack standing"); *Schonberg v. FEC*, 792 F. Supp. 2d 14, 19 (D.D.C. 2011) (per curiam) (dissolving three-judge court for lack of standing where plaintiff "fail[ed] to show redressability"); *Rufer v. FEC*, 64 F. Supp. 3d 195, 203-04 (D.D.C. 2014).[7]

[7] Subsection (b)(3) is severable. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988) ("The design of the regulation is such that the subsection . . . is severable."). Moreover, "[t]he severance and invalidation of . . . subsection [(b)(3)] will not impair the function of the [provision] as a whole, and there is no indication that the regulation would not have been passed

Because PAG lacks standing to bring a content-based challenge to 11 C.F.R. § 102.14(b)(3), the portion of the regulation upon which it solely bases its challenge in Count 3 (*see* PAG Prelim. Inj. Mem. at 28-31), the Court cannot grant it preliminary injunctive relief on that count. *Sibley v. Alexander*, 916 F. Supp. 2d 58, 63 (D.D.C. 2013) (plaintiff's "motion for a preliminary injunction must be denied" because he lacked standing and claim was moot).

2. PAG's Content-Based Challenge to 11 C.F.R. § 102.14(b)(3) Lacks Merit

Even if PAG could demonstrate standing, its content-based challenge would still fail because the name identification requirement is not a content-based restriction, as PAG contends. (PAG Prelim. Inj. Mem. at 28-31.) The rule that political committees and their special projects must disclose the status of their authorization by candidates in their *names* is not a ban on the content of their communications. Like other disclosure requirements, the name identification requirement promotes transparency and limits opportunities for confusion, fraud, and abuse. For example, 52 U.S.C. § 30120(a)(3) requires an unauthorized political committee sponsoring a website about a candidate to state who paid for it and "that the communication is not authorized by any candidate or candidate's committee." *See also* 11 C.F.R. §110.11(a)-(b). As the D.C. Circuit has pointed out, the name identification requirement "supplements" this provision "by ensuring that once a contributor learns who is paying for the" communication, "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. Thus, just as the unauthorized XYZ committee cannot misrepresent that its website was authorized by Mr.

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but for its inclusion." *Id.* On the contrary, there is good reason to think that the FEC would have passed the regulation without subsection (b)(3) — because that is what it did in 1992. *MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 236 F.3d 13, 22 (D.C. Cir. 2001).

Huckabee, when it was not, it also cannot suggest that misrepresentation through the alternate route of naming the special project that created the website "XYZ for Huckabee."

These rules merely provide a floor for disclosure of whether an organization speaks independently or on a candidate's behalf. The requirements do not deprive groups of speech; they limit confusion "about the person or group who is speaking" and help make clear that the groups' communications "are not funded by a candidate," *Citizens United*, 558 U.S. at 368 — important governmental interests that eight Justices of the Supreme Court have repeatedly embraced. *See id.*; *McConnell*, 540 U.S. at 196-97. The requirement does not control content any more than do the rules requiring small disclaimers on communications.

In *Republican National Committee v. FEC* ("*RNC*"), the D.C. Circuit rejected a nearly identical claim that a disclosure-promoting FEC regulation was a content-based speech prohibition. 76 F.3d 400 (D.C. Cir. 1996). There, the plaintiffs challenged an FEC regulation implementing the Act's requirement that political committees use their "best efforts" to provide information about donors who give more than $200 in a single year. *Id.* at 403. The regulation the FEC adopted provided that committees would only be deemed to have used their best efforts if they made a separate follow-up request to contributors failing to disclose all the needed information. The follow-up request could "not contain anything other than the request for the missing information, [a] mandatory statement [regarding the request for information], and an expression of gratitude." *Id.* at 404; 11 C.F.R. § 104.7(b)(2) ("The written or oral request shall not include material on any other subject or any additional solicitation, except that it may include language solely thanking the contributor for the contribution."). The plaintiffs challenged this "restriction on additional speech" in the follow-up request as content based. 76 F.3d at 409.

The Court of Appeals rejected this contention. It explained that in order "[t]o determine whether the regulation is content-based (in which case we would apply strict scrutiny) or content-neutral (in which case we would apply intermediate scrutiny), we ask whether 'the government has adopted a regulation of speech because of disagreement with the message it conveys,' or whether '[The] regulation . . . serves purposes unrelated to the content of expression.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Applying that standard, the D.C. Circuit concluded that the "regulation is content-neutral. It forbids additional speech not because of any hostility to the content of that speech, but to ensure that a written request for the information is not overlooked." *Id.* at 410 (internal quotation marks omitted). It then held that the regulation satisfied intermediate scrutiny. *Id.*

The analysis in *RNC* is on all fours with this case. As with the regulation PAG challenges here, the "best efforts" regulation challenged in *RNC* (11 C.F.R. § 104.7(b)(2)) is part of FECA's disclosure regime. The D.C. Circuit thus said that the "simple answer" to the plaintiffs' challenge was "*Buckley*'s holding that the Act's disclosure requirements are not inconsistent with the First Amendment." *RNC*, 76 F.3d at 409. PAG argues that the regulation's name identification requirement distinguishes based upon the content of speech, treating unauthorized group's names differently based upon whether they do or "do[] not show opposition. " (PAG Prelim. Inj. Mem. at 30.) But precisely the same could be said of follow-up letters requesting information that do or do not show the group's "thank[s]." 11 C.F.R. § 104.7(b)(2). Yet in addressing this argument, the D.C. Circuit had no trouble concluding that this supposed restriction on speech was content neutral: the rule was not based on any hostility to the content of the follow-up letters; it was designed "to 'ensure that a written request for the information is not overlooked.'" *RNC*, 76 F.3d at 410.

In *RNC*, as here, the FEC's regulation is "*justified* without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (internal quotation marks omitted) (emphasis added). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*; *cf. Wagner v. FEC*, ___ F.3d ___, 2015 WL 4079575, at *22 (D.C. Cir. July 7, 2015) (en banc) (finding no hint of "any purpose to disfavor" some individuals affected by a contribution prohibition "as against the categories proffered by the plaintiffs"). PAG's challenge to the regulation is not based upon the FEC's supposed disagreement with any *message* that may be conveyed by committee and project names, and PAG tellingly does not attempt to argue otherwise. There is no question that the FEC's purpose has nothing to do with the content of committees' messages, but instead is to limit fraud, abuse, and confusion regarding whether a speaker advocating for a candidate is speaking independently or on the candidate's behalf. 1992 Explanation & Justification, 57 Fed. Reg. at 31,424 (discussing the FEC's "increasing[] concern[] over the possibility for confusion or abuse inherent" where the special projects of unauthorized committees use candidate names). Importantly, both in *RNC* and here, "[t]he regulation also leaves political committees free to express their views . . . in other communications." 76 F.3d at 410. Indeed here, the challenged regulation leaves unauthorized political committees free to express their views *in the same communications*.

PAG bases its content-based claim almost exclusively on the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). (*See* PAG Prelim. Inj. Mem. at 28-31.) In fact, that case does not apply here at all. *Reed* concerned an Arizona town's imposition of varying size, location, and duration restrictions on the manner in which individuals were permitted to display outdoor signs, and, in particular, the regulation's distinct requirements for

directional and other categories of signs. *Id.* at 2224-25. All members of the Court agreed that the challenged restrictions were unconstitutional and three Justices thought that the restrictions even failed the "laugh test." *Id.* at 2239 (Kagan, J., concurring). The law in question restricted the amount, location, and duration of certain speech on the basis of what kind of message the sign communicated. "Ideological messages [we]re given more favorable treatment than messages concerning a political candidate, which [we]re themselves given more favorable treatment than messages announcing an assembly of like-minded individuals." *Id.* at 2230. But that "paradigmatic example of content-based discrimination," *id.* at 2230, is wholly absent from the FEC's regulation, which permits all unauthorized political committees unfettered opportunity to "discuss candidates throughout" the content of their "communication; and to use candidates' names as frequently, and highlight them as prominently (in terms of size, typeface, location, and so forth) as they choose." 1994 Explanation & Justification, 59 Fed. Reg. at 17,268-69; *see also RNC*, 76 F.3d at 410 (regulation left committees "free to express their views . . . in other communications"). In other words, unlike the provision at issue in *Reed*, the Commission's naming regulation does not restrict the amount, location, or duration of any unauthorized political committee's speech.

Reed is inapposite for the additional reason that the sign law at issue in that case did not promote *any* disclosure interest, let alone constitute an integral part of FECA's comprehensive disclosure program that has been deemed constitutional since *Buckley* and overwhelmingly supported by eight current Supreme Court Justices and the en banc D.C. Circuit Court of Appeals in 2010. *See supra* pp. 25-26. *Reed* should not be read to silently displace this longstanding precedent.

E. The Name Identification Requirement Also Satisfies Strict Scrutiny

For the reasons detailed above, PAG's constitutional challenge to the Commission's name identification requirement should be evaluated under intermediate or "exacting" scrutiny, a level of constitutional scrutiny that the disclosure requirement easily satisfies. *See supra* pp. 24-29. But even if this Court accepts PAG's argument that its constitutional challenge requires more stringent, "strict" scrutiny, the name identification requirement is narrowly tailored to serve a compelling government interest and it thus satisfies that test as well. PAG's apparent assumption (PAG Prelim. Inj. Mem. at 22-31) that the application of strict scrutiny is necessarily fatal is mistaken. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665-66 (2015) (collecting cases that satisfied strict scrutiny).

As discussed above, *see supra* pp. 25-27, the government's interests in limiting confusion, fraud, and abuse and preserving the integrity of American elections are important interests. They are also compelling. The Supreme Court has already "concluded that a State has a compelling interest in protecting voters from confusion and undue influence." *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *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."); *accord McCutcheon*, 134 S. Ct. at 1445-46 (explaining that although government's interest in preventing quid pro quo corruption needed to be only "sufficiently important" to satisfy the closely drawn scrutiny that applies to contribution limits, the Court had itself already stated that that "interest may properly be labeled 'compelling'").

PAG's main argument that the government lacks a compelling interest in this case is to posit that the anti-confusion rationale does not exist outside the fundraising context. (*See, e.g.*, PAG Prelim. Inj. Mem. at 26.) But the goal of "avoid[ing] confusion" that prompted

Congressional enactment of section 30102(e)(4) in the first place was described only in general terms, and said nothing about the context of fundraising upon which PAG focuses. *Federal Election Campaign Act Amendments, 1979: Hearing Before the Senate Comm. on Rules and Administration*, 96th Cong., 1st Sess. 23 (1979). PAG presents no reason to believe the name identification requirement does not reduce confusion outside the fundraising context.

The regulation is also "narrowly designed to further the legitimate governmental interest[s]." 1992 Explanation & Justification, 57 Fed. Reg. at 31,425. That narrow tailoring is evident in the both the extremely limited scope of the rule, which applies only to committee and project names, and not to any content, and in the extensive care with which the FEC crafted and revised the regulation over time. PAG offers no less restrictive suggestion, instead simply repeating its mantra that the Commission's 1980s-era interpretation better suits its interests. But the FEC's decision to change the regulation was based upon the Commission's recognition that "the situation today differs significantly from that of the early 1980's" and "increasing[] concern[] over the possibility for confusion or abuse inherent in [the] interpretation" PAG favors. *Id.* at 31,424. Specifically, it found that "the potential for confusion is equally great in *all types* of committee communications." *Id.* at 31,425 (emphasis added).[8] The Commission's name identification requirement is a narrowly tailored approach to reducing confusion about whether a

[8] As PAG observes (PAG Prelim. Inj. Br. at 12-13), at the public Commission meeting during which the FEC Commissioners discussed CAP's advisory opinion request, one Commissioner stressed that the fundamental reason for the name identification requirement "is to avoid fraud and confusion" and volunteered his willingness to "look[] again at this restriction" in the future to consider its application in situations where there is clearly "no fraud or confusion." (*Id.* (quoting portion of audio of FEC July 15, 2015 open meeting).) That Commissioner nevertheless joined his colleagues in voting unanimously to conclude that CAP was not permitted to use Sanders's name in its website and social media pages under the regulation and "the precedents of the Commission." (*Id.*) And even if the Commission were to further narrow its regulation, PAG does not appear to present a circumstance free of confusion. *See supra* p. 24 (discussing substantial conflation by the public of PAG's Facebook page and candidate Huckabee himself).

particular political committee is speaking independently or on behalf of a candidate. The regulation thus satisfies strict scrutiny.

III. PAG FAILS TO DEMONSTRATE IRREPARABLE HARM

PAG fails to meet its burden to show that it will suffer irreparable harm without the extraordinary remedy it seeks. *Winter*, 555 U.S. at 22. "[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation and internal quotation marks omitted). The D.C. Circuit "has set a high standard for irreparable injury," underscoring that the injury "must be both certain and great . . . actual and not theoretical." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation marks omitted).

PAG proffers no evidence of any irreparable harm that it has suffered or will suffer by abiding by the same name identification requirement that has applied to other unauthorized committees for more than two decades — well before either Facebook or Twitter were created (PAG Prelim. Inj. Mem. at 13 n.10). Instead, PAG simply repeats its merits arguments and assumes that irreparable harm flows from its contentions that its First Amendment rights have been infringed. (*Id.* at 31-33.) But PAG's "mere allegations, without more, do not support a finding of irreparable injury," even in the First Amendment context. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297-99; *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 76 (D.D.C. 2013) (noting that the D.C. Circuit in *Chaplaincy* has required "movants to do more than merely allege a violation of freedom of expression in order to satisfy the irreparable injury prong of the preliminary injunction frame-work." (citations and internal quotation marks omitted)), *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014).

PAG purports to rely on *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality), but that case does not support its position. *Elrod* held that conditioning municipal employment on membership in a particular political party was an unconstitutional infringement on First Amendment rights. *Id.* at 372. That holding rested on the finding that government employees had already been "threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge," and it was "clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Id.* at 373. *Elrod* thus did not eliminate a First Amendment plaintiff's burden to show that its interests are actually threatened or being impaired. *Nat'l Treasury Emps. Union v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991); *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (per curiam) (denying request for preliminary injunction to require local government to issue parade permit for planned march longer than had been approved; finding *Elrod* not controlling on irreparable harm because allowing for shorter parade was not a denial of First Amendment rights); *Am. Meat Inst.*, 968 F. Supp. 2d at 76; *Sweis v. U.S. Foreign Claims Settlement Comm'n*, 950 F. Supp. 2d 44, 48 (D.D.C. 2013) (finding that "merely raising a constitutional claim is insufficient to warrant a presumption of irreparable injury").

Indeed, PAG has alleged no governmental action whatsoever against it, and offers no reason why it could not have brought its challenge to the decades-old name identification requirement sooner. Even PAG's "Statement of Facts Making Expedition Essential" (Docket No. 8) does not actually present any additional facts, but rather just recites PAG's apparently litigation-driven decision to stop adding content to the Huckabee website and Facebook page following the Commission's issuance of the CAP Advisory Opinion. Why PAG would

undertake such an action is a mystery: the names of the website and Facebook page still improperly include the name of a candidate, while the challenged requirements have never restricted the content of either medium.

In any event, courts have found that irreparable injury is not present in the event of such self-created urgency. *See Tenacre Found. v. INS*, 78 F.3d 693, 695 n.2 (D.C. Cir. 1996) (finding that seven-month delay before filing suit "undermines any assertions that [plaintiff] will suffer irreparable harm if the Court does not grant preliminary injunctive relief"); *cf. Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) ("[Plaintiff's] cries of urgency are sharply undercut by its own rather leisurely approach to the question of preliminary injunctive relief.").

As two other courts in this District recently concluded, in rejecting motions to preliminarily enjoin other parts of FECA, "[p]laintiffs are not likely to suffer irreparable harm; rather, 'they will simply be required to adhere to the regulatory regime that has governed campaign finance for decades.'" *Holmes v. FEC*, 71 F. Supp. 3d 178, 188 (D.D.C. 2014) (quoting *Rufer*, 64 F. Supp. 3d at 206).

IV. THE RELIEF PAG REQUESTS WOULD HARM THE GOVERNMENT AND UNDERCUT THE PUBLIC INTEREST

Allowing PAG to identify itself through the use of Mr. Huckabee's name, without actually being authorized to act on his behalf, would undermine the government's interests in limiting fraud, abuse, and confusion, thereby harming the public interest and the government. This harm is borne out by the evident confusion that the unauthorized Huckabee Facebook page has already caused. (*See* Sadio Decl. ¶¶ 4-5 & Exh. A.)

The current version of the name identification requirement has been law for twenty-one years. "It is in the public interest for courts to carry out the will of Congress and for an agency to

implement properly the statute it administers." *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). There is a "presumption of constitutionality which attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984); *Holmes*, 71 F. Supp. 3d at 188 (same); *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 50 (D.D.C. 2012) (same), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014). Indeed, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). The government and the public are similarly harmed when a court proscribes enforcement of a federal statute. Enjoining the FEC from performing its statutory duty constitutes a substantial public injury. *Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 90 (D.D.C. 2006) (per curiam).

Furthermore, granting the preliminary injunctive relief PAG seeks in this case would alter the "federal campaign finance framework only months prior to the next federal election based on an as yet untested legal theory. Permitting that to happen would be imprudent, to say the least, and certainly not in the public interest." *Rufer*, 64 F. Supp. 3d at 206; *Holmes*, 71 F. Supp. 3d at 188 ("Plaintiffs' attempt to locate a problem of constitutional proportions in the [challenged] contribution limit would upset settled expectations immediately before the vote itself."). The Supreme Court has made clear that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Rufer*, 64 F. Supp. 3d at 206 (same); *Stop This Insanity, Inc. Emp. Leadership Fund*, 902 F. Supp. 2d at 50 ("[P]laintiffs do not seek a preservation of the status quo, but rather they seek fundamental change in how [separate segregated funds] are

regulated by the FEC . . . ."). Granting preliminary relief in this case would do precisely the opposite.

CONCLUSION

For the foregoing reasons, the Court should deny PAG's motion for a preliminary injunction.

Respectfully submitted,

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