UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL ELECTION COMMISSION'S REPLY
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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The Federal Election Commission ("FEC" or "Commission") demonstrated in its initial brief and accompanying statement of material facts that Pursuing America's Greatness's ("PAG") challenge to 11 C.F.R. § 102.14(a)-(b) must fail because that regulation is narrowly tailored to serve the government's compelling interests in limiting confusion, fraud, and abuse. By requiring political committees that have been authorized to speak on behalf of candidates to incorporate the candidates' names into their committee names, and, conversely, regulating the use of candidate names by committees like PAG that have not been so authorized, section 102.14 reduces the possibilities for confusion and abuse that arise when committees' uses of candidate names lead supporters to believe that the committees have been authorized when they have not. The compelling nature of the government's interests in limiting confusion, fraud, and abuse in this manner is supported by numerous Supreme Court decisions and an extensive record documenting a wide range of confusion and abuses. In addition, the FEC's tailoring of its efforts to provide information about the sources of political speech, limited in section 102.14 solely to political committees' operating names, advances these interests with the least restrictions possible. After carefully considering its options, including those proposed by PAG, the FEC correctly concluded that there is no less restrictive, adequate alternative.

PAG's response fails to controvert any of these points. Its argument that the governmental interests at issue are not compelling is unsupported by the cases it cites, and its objections to the vast evidence supporting the constitutionality of section 102.14 are erroneous and insubstantial. The evidence is not "a hyperbolic parade of horribles"; it is a preview of the harms that would follow were the Court to make permanent the injunction PAG has preliminarily obtained but not used. The Court can and should consider the evidence fully. Equally meritless

are PAG's claims that section 102.14 could be more narrowly tailored. PAG errs in arguing that a disclaimer would be an adequate alternative in this context. To the contrary, the evidence confirms that the Commission was correct to reject PAG's proposed alternative as a more burdensome alternative. Because section 102.14 serves compelling interests and is narrowly tailored, it is constitutional and the Court should award summary judgment to the Commission.

I. THE GOVERNMENTAL INTERESTS IN LIMITING FRAUD, CONFUSION, AND ABUSE ARE COMPELLING

In its opening brief, PAG did not argue directly against the compelling nature of the interests served by section 102.14, instead asserting only that there is "no record evidence . . . to support" a compelling governmental interest based on confusion. (Pl.'s Mem. in Supp. of Its Mot. for Summ. J. at 2-3, 25-29 (Docket No. 38-1) ("Pl.'s Mem.").) The Commission's opening brief and statement of facts demonstrated that claim to be incorrect. The FEC showed the compelling nature of the government's interests by detailing many record examples of name-related confusion and abuses spanning the 1980s to the present. (FEC's Mem. in Supp. of Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. at 17-29 (Docket No. 40) ("FEC Mem."); FEC's Responses to Pl.'s Statement of Undisputed Facts and Defendant's Further Statement of Material Facts ¶¶ 27-84, 94-101, 114-176 (Docket No. 40) ("SMF").) Now PAG argues that court decisions do not support such interests and attempts to limit the Court's consideration of the record. (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. and Reply in Supp. of Pl.'s Mot. for Summ. J. at 5-10 (Docket No. 42) ("Pl.'s Reply").) These arguments are meritless.

A. Courts Have Recognized the Government's Compelling Interests in Limiting Voter and Supporter Confusion, Fraud, and Abuse

As the FEC has explained, the Supreme Court has already "'concluded that a State has a compelling interest in protecting voters from confusion and undue influence.'" (FEC Mem. at 17

(quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality op.).) In cases from *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) to *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014), the Supreme Court has reaffirmed the importance of providing the electorate with information about the sources of certain kinds of election-related speech. (FEC Mem. at 17-18 (collecting cases).)[1]

PAG itself acknowledges that effective disclaimers are constitutional precisely because they can "'avoid confusion by making clear that the ads are not funded by a candidate or political party.'" (Pl.'s Reply at 25 (quoting *Citizens United v. FEC*, 558 U.S. 310, 368 (2010)).) This Court has made the same observation, explaining that such interests apply to section 102.14, which at least "helps to 'avoid confusion by making clear' to the voting public that communications disseminated via unauthorized committees' special projects 'are not funded by a candidate or political party.'" *Pursuing America's Greatness v. FEC*, 132 F. Supp. 3d 23, 41-42 (D.D.C. 2015) ("*PAG I*") (quoting *Citizens United*, 558 U.S. at 368). The D.C. Circuit panel likewise "assume[d] that the government has a compelling interest in avoiding the type of voter confusion identified by the FEC." *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 510 (D.C. Cir. 2016) ("*PAG II*") (citing *Burson*, 504 U.S. at 199). The panel explained that the FEC "reasonably fears that voters might mistakenly believe an unauthorized committee's activities are actually approved by a candidate if the committee uses the candidate's name in its title." *Id*.

PAG nevertheless disputes that *Burson* stands for the proposition that the government has a "compelling interest in protecting voters from confusion and undue influence," 504 U.S. 191,

[1] In addition, the Supreme Court has upheld state requirements that candidates show preliminary support to be included on a ballot, identifying state interests "in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Bullock v. Carter*, 405 U.S. 134, 145 (1972) (explaining that the state "understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting"); *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991) ("Avoiding voter confusion is also a compelling state interest." (citing *Bullock*, 405 U.S. at 145)).

attempting to limit *Burson* to the "narrow parameters established to protect another constitutional right, namely the right to vote" (Pl.'s Reply at 8). It is true, as this Court has explained, that in *Burson* "[t]he Court held . . . that a Tennessee statute prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place was narrowly tailored to serve the compelling state interest in preventing voter intimidation and election fraud, as required by the First Amendment." *PAG I*, 132 F. Supp. 3d at 40. And the *Burson* opinion did discuss the body of precedent that supported such interests and concluded that "a State has a compelling interest in protecting voters from confusion and undue influence" in light of the foundational importance of the right to vote. *Id.*[2]

It is not the case, however, that these compelling interests are limited to the polling place. Providing accurate information about the sources of speech from and about candidates is related to the right to vote, not entirely separate from it. "The parallel between *Burson* and the instant case" remains "readily evident." *PAG I*, 132 F. Supp. 3d at 40. The compelling nature of the confusion and undue influence interests identified in *Burson* apply equally to the compelling interests in limiting voter confusion, fraud, and abuse resulting from the use of candidate names in the operating names of unauthorized committees such as PAG. *Burson* is only one iteration of the voter protection interest that the Supreme Court has repeatedly affirmed, and PAG itself acknowledges that limiting voter confusion helps "protect" the right to vote. Pl.'s Reply at 8; *see*

[2] Indeed, in light of the government's indisputably "compelling interest in preserving the integrity of its election process," the Supreme Court reiterated that it "thus has upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself," in light of the "compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id*. (internal quotation marks and citations omitted). The Supreme Court stated that these election integrity and reliability interests were not just compelling but "obviously" so. *Burson*, 504 U.S. at 199.

supra p. 3-4.[3] PAG focuses on the "highly limited" nature of the regulation at issue in *Burson* (Pl.'s Reply at 7), but that argument properly goes to tailoring rather than the compelling nature of the interest.[4] And even if relevant here, that polling place restriction "parallel[s]" the regulation at issue here because section 102.14 is also highly limited, applying only to "the names or titles of th[e] communications," as this Court has observed. *PAG I*, 132 F. Supp. 3d at 40. The judicial solicitation regulation upheld in *Williams-Yulee v. Florida Bar* similarly served a compelling interest while restricting only "a narrow slice of speech." 135 S. Ct. 1656, 1670 (2015). Because it addresses a context in which the potential for voter confusion is particularly acute and focuses only on political committees' use of candidate names in their operating names, section 102.14 is directly analogous to the polling place regulation upheld in *Burson*.

As the undisputed facts in the record show, when an unauthorized political committee uses a candidate's name in its operating name, viewers mistakenly believe that the committee or activity is authorized by the candidate.[5] The evidence also shows that this confusion regarding

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[3] PAG argues that *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) limited *Burson*'s holding to "polling places and the mechanics of voting." (Pl.'s Reply at 9 (citing *McCullen*, 134 S. Ct. at 2540).) Not so. In *McCullen*, the Court distinguished the access restriction to polling places in *Burson* from restrictions relating to abortion clinics on the basis that "[v]oter intimidation and election fraud are . . . difficult to detect" whereas the "[o]bstruction of abortion clinics and harassment of patients, by contrast, are anything but subtle," and because "'law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process,' with the result that 'many acts of interference would go undetected,'" whereas "the police maintain a significant presence outside Massachusetts abortion clinics." 134 S. Ct. at 2540. Thus, "[t]he buffer zones in *Burson* were justified because less restrictive measures were inadequate. Respondents have not shown that to be the case here." *Id.*

[4] Though PAG argues that "*Burson* explicitly distinguishes its analysis from political speech cases generally" (Pl.'s Reply at 7), the footnote in *Burson* to which PAG cites is about whether the provision at issue was narrowly tailored. 504 U.S. at 209 n.11. The footnote has no bearing on the Court's finding regarding the compelling nature of the interests identified.

[5] SMF ¶¶ 43-84 (examples of viewers mistakenly believing that unauthorized, candidate-named projects and committees were authorized by the named candidate); *id.* ¶¶ 94-101

whether an activity is authorized by a candidate leads to the interception of contributions intended for candidates, confusion about whether messaging is from a candidate, and concerns by candidates that unauthorized efforts are in effect hijacking their message, support, or contributions. (*See* FEC Mem. at 17-28.) These effects interfere with voters' evaluation of candidates and supporters' attempts to exercise *their* First Amendment rights of association and expression, including through financial contributions. The government's compelling interest in limiting voter fraud, confusion, and abuse to protect "the right of its citizens to vote freely" and "the right to vote in an election conducted with integrity and reliability," *Burson*, 504 U.S. at 198, 199, are furthered by efforts to inform voters and donors.

PAG's reliance on *United States v. Alvarez*, 567 U.S. 709 (2012), is equally misplaced. *Alvarez* concerned an appeal of a criminal conviction for violating the Stolen Valor Act, a statute that made it a crime to claim falsely that one had received military decorations or medals, with an enhanced penalty if the falsity involved the Congressional Medal of Honor. Contrary to PAG's claim that "in the arena of political speech, the U.S. Supreme Court recently held that the government does not have a compelling interest in preventing false speech" (Pl.'s Reply at 8), in *Alvarez* the Court did not once characterize the proscribed speech as political speech and did not hold that the government's interest was not compelling, as PAG claims. The Court accepted that the statute's regulation "serve[s] the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service," and "'foste[rs] morale, mission accomplishment and esprit de corps' among service members," but found that it was not "actually necessary" to achieve these ends because of a lack of direct causal link between the

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(comments on candidate-named Facebook pages that are unauthorized by a candidate that show viewers mistakenly believed that the pages were run by the named candidates); *id.* ¶¶ 114-15 (evidence of such confusion on an unauthorized Twitter account named after a candidate).

furtherance of the government's interests and the proscribed conduct, and that a less restrictive alternative was available. 567 U.S. at 724-29.[6]

PAG's reliance on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), is similarly unfounded. PAG contends that, "when analyzing an Ohio disclosure statute, the U.S. Supreme Court did not characterize Ohio's interest in preventing fraudulent and libelous statements as compelling, but rather, merely 'legitimate.'" (Pl.'s Reply at 9 (quoting *McIntyre*, 514 U.S. at 349-51).) In that case, the Court applied "exacting scrutiny," an intermediate scrutiny applied in disclosure cases, finding that the law was not "narrowly tailored to serve an overriding state interest." 514 U.S. at 347. Although the *McIntyre* Court did not apply strict scrutiny, and so had no reason to make a finding that the state's interests were compelling, it recognized that the "state interest in preventing fraud and libel stands on a different footing" and "agree[d] . . . that this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." 514 U.S. at 349. But the Court observed that an Ohio law specifically prohibited making false statements during a political campaign and found that the "ancillary benefits" of preventing fraud and libel could not justify the law's "extremely broad prohibition" which "encompasse[d] documents that are not even arguably false or misleading." *Id.* at 351. The prohibition on the distribution of *any* anonymous campaign material applied not only to "the activities of candidates and their organized supporters, but also to individuals acting independently"; not just to the "elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any

[6] PAG also irrelevantly argues that *Alvarez* establishes that governmental regulation of "false speech" is limited to certain circumstances. (Pl.'s Reply at 8.) But, like *Burson* and *Williams-Yulee*, this is not a false speech case. The Commission has never argued that PAG's "I Like Mike Huckabee" name is false. Rather, its argument is that section 102.14 is constitutionally permissible because it serves the government's compelling interests. *Alvarez* does not advance PAG's claim.

potential appearance of corrupt advantage"; and "not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance." *Id.* at 351-52. The regulation at issue here is not comparable to the broad prohibition at issue in *McIntyre*.

PAG also suggests (Pl.'s Reply at 9) that the existence of a statutory provision outlawing fraudulent fundraising, 52 U.S.C. § 30124, undercuts the government's compelling interests here, based on the *McIntyre* Court's observation that Ohio had a fraud statute that more directly addressed the government's asserted interest in preventing fraud and libel, but this argument is unpersuasive as well. The statute cited by PAG, 52 U.S.C. § 30124, in relevant part, prohibits a person from "fraudulently misrepresent[ing] the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations." 52 U.S.C. § 30124(b). Though this statute targets a narrow slice of the activity resulting from the use of candidate names by unauthorized political committees, it does not address voter, supporter, and contributor confusion, fraud, and abuse that do not directly arise in a fraudulent solicitation context. Section 102.14 and the statutory provision it implements, 52 U.S.C. § 30102(e)(4), address broader concerns. *See Buckley*, 424 U.S. at 28 (contribution limits not invalid despite arguments that disclosure requirements are a less restrictive existing alternative to addressing the corruption interest justifying contribution limits); *Burson*, 504 U.S. at 206-07 ("Intimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." (quoting *Buckley*, 424 U.S. at 28)). As the undisputed facts show, the unauthorized political committee's use of a candidate's name in its name under which it conducts activities may lead to fraud in some cases, but in many cases has damaging effects that are not

covered by section 30124. *E.g.*, SMF ¶¶ 165-76 (examples of non-monetary and informational harm caused by unauthorized committees' use of candidate names in their operating names).

The Supreme Court has repeatedly recognized a compelling governmental interest in limiting voter and contributor confusion, fraud, and abuse, and none of the cases to which PAG cites diminishes the Court's affirmation that such interests exist here.

B. The Court Should Consider the Record in Its Entirety

PAG's objections to the Commission's facts fare no better than its case law analysis. The record demonstrates that the government's interests in limiting confusion, fraud, and abuse are compelling. The Commission has presented evidence showing that, when unauthorized committees use a candidate's name in the names under which they operate, including website titles and uniform resource locators ("URLs"), voters and contributors can be confused because they believe that the committee's activities are authorized by the named candidate. SMF ¶¶ 43-84. The Commission has also demonstrated that an unauthorized political committee's use of a candidate's name in the title of its Facebook page or Twitter page creates the impression that the Facebook or Twitter page is run by the candidate after whom it is named. *Id.* ¶¶ 94-95 (describing comments on PAG's "I Like Mike Huckabee" Facebook page that indicate viewers misunderstood the page to be run by Mike Huckabee); *id.* ¶¶ 96-101 (describing comments on unauthorized Facebook pages named after a candidate that indicate viewers believed that the pages were run by the named candidates or officeholders); *id.* ¶¶ 114-15 (describing an interaction on an unauthorized Twitter page that included President Trump's name indicating that the viewer believed he was speaking to Trump and the account holder failing to disabuse the viewer of this belief). The Commission has shown that an unauthorized political committee's use of a candidate's name in the name under which it operates can lead to the interception of

funds that were intended for candidates, *id.* ¶¶ 116-38, even in the absence of a solicitation, *id.* ¶¶ 139-46. Additionally, the Commission has shown that, because political committees have broad discretion over how they use funds, committees that raise funds through the use of a candidate's name can and do choose to use those funds in ways contributors may not have expected, including by spending funds on entities in which the committee's principals have a financial interest. *Id.* ¶¶ 147-64. And the Commission has demonstrated that an unauthorized committee's use of a candidate's name in its operating names can cause non-monetary confusion and informational harm to candidates and voters, such as interfering with the candidate's messaging by misrepresenting that the committee acts on behalf of the candidate. *Id.* ¶¶ 165-77.

PAG does not seriously dispute the underlying facts in the record regarding the voter and contributor confusion resulting from an unauthorized committee including a candidate's name in its name. In its responses to the FEC's statement of facts, PAG repeatedly stated that its response to the FEC's evidence is "Qualified" or "Disputed" as to relevance and materiality, with references to its legal brief. (*E.g.*, Pl. PAG's Responses to Def.'s Further Statement of Material Facts ¶¶ 81-84 (Docket No. 42-1) ("Pl.'s Responses to SMF").) Under Local Rule 7(h)(1), however, a statement of genuine issues must set forth "all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement." LCvR 7(h)(1). PAG failed to provide citations for its "Qualified" and "Disputed" responses. To the extent that PAG failed to dispute the Commission's Statement of Material Facts with citations, the underlying facts should be deemed undisputed.[7] In any event, the Court should reject PAG's attempts to depict almost the

[7] *See Pearce v. E.F. Hutton Grp., Inc.*, 653 F. Supp. 810, 812 (D.D.C. 1987) (striking plaintiff's opposition because its "statement of genuine issues included arguments and allegations without citation to the record"); Fed. R. Civ. P. 56(e)(2) ("If a party fails to properly

entire record in this case as immaterial or irrelevant. (Pl.'s Reply at 5-6.) Its objections are unfounded and inaccurate.

1. The FEC's Evidence Regarding an Unauthorized Committee's Use of a Candidate's Name in Any Name Under Which It Conducts Activities Is Material

PAG attempts to dismiss much of the evidence in the record on the ground that it "concerns the impermissible use of a candidate's name in an unauthorized committee's name, which of course is governed by the provisions that PAG does *not* challenge." (Pl.'s Reply at 5.) PAG's argument is factually incorrect and conceptually flawed.

Almost all of the examples that PAG characterizes as involving only a registered committee name in fact fall within PAG's narrow definition of a "special project name or title." (Pl.'s Reply at 6.) For instance, PAG disputes the materiality of facts pertaining to the Reagan Political Victory Fund to the extent that the candidate's name was in a formal "committee name" and not in a "special project name[] or title[]." (Pl.'s Reply at 6 & n.1; Pl.'s Responses to SMF ¶¶ 49, 124-27, 162.) But the Reagan Political Victory Fund was a project of the unauthorized political committee American Citizens for Political Action. *See* FEC, MUR 2678, at 63, *available at* https://www.fec.gov/files/legal/murs/2678.pdf ("American Citizens for Political Action is managing the RPVF [Reagan Political Victory Fund] project . . . .") (Letter from Robert E. Dolan to Mrs. Otto F. Blaske at 1 (Mar. 23, 1988)). Similarly, PAG disputes the materiality and relevance of the following facts on the basis that "the present case involves a special project name not a PAC name or solicitations" (*E.g.*, Pl.'s Responses to SMF ¶ 158) despite each of these examples involving a project of a committee: (1) "Americans for Kemp"

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support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may, *inter alia*, consider the fact undisputed for purposes of the motion.").

was a project of Conservative Victory Committee, SMF ¶ 158; (2) "Americans for Dole" was a project of the committee American Citizens for Political Action, SMF ¶ 160; (3) "American's for Reagan" was a project of the unauthorized committee Americans for Change, SMF ¶ 165; and (4) the Facebook and Twitter accounts named after candidate Carlos Curbelo were run by the unauthorized political committee Americans for Sensible Solutions, SMF ¶ 172.

PAG also incorrectly disputes the materiality and relevance of a large number of facts on the basis that the candidate's name was in a "committee name" and not in a "special project name[] or title[]," despite each one of these examples also involving the use of a candidate's name even in the "project title" of the committee. As the FEC has explained, the regulation at issue includes using a candidate's name in a website address or URL. (FEC Mem. at 9-10.) Accordingly, these examples fall into the regulation's special project purview through the use of candidate names in URLs. SMF ¶¶ 56, 58, 132-34, 151, 167-71 (involving unauthorized committees that used then-candidate Trump's name in URL); *id.* ¶¶ 70, 137, 141-44, 173-75 (candidate Bernie Sanders's name in URL); *id.* ¶ 80 (candidate Trump's name in unauthorized committee's URL); *id.* ¶¶ 81-84 (candidate Bernie Sanders's name in unauthorized committee's URL). PAG likewise errs in disputing the materiality of the FEC's evidence regarding Raymond Bellamy (Pl.'s Reply at 20), arguing that the National Republican Congressional Committee's use of candidate Alex Sink's name was not in violation of the regulation at issue because of the regulation's opposition exception. 11 C.F.R. § 102.14(b)(3). PAG's analysis disregards the use of candidate Alex Sink's name in the URL of the website, a use that falls within the scope of the name regulation. SMF ¶ 8 (describing analysis of FEC advisory opinion).

PAG's distinction between formal committee "names" and "special project names or titles" (*id*. at 6) is insubstantial because the regulation it challenges makes no distinction between

a committee's name as registered with the Commission and a "special project name[] or title[]." Section 102.14(a), in relevant part, states that "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). Section 102.14 and the statutory provision it implements, 52 U.S.C. § 30102(e)(4), both regulate political committees' use of candidate names. That PAG is not challenging section 30102(e)(4) makes no difference. Confusion, fraud, and abuse resulting from an unauthorized political committee's use of a candidate's name in its *formal* name is relevant to evaluating the effects of an unauthorized political committee's use of a candidate name in its *operating* name. The Court should thus consider evidence in the record of confusion, fraud, and abuse arising from the use of a candidate's name in the name under which a committee conducts its activities, regardless of whether this name is also a committee's formal name.

Accordingly, the facts in the record pertaining to confusion, fraud, and abuse arising from unauthorized committees using candidate names in the names under which they conduct activities constitutes evidence that is material and relevant to this case. PAG's assertions to the contrary are not only inconsistent with the language and application of the regulation it challenges, but a substantial amount of the facts to which PAG objects also meet the narrowed definition of "name" that PAG itself advances.

2. The FEC's Evidence Regarding an Unauthorized Committee's Use of a Candidate's Name in Both the Solicitation and Non-Solicitation Contexts Is Material

PAG also attempts to limit the Court's consideration of the record in arguing that any facts that involve solicitations or fundraising lie outside the scope of this case. (*See* Pl.'s Reply

at 6.) But the FEC explained in its initial brief that the record in this case should not be limited to the confusion occurring outside the contexts of solicitations and fundraising. (*See* FEC Mem. at 24-28.) Regardless of the contours of PAG's intended as-applied challenge, the *PAG II* panel concluded that it was within its discretion to consider what the regulation says on its "face" and that there was insufficient evidence to justify the regulation at the preliminary phase of the case. 831 F.3d at 509 n.5.[8] The Commission is thus permitted to introduce evidence supporting the entire regulation and respectfully suggests the fact-finding by this Court regarding all of the regulation's contexts may be of benefit to the Court of Appeals in the event of another appeal.

In any case, the record contains numerous examples of voters and supporters who, in the absence of a solicitation, became confused when they attempted to locate the website of a candidate and mistakenly found a candidate-named website created by an unauthorized committee. For instance, PAG objects to facts concerning Mark Sherman's misimpression that the Americans Socially United's Bet on Bernie website was authorized by then-candidate Bernie Sanders, on the basis that "this case is *not* about fundraising." (Pl.'s Responses to SMF ¶ 78.) But, as the Commission explained in its opening brief, these examples arise in the nonsolicitation context. (FEC Mem. at 24-28.) The record indicates that Mr. Sherman did not respond to any solicitation but still became confused when he attempted to locate the website of Senator Sanders. Similarly, the examples of Dr. Bellamy's contribution to the "Alex Sink for Congress" website, and the contributions to Americans Socially United by Mr. Panagopoulos, were not in response to solicitations. As the record shows, each one of these supporters decided to engage

[8] Moreover, an unauthorized committee's special projects, though containing no solicitation language in themselves, may result in fundraising. It is undisputed that people could contribute to PAG by visiting the Pursuing America's Greatness website from PAG's special project website, SMF ¶ 19, and that PAG has fundraised and collected donations through its non-candidate name websites in the past and plans to continue to do so in the future, *id.* ¶ 20.

with the candidate or the candidate's authorized committee prior to encountering any fundraising pleas by the unauthorized committees. *Id*. PAG similarly objects to the American's for Reagan example, but the evidence shows that the telegram actually concerned a request to join a steering committee in support of the candidate while also including contribution suggestion information at the end of the telegram. SMF ¶ 165. The Court should continue to reject PAG's request that the Court disregard examples of confusion involving financial contributions.

3. PAG's Hearsay Objections to the FEC's Evidence Are Unfounded

Additionally, PAG objects on hearsay grounds to the FEC's use of social science research and market reports on online advertisement click-through rates. Specifically, PAG disputes as hearsay the Commission's use of a 2012 study by the Coalition Against Domain Name Abuse. (Pl.'s Responses to FEC SMF ¶¶ 176, 183-85.) PAG also disputes the Commission's use of published social science research (Pl.'s Responses to FEC SMF ¶¶ 178-80, 192-93) and market research regarding click-through rates for online advertisements (Pl.'s Reply at 10 n.2, 27-28).

The underlying facts supported by these sources, however, are not "adjudicative facts" subject to the Federal Rules of Evidence, but "legislative facts," which those Rules do not govern. Therefore, this Court may consider the Commission's facts regardless of the usual evidentiary requirements. Adjudicative facts are those that concern the immediate parties to a lawsuit and address the parties' activities. *See, e.g.*, *Alaska Airlines, Inc. v. CAB*, 545 F.2d 194, 200 n.11 (D.C. Cir. 1976). These facts address specific incidents giving rise to a lawsuit and must comport with the rules of evidence. *Id*. In contrast, legislative facts are broader in scope and import, may be disputable, and no Federal Rule of Evidence directly limits a court's authority to consider them. They are usually more "general" than adjudicative facts and "help the tribunal decide questions of law and policy." *Friends of the Earth v. Reilly*, 966 F.2d 690,

694 (D.C. Cir. 1992) (internal quotation marks and citation omitted). In other words, legislative facts serve a purpose different from the purpose of adjudicative facts; they reflect larger conclusions about the way in which the world operates — conclusions similar to those found by Congress when enacting laws — that relate to determinations of fact outside the confines of a particular dispute and are frequently based on materials such as reports, news articles, and academic studies, including political and social science studies.

Federal courts have frequently cited legislative facts in determining the constitutionality of a law or regulation, including campaign finance laws. *Libertarian Nat. Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 157 (D.D.C. 2013) (overruling hearsay objections and finding that legislative facts need not be developed through evidentiary hearings), *aff'd*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014) (per curiam); *Holmes v. FEC*, 99 F. Supp. 3d 123, 126 (D.D.C. 2015) (overruling "most of Plaintiffs' admissibility objections" for the same reason), *rev'd on other grounds*, 823 F.3d 69 (D.C. Cir. 2016); *Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975) (en banc) (per curiam) (instructing district court to gather all "necessary" evidence for determination, including "legislative facts"). Indeed, the Supreme Court explicitly relied on the D.C. Circuit's discussion of these legislative facts in *Buckley*, 424 U.S. at 27 & n.28, and regularly relies on legislative fact evidence including materials outside lower court records. *See, e.g., Wisc. Right to Life v. FEC*, 551 U.S. 449, 470 n.6, 507 (2007) (reliance in plurality and dissenting opinions on published studies).

This Court should similarly reject PAG's challenge to the Commission's use of social science reports and online advertising market reports. These facts pertain not to the parties' actions here but to the political, technological, and social environment in which PAG's claims arise. Taking these facts into account is essential to challenging unsupported assumptions about

our larger environment on which PAG relies. For example, market research shows that, generally, people do not click on ads in social media, suggesting that misimpression of candidate-authorization status arising from the name of the account would often remain undisturbed if users were required to click on ads to learn the authorization status of the named candidate. (FEC Mem. at 41.) Moreover, because this case implicates interests far beyond the parties, the Court should consider the evidence fully.

II. THE NAME REGULATION IS NARROWLY TAILORED

In its opening brief, the Commission demonstrated that section 102.14(a)-(b) is narrowly tailored. In particular, when crafting the regulation, the FEC carefully considered alternatives, such as: (1) requiring checks to be payable to the reporting committee; (2) requiring a different disclaimer than that required at the time; (3) requiring unauthorized committees to obtain consent from the candidate before using his or her name in a special project title; and (4) allowing the use of candidate names only by party committees of the same party as the candidate. (FEC Mem. at 30-34.) The FEC also modified the rule subsequent to the 1992 revision to restrict even less speech, including an exception in the rule for certain instances that implicate less the voter confusion, fraud, and abuse that motivated the rule in the first place. (*Id*. at 35-38.) And the FEC demonstrated that no less restrictive yet equally effective alternative exists. (*Id*. at 38-43.)

PAG's first brief proposed three allegedly less restrictive alternatives: (1) "larger disclaimers," (2) third-party signifiers, and (3) relying on the voluntary authentication marks Facebook and Twitter have used. (Pl.'s Mem. at 31-32.) In response, the FEC demonstrated that disclaimers are not a less restrictive, equally effective alternative in this context. (FEC Mem. at 30-35, 39-41.) The agency also showed that including third-party signifiers, such as "friends of," in the name of an unauthorized committee when that committee uses a candidate's name in its

name is unworkable. (FEC Mem. at 41-42.) And the Commission explained why government reliance on for-profit, third-party social media verification systems are not worth considering. (*Id*. at 42-43.) Indeed, both Facebook and Twitter have discontinued their use of their respective verification systems. SMF ¶ 283 (stating that Facebook is not continuing its use of blue verification badges); Nellie Bowles, *Twitter, Facing Another Uproar, Pauses Its Verification Process*, N.Y. Times (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/technology/jason-kessler-twitter-verification.html ("Twitter announced it would be halting its entire general verification program."). PAG has now abandoned its claims that third-party signifiers and third-party verification systems are less restrictive alternatives by not responding to the Commission's arguments.[9] All that remains is PAG's claim that "larger disclaimers" are a less restrictive, equally effective alternative here. (Pl.'s Reply at 10-26.) PAG's argument fails.

A. Enhanced Disclaimers Are Not A Required Interpretation of Section 30102

Initially, PAG contends that there is a "perplexing" incongruence between the Commission's arguments here and its general "champion[ing] of the efficacy and value of disclaimers and disclosure." (Pl.'s Reply at 2.) But the Federal Election Campaign Act ("FECA" or the "Act") allows for various tools that promote transparency in the political marketplace, including reporting requirements, 52 U.S.C. § 30104; disclaimer requirements, *id*. § 30120; and requirements to "make accessible to the public all publicly available election-related reports and information," *id*. § 30112. The name regulation at issue is one tool for transparency to limit voter confusion, fraud, and abuse and to protect the integrity of the electoral

[9] *Lockhart v. Coastal Int'l Sec., Inc.*, 5 F. Supp. 3d 101, 108 n.4 (D.D.C. 2013) (treating as conceded defendant's argument that plaintiff failed to address); *Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." (citing *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997))).

system, and it was permissible for Congress to conclude that other tools, such as disclaimers, are not sufficient *by themselves* to achieve the same end where the use of candidate names is at issue. *Cf. Common Cause v. FEC*, 842 F.2d 436, 442 (D.C. Cir. 1988) (regulation through committee names, as in section 102.14, "makes § [30120(a)'s] disclaimers more effective").

As the FEC has explained, PAG's disclaimer proposal is fundamentally insufficient in the context here because the use of a candidate name itself contradicts the message of a disclaimer. (FEC Mem. at 39-40.) PAG's only response is to say that a special project name signaling authorization, such as "'Trump for President's Official Campaign Page,'" that is then contradicted by a disclaimer, "presents a situation not before the Court." (Pl.'s Reply at 26.) But if section 102.14 is invalidated, then PAG's assurances of what it will or will not do are immaterial because there is a clear record here of precisely what will happen now on a grander scale. The record evidence demonstrates that actors will use candidate names to exploit ambiguity about the candidate-authorization statuses of their political committees, and the result will be more voter confusion and more abuses of the type detailed in the record.

Nor is PAG correct that *Citizens United* requires the use of a disclaimer in this context. (Pl.'s Reply at 2.) In that case, the challenger was not insinuating its association with a candidate by using a candidate's name in its name, so the disclaimers at issue did not provide potentially inconsistent information. Furthermore, the Supreme Court's observation in *Citizens United* that "'disclaimers *avoid confusion by making clear that the ads are not funded by a candidate or political party*'" supports the FEC here, not PAG. (Pl.'s Reply at 2 (quoting *Citizens United*, 558 U.S. at 368-69) (PAG's emphasis).) This passage supports the Commission's position that identifying the sources of election-related spending is a compelling interest. *See supra* p. 3. Unlike in *Citizens United*, however, here a disclaimer such as the one proposed by PAG would

not make clear that the ads are not funded by a candidate or party because the use of a candidate's name would interfere with that message. Thus, in the case of Dr. Bellamy and the other declarants, the use of candidate names suggested that the pages were authorized, precisely the opposite of the effective disclaimer at issue in *Citizens United*. SMF ¶¶ 259-67 (evidence of confusion despite the presence of disclaimers).

B. The Record Demonstrates that Disclaimers Are Not An Adequate Alternative In This Context

The Commission's opening brief also demonstrated that section 102.14 restricts the least amount of speech while effectively furthering the government's interest in limiting confusion, fraud, and abuse. *Accord PAG II*, 831 F.3d at 510-11 (recognizing that alternative means of regulation must be equally effective).

PAG contends that the Commission may not prove that its regulation is narrowly tailored through common sense and may do so only with "empirical evidence." (*See* Pl.'s Reply at 12.) But the Commission demonstrated narrow tailoring first and foremost here with a record replete with examples demonstrating that disclaimers are not sufficient when candidate names are used.

The agency was also required to make some determinations about matters that are not readily quantifiable, but the Supreme Court "has found 'various unprovable assumptions' sufficient to support the constitutionality of state and federal laws." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 15-16 (D.C. Cir. 2009) (quoting *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996, 1000 (D.C. Cir. 2009)). In *Nat'l Ass'n of Mfrs.*, the D.C. Circuit distinguished the case from one "where Congress' justification for a statute rested on 'economic' analysis that was susceptible to empirical evidence." *Nat'l Ass'n of Mfrs.*, 582 F.3d at 16. In *Burson*, the Court explained that it is not necessary for the "State's political system [to] sustain some level of damage before the legislature could take corrective action. Legislatures, we think,

should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively . . . ." 504 U.S. at 209 (internal quotation marks omitted).

The Commission is "not required in these circumstances to submit studies, statistics or other empirical evidence" to demonstrate narrow tailoring. *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C.*, 846 F.3d 391, 408 (D.C. Cir. 2017) ("*ANSWER*"), *cert. denied sub nom. Muslim Am. Soc'y Freedom Found. v. D.C.*, 138 S. Ct. 334 (2017). In *ANSWER*, the D.C. Circuit explained that the relationship between the government's interest and the regulation "is less a matter to be established by empirical evidence than it is the result of a straightforward line of reasoning: 'A poster for an event that has already occurred is more likely to constitute litter and blight than a poster for a future event' or a non-event-related sign." 846 F.3d at 408 ("The justification for the rule[] . . . that event-related signs be removed within thirty days of the event is just the sort of common-sense judgment for which empirical data is likely to be both unavailable and unnecessary."); *see also Nat'l Ass'n of Mfrs.*, 582 F.3d at 16 (explaining that because "a value judgment based on the common sense of the people's representatives" is not like a justification based on "'economic' analysis that [is] susceptible to empirical evidence," such judgment did not need to be supported by an evidentiary showing).[10] The undisputed evidence the Commission has presented that disclaimers did not prevent viewers from mistakenly assuming that websites run by unauthorized committees using candidate names

[10] Moreover, the Supreme Court has observed that the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *McConnell v. FEC*, 540 U.S. 93, 144 (2003) (citation and internal quotation marks omitted), *overruled in part by Citizens United*, 558 U.S. 310. Just as the "idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible," *id.*, the idea that political committee's unauthorized uses of candidate names in their operating names may cause harmful confusion and abuse is not novel or implausible. Rather, the record confirms it.

in their URLs or titles were authorized by the candidate is sufficient here, and a granular burden analysis of different alternatives PAG proposes is neither required nor possible. *See supra* p. 20.

PAG characterizes the Commission's discussion of *Williams-Yulee* (*see* FEC Mem. at 36 n.8) as an attempt to import an available "alternative channels of communication" inquiry into the strict scrutiny standard (Pl.'s Reply at 11), but PAG misperceives the FEC's argument. As the Commission explained, *Williams-Yulee* illustrates that alternative channels of speech that the regulation does not touch can be relevant to determining whether a regulation subject to strict scrutiny is narrowly tailored. *Id.* The Supreme Court evaluated alternative channels of communication in response to the Petitioner's claim that the challenged rule "violates the First Amendment because it restricts too much" because "[i]n her view, the [rule] is not narrowly tailored to advance the State's compelling interest through the least restrictive means." *Williams-Yulee*, 135 S. Ct. at 1670. The Court observed that the rule

> leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters . . . . They can promote their campaigns on radio, television, or other media. They cannot say "Please give me money." [The rule] is surely not a wildly disproportionate restriction upon speech.

Id. at 1670-71 (internal quotation marks omitted). Though not included in the strict scrutiny standard, the Court nevertheless looked to the various ways that the challenger could achieve her objectives that were not prohibited and found relevant that the rule only "restrict[ed] a narrow slice of speech." *Id*. at 1670. In the same manner, the other avenues of communication through which PAG could achieve its objectives are instructive to determining whether the name regulation is narrowly tailored. (*See* FEC Mem. at 35-37.)

PAG now focuses on large disclaimers as a less restrictive alternative to the name regulation. But the record shows that a disclaimer requirement, regardless of disclaimer size, is

not necessarily less burdensome than the name regulation at issue. A disclaimer requirement, including the one proposed by the Democratic National Committee, implicates a burden in placing the disclaimer on a webpage or communication. PAG itself does not dispute that the placement of a disclaimer "would be burdensome and impractical, and ineffective in th[e] context" of Facebook ads and tweets. (Pl.'s Response to SMF ¶ 23 (not disputing the FEC's characterization of PAG's admission); SMF ¶ 258 (describing that a disclaimer would consume a portion of limited text on a Facebook sponsored post); FEC Mem. at 40 n.11 (explaining how "[d]isclaimers on each post or news item would be insufficient in many internet and social media contexts that are character-limited" to dispel inferences from usage of candidate names).)[11]

And undisputed evidence in the record establishes that disclaimers are not an "equally effective" alternative in this context because (1) visitors to webpages may fail to see disclaimers or to perceive them when the website contains the candidate's name in the website address or is named after a candidate (FEC Mem. at 39-40), and (2) social media platforms are not always conducive to the viewing of disclaimers addressing the name used in a title (*see id*. at 40-41). PAG does not dispute the facts involving witnesses who did not see a disclaimer on a candidate-named but unauthorized website or social media account. PAG only disputes whether these facts evidence the inadequacy of disclaimers. PAG thus argues that the example of Dr. Bellamy, who

[11] The FEC objects to PAG's responses to the FEC's responses to PAG's factual submission. Although courts have relied upon such responses-to-responses in their discretion, they are not contemplated by either the District's Local Rules or this Court's guidance regarding summary judgment submissions. *See, e.g.*, *Baloch v. Norton*, 517 F. Supp. 2d 345, 348 n.2 (D.D.C. 2007) (permitting the plaintiff's response to the defendant's statement of genuine issues while recognizing that "the Local Rules do not contemplate this submission"); http://www.dcd.uscourts.gov/judge-tanya-s-chutkans-court-webpage. In accordance with this guidance, and because PAG's responses to the Commission's facts focus almost exclusively on legal issues rather than factual disputes, the Commission's response to the legal arguments set forth in PAG's responses to the FEC's statement of facts are contained within this Reply.

conducted a Google search of a candidate and clicked on a URL that included the candidate's name, "does not demonstrate that disclaimers are less effective" than the name regulation, only that "Dr. Bellamy failed to read large, bolded text that would have cured his confusion." (Pl.'s Reply at 20.) But PAG's observation is the point of Dr. Bellamy's attestation. He failed to notice the text that might have cured his confusion but he did see the committee's use of the candidate's name, including in the website's address and page name. SMF ¶ 263.[12] As the FEC itself explained, "[p]rogram investigators found that elderly people are particularly vulnerable to being misled in this manner, since they may not notice or fail to fully comprehend the disclaimers included with the solicitations." 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").

PAG similarly attempts to dismiss the example of Mark Sherman, who also performed an online search for a candidate, found an unauthorized committee's website that was named after the candidate and which used the candidate's name in its URL, and then donated to the unauthorized committee in the belief that it was the candidate's authorized committee. (Pl.'s Reply at 20-21.) PAG contends that "[i]f Mr. Sherman had read the materials more closely, he may have cured his own confusion." (*Id*. at 21.) But saying that disclaimers are effective if people read them and understand them is tautological. What the record shows is that, contrary to PAG's assumption, disclaimers can fail to clarify a committee's authorization status.

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[12] PAG also incorrectly asserts that "to the extent [Dr. Bellamy] was confused after not reading the webpage, he was confused in spite of the [name regulation], which specifically allows what FEC claims is the source of confusion here." (Pl.'s Reply at 20.) As the Commission described in its opening brief (FEC Mem. at 34), and as is clear from the FEC's statement of facts, SMF ¶¶ 263-64, the unauthorized website to which Dr. Bellamy's online search for a candidate led in fact appeared to contain the candidate's name in its URL, which would bring it within the name regulation's ambit.

PAG's dismissal of this evidence is similar to its characterization of the "hundreds of comments on the ["I Like Mike Huckabee"] Facebook page that appear to be directed to Governor Huckabee himself." *PAG I*, 132 F. Supp. 3d at 35. As the Court found, the "confusion on display throughout the Facebook page stems in part from commenters not reading the Facebook page's disclaimers before posting their comments," which "reinforces the FEC's finding . . . that FECA's disclaimer requirement is not, on its own, sufficient to address the kind of confusion that [section 102.14] was designed to protect against." *PAG I*, 132 F. Supp. 3d at 35-36 (internal citations omitted). The Court concluded that "the comments . . . directed towards Governor Huckabee clearly demonstrate that 'proper disclaimers' do not always suffice to dispel the confusion wrought by a confusing or misleading special project name, and that rules and regulations restricting the use of confusing or misleading names are needed to limit voter confusion." *Id.*[13] Similarly, the undisputed evidence that Dr. Bellamy, Mr. Sherman, Lucille Maloney, and Kostas Panagopoulos all failed to see disclaimers on websites or communications, SMF ¶¶ 77, 131, 143, 262, confirms that disclaimers are insufficient without a name regulation.

The FEC has also explained that the use of disclaimers likely would not meaningfully replace the name regulation on Facebook and Twitter because only the names of accounts and a

[13] PAG's claim that these interactions can be viewed as "parasocial interactions," whereby "one person interacts with celebrities or public figures through social media not expecting a response" (Pl.'s Reply at 24), is unsupported and not credible. Several of the social media comments included in the record in fact requested a response from the candidate or referred to previous attempts to communicate with the candidate. *See, e.g.*, SMF ¶ 96(i) ("Can[']t get you by phone, so I want to Thank You Mr. Gowdy . . . ."). Other comments explicitly indicated that the viewer could not determine whether the candidate ran the page. *See, e.g.*, *id.*¶ 101(i) ("Not sure if this is a Rand Paul sanctioned FB feed. If it is, Rand with all due respect . . . ."); *id.* ¶ 101(vii) ("Paul, you need to fire whoever runs your page!!"). These comments are not akin to people "yelling at the television set during a sports game." (Pl.'s Reply at 24.) Rather, the record shows that, unlike with television sets, the people who run unauthorized candidate-named social media accounts may interact with commenters, perpetuating the confusion. SMF ¶ 115. The Court should continue to view the comments for what they are: evidence of confusion.

profile photo — not a disclaimer — typically travel throughout these social media environments with posts, reposts, and replies. (FEC Mem. at 40 n.11.) PAG does not dispute the facts regarding what users of Facebook and Twitter see on their accounts when looking at posts of groups. (Pl.'s Responses to SMF ¶¶ 85-92 (describing the limited information — the name and profile photo — that viewers may see of an unauthorized committee's Facebook Page on their home pages); *id.* ¶¶ 102-112 (same with respect to Twitter).) In fact, PAG admits that a viewer of a Facebook post from PAG's "I Like Mike Huckabee" page may not see a disclaimer because, even if the viewer were to click on the Facebook post, the viewer may or may not be directed to the "I Like Mike Huckabee" Facebook page, depending on where within the post the viewer clicked. (*Id.* at 173.) Accordingly, the undisputed record establishes that the concern of disclaimers not being noticed in traditional settings would be further exacerbated in the social media context, where some viewers may not even have the chance to fail to notice the disclaimers because they may never be presented at all.[14]

C. The Commission's Deliberations Demonstrate that Section 102.14 Is Narrowly Tailored

The FEC's opening brief detailed how the Commission considered several alternatives to the name regulation before determining that it was the least restrictive effective alternative.

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[14] For the first time on reply, PAG argues that it could "provide its disclaimer using rollover technology." (Pl.'s Reply at 26-27.) PAG has forfeited this argument by not raising it in its opening brief. *See Pardo-Kronemann v. Donovan*, 601 F.3d 599, 610 (D.C. Cir. 2010) (observing that "district courts, like this court, generally deem arguments made only in reply briefs to be forfeited"); *Lester E. Cox Med. Ctrs. v. Sebelius*, 691 F. Supp. 2d 162, 167 n.7 (D.D.C. 2010) (rejecting plaintiff's argument about the scope of permissible arguments in a brief that is a joint Opposition and Reply, and finding that "[a]n argument that is not raised before the reply is untimely and will not be allowed" if the "argument is not designed to respond to a new or unexpected point at issue" and "pertains to *the* dispositive issue in the case"). In any event, PAG offers no reason to think that rollover disclaimers would be adequate to overcome assumptions created through the use of candidate names in titles, and the FEC's evidence of low click-through rates, discussed *supra* pp. 15-17, strongly indicates that they would not be.

(FEC Mem. at 30-35.) In maintaining that section 102.14 is not narrowly tailored, PAG responds by mischaracterizing the Commission's rulemakings. PAG claims that "the record indicates that the FEC dismissed the disclaimer approach on the basis of one unsupported statement from the agency's General Counsel." (*See* Pl.'s Reply at 13.) But a review of the record shows that several commenters and Commissioners, the experts in this field, acknowledged that a large disclaimer could burden the content of communications. (*See* FEC Mem. at 31-35.) As the Dateline Report and Dr. Bellamy examples confirm, even a large statement disclaiming the authorization implication of a political committee's operating name incorporating a candidate's name would "still not solv[e] the potential for fraud and abuse in this area" because viewers may not notice or understand the disclaimers. FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees*, 59 Fed. Reg. 17,267, 17,268 (Apr. 12, 1994) ("1994 Explanation & Justification"); *see also* SMF ¶ 232 (one comment noted that "[t]here is little potential for misleading a contributor when a political committee solicits contributions using [sic] its own name, and a much higher risk when an unauthorized committee solicits in the name of a candidate"); *id.* ¶¶ 210, 252 (expressing a Commissioner's concern that committees would place the disclaimer in a way such that "the average reader isn't going to find it"); *id.* ¶ 206 (expressing a Commissioner's concern about allowing the use of candidate names even in conjunction with other safeguards given that "there's not [a] dispute that [the name] causes great confusion").[15]

[15] PAG's claimed willingness to place a large disclaimer at the top of its website (*compare* Pl.'s Reply at 24, *with* Pl.'s Mem. at 31-32) is contrary to its sworn testimony. When PAG was asked whether the way PAG's "I Like Mike Huckabee" Facebook page existed at the time it filed its complaint, with a small disclaimer in the banner logo (SMF ¶ 11), was sufficient "in lieu of the FEC regulating through the use of candidate name," PAG answered: "As a president of PAG, I believe that it is." (FEC Exh. 1 at 87:1-7, 19-24.)

PAG also errs in arguing that the Commissioners blithely dismissed a litigation risk surrounding First Amendment concerns with a "'let the courts sort it out' approach," and that this is evidence of a lack of narrow tailoring. (*See* Pl.'s Reply at 14.) In fact, the statement by Commissioner Potter that PAG has chosen to highlight as an example of the Commission's supposedly "cavalier" approach (*id.*) demonstrates that the record could not be more directly contrary to PAG's characterization. In the passage PAG cites, Commissioner Potter in fact explained that this was a "terrifically important rulemaking" that dealt with "what we as a commission has identified as, a very serious problem in the current operation of the political system." (Decl. of Jayci A. Sadio, Oct. 23, 2017 & Sadio Exh. S at 24-25 ("2017 Sadio Decl.").) Commissioner Potter continued:

> The record over a number of years and in this rulemaking is full of examples of people who were so confused that they thought they were giving to an individual and it turned out they were in fact giving to some committee not authorized by that candidate. . . . The word used throughout this record is fraud. . . .
>
> It may well be that our regulation today, if we adopt it, will be challenged. Fine. Our job as a commission is to make the best call we can based on the record in front of us. Here we have identified a serious problem. *We have explored ways to regulate it and we have on, I think a good faith basis, come up with a draft, that I'm going to urge we adopt, that does represent this Commission's best call as to how to regulate this problem.* A court may later determine that our attempt to solve this problem is impermissibly broad because of the First Amendment of the Constitution. If I thought that was the fact, I wouldn't vote for this. But I don't think it is. I think that we are permitted on a broad basis to under our act, and I don't think our act is unconstitutional in this regard, to regulate the use of a candidate's name in the name of a committee or the apparent name of the committee, which is what we're talking about here, the project name.

Id. at 25-27 (emphasis added). A fair reading of this discussion and the rest of the Commissioners' deliberations establishes that, contrary to PAG's claims, the Commissioners

carefully balanced First Amendment interests with limiting confusion, fraud, and abuse and concluded that the name regulation was the most narrowly tailored, effective path. The Commission, for instance, thought it important to not regulate the *content* of communications, leaving committees free to "discuss any number of candidates, by name, in the body of a communication." 1992 Explanation & Justification, 57 Fed. Reg. at 31,425. And though PAG seizes on an instance in which Commissioner Aikens asked the Commission's General Counsel staff about the First Amendment issues raised by commenters (Pl.'s Reply at 14), PAG fails to mention that the General Counsel's Office then responded by explaining that the agency's staff did "in fact consider all the comments" and that the court decisions to which commenters had cited involved "total bans" on expenditures. (Sadio Decl. Exh. S at 13 (noting that the regulation "would be construed a reasonable limitation in view of the record's documentation").)

In sum, the record establishes that the Commission considered alternatives, including the possibility of larger disclaimers, and that it concluded that the name regulation was the agency's "best call as to how to regulate this problem." (Sadio Exh. S at 27.) That conclusion is thoroughly supported by the record evidence demonstrating why disclaimers are ineffective in this context and that average voters continue to be confused by unauthorized committees' uses of candidate names, even when accompanied by disclaimers. It also fits with the Congressional drafting committee's statement of its "intent" in preparing the text of 52 U.S.C. § 30102(e)(4) that "the average contributor or voter be able to determine, by reading the committee's name, on whose behalf the committee is operating." SMF ¶ 30. Section 102.14 is constitutional.

III. EVEN IF SECTION 102.14 CONTAINED A CONSTITUITONAL INFIRMITY, THE REMEDY WOULD BE SEVERING SUBSECTION (B)(3)

Finally, PAG claims that 11 C.F.R. § 102.14(b)(3) is not severable because of a lack of agency intent for section 102.14(b)(3) to be severable and because the regulation is not narrowly

tailored. (Pl.'s Reply at 30-31.) To the extent that PAG argues that the name regulation unfairly permits some candidate-named committee names while disallowing others based on content (*see* Pl.'s Mem. at 2), this Court may cure any resulting constitutional defect that it finds by severing section 102.14(b)(3) from the regulation, eliminating the content-based treatment of which PAG complains. Courts will "'sever[ ] and affirm[ ] [ ] a portion of an administrative regulation' only when we can say without any 'substantial doubt' that the agency would have adopted the severed portion on its own." *Am. Petroleum Inst. v. Envtl. Prot. Agency*, 862 F.3d 50, 71 (D.C. Cir. 2017) (quoting *New Jersey v. EPA*, 517 F.3d 574, 584 (D.C. Cir. 2008)). The FEC added section 102.14(b)(3) to the previously functioning version of the regulation. (FEC Mem. at 8.) Therefore, there cannot be any doubt that the Commission would have enacted the name regulation without section 102.14(b)(3) — the agency did so.

"In evaluating whether the remainder of the regulation could function sensibly, the D.C. Circuit considers, for example, whether severance would 'impair the function' of the remaining regulations or 'sensibly serve the goals for which [the regulation] was designed.'" *Nat'l Treasury Employees Union v. Chertoff*, 394 F. Supp. 2d 137, 140-41 (D.D.C. 2005), *aff'd in part, rev'd in part and remanded*, 452 F.3d 839 (D.C. Cir. 2006) (internal citations omitted). Section 102.14(a) functions to clarify the candidate-authorization status of unauthorized committees by disallowing the use of candidate names in the names under which unauthorized committees conduct activities. Section 102.14(b)(3) excepts from this broader prohibition on the use of candidate names only those names that indicate "clear" opposition to the named candidate. The severing of 102(b)(3) would therefore not impair the function of section 102.14(a) because it would not affect the manner by which 102.14(a) prevents confusion, fraud, and abuse arising from unauthorized committees using candidate names to misrepresent their authorization status.

PAG's argument that section 102.14(a)-(b) would remain a content-based speech restriction in the event that section 102.14(b)(3) is severed is similarly unavailing. Whether there is a reference to a candidate in certain portions of communications is a regulation of speakers "not on what they say," but "simply where they say it," *McCullen*, 134 S. Ct. at 2531 (internal quotation marks omitted), and does not draw "distinctions based on the message a speaker conveys," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Though the potential for fraud and abuse is "significantly reduced" in the context of opposition groups, 1994 Explanation & Justification, 59 Fed. Reg. at 17,269, after severing (b)(3), 102.14(a)-(b) would satisfy the intermediate scrutiny that would apply because it would not "burden substantially more speech than necessary" to further the important government interests it serves given the rare occurrence of opposition groups relative to the thousands of authorized and unauthorized political committees overall. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).[16] To any extent the Court concludes 102.14(a)-(b) is an impermissible content-based restriction based on the opposition exception in (b)(3), *see PAG II*, 831 F.3d at 509, the severing of (b)(3) would render it a permissible content-neutral regulation.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Commission's opening brief, the Court should grant the Commission's motion for summary judgment, deny PAG's motion for summary judgment, and dissolve the preliminary injunction.

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[16] *See* FEC, Summary of PAC Activity, PAC Table 1, https://transition.fec.gov/press/summaries/2018/tables/pac/PAC1_2017_6m.pdf (Sept. 29, 2017) (summarizing nearly 7000 unauthorized committees); FEC, Congressional Candidate Table 1, https://transition.fec.gov/press/summaries/2018/tables/congressional/ConCand1_2017_6m.pdf (Sept. 29, 2017) (nearly 1000 authorized committees).

Respectfully submitted,

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