UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Pursuing America's Greatness ("PAG") challenges the constitutionality of the FEC's PAC Name Prohibition, a regulation that the U.S. Court of Appeals has already ruled is subject to strict scrutiny because it is a content-based speech ban, "pure and simple." *See Pursuing America's Greatness v. FEC*, 831 F.3d 500, 509-10 (D.C. Cir. 2016). The PAC Name Prohibition prohibits unauthorized political committees from using a candidate's name in its website URL, Twitter handle, or in the name of the committee's Facebook page, unless the name unambiguously expresses opposition to the candidate. *See* 11 C.F.R. § 102.14(a) and (b)(3); FEC AO 2015-04 (Collective Actions PAC) (Ver. Compl. Ex. 2) (Dkt. No. 1-2).

The FEC bears the burden of proving that the PAC Name Prohibition furthers a compelling governmental interest and is narrowly tailored to achieve the government's identified compelling interest. *See Pursuing America's Greatness*, 831 F.3d at 510 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015)). As the Supreme Court has stated on several occasions, "it is the 'rare case[ ] in which a speech restriction withstands strict scrutiny.'" *Reed*, 135 S. Ct. at 2236 (Kagan, J., concurring) (alteration in original) (quoting *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015)); *see also United States v. Playboy Entm't Grp.,* 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."). The FEC cannot meet its burden and this Court should grant PAG's Motion for Summary Judgment.

First, the D.C. Circuit assumed, without examining the record evidence, that the FEC has a compelling interest in "avoiding" voter confusion. After eight months of discovery, however, the FEC has no record evidence, from this litigation or in the Federal Register, to support its argument that "voter confusion" actually occurs as a result of an unauthorized political

committee's use of a candidate's name in a special project website, Twitter handle, or Facebook page where the committee is not soliciting campaign contributions. In other words, while there may be a compelling interest in avoiding voter confusion, there is no evidence of any actual voter confusion resulting from the type of activity at issue here. The FEC's regulation is a solution to a problem that does not exist, meaning the FEC's compelling interest argument is inapplicable.

Second, even if there were sufficient evidence to demonstrate an actual voter confusion problem, the PAC Name Prohibition is not narrowly tailored to address the government's compelling interest. The PAC Name Prohibition is a content-based ban on speech. *See Pursuing America's Greatness*, 831 F.3d at 508, 510. The U.S. Supreme Court has repeatedly stated that disclaimers and disclosure requirements are less restrictive means than flat bans on speech. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014). There is, however, nothing in the record demonstrating that disclaimers are somehow insufficient to address the purported compelling interest of preventing voter confusion. *Playboy Entm't Grp.,* 529 U.S. at 813 ("If a less restrictive alternative for achieving that interest exists, the government must use that alternative."). "The FEC offered no evidence that larger or differently worded disclosures would be less effective at curing fraud or abuse than a ban on speech. Nor did the FEC make an effort to explain why such disclosures would be more burdensome." *Pursuing America's Greatness*, 831 F.3d at 510-11. The FEC's "anecdote and supposition" is insufficient "to support a regulation subject to strict scrutiny." *Id*. at 511 (citation omitted). Accordingly, the FEC's PAC Name Prohibition is not narrowly tailored.

STATEMENT OF FACTS

In the months preceding the Republican primary elections, PAG sought to exercise its First Amendment rights in a revolutionary manner. Statement of Material Facts ¶¶ 10-11 [hereinafter SMF]. In July 2015, PAG associated with Strategic Media 21, which had cultivated more than 170,000 individuals who had affirmatively indicated support for Mike Huckabee, so that PAG could disseminate its message directly to those 170,000 individuals through a Facebook page and website titled "I Like Mike Huckabee". SMF ¶ 10-11. By comparison, approximately 10,000 individuals had affirmatively "liked" PAG's Facebook page. SMF ¶ 11. Under the arrangement with Strategic Media 21, PAG would craft and approve the content to be placed on the "I Like Mike Huckabee" websites. SMF ¶ 10. The content on the "I Like Mike Huckabee" sites would be *positive* in nature, which is unique to Super PACs in the current political climate. SMF ¶ 11. This is in contrast to PAG's own speech, which did speak negatively about Mike Huckabee's primary opponents. SMF ¶ 11.

Before PAG could fully implement its plans, however, the FEC issued an advisory opinion to a similarly-situated organization. In Advisory Opinion 2015-04 (Collective Actions PAC) (July 16, 2015), the FEC determined that an unauthorized committee's use of a candidate's name in special project website URLs, Facebook page names, and Twitter handles violated the FEC's PAC Name Prohibition unless unambiguous opposition to the named candidate is expressed. SMF ¶ 13. *See also* 11 C.F.R. § 102.14(a)-(b) (2017). The FEC's advisory opinion served to prohibit PAG from speaking directly to the 170,000 individual known supporters of Mike Huckabee through its "I like Mike Huckabee" Facebook page, website URL at www.ilikemikehuckabee.com, and Twitter handle. SMF ¶¶ 13-14.

PAG registered with the FEC as an unauthorized independent expenditure committee on

March 11, 2015. SMF ¶ 1. PAG is an Arkansas corporation organized under Section 527 of the Internal Revenue Code. SMF ¶ 2. Although now PAG advocates for candidates who promote conservative principles, when it was first organized, PAG focused its efforts on independently advocating for the nomination and election of Mike Huckabee for President. SMF ¶¶ 3-4.

To advocate for the nomination and election of Mike Huckabee, PAG used several tools that it had at its disposal. SMF ¶ 9. These tools include television and radio advertisements, direct mail, and online marketing. SMF ¶ 9. PAG owns and operates a Facebook page, Twitter account, and website. SMF ¶¶ 5-7. PAG spent $3.5 million in independent expenditure advertisements advocating for Mike Huckabee. SMF ¶ 9.

On approximately July 9, 2015, PAG added additional tools to its toolbox, namely, the use of special project Facebook pages and websites bearing the title "I Like Mike Huckabee." SMF ¶ 10. These pages and websites were revolutionary and the Facebook page already contained approximately 170,000 individuals who had already affirmatively "liked" Mike Huckabee. SMF ¶ 11. PAG does not and will not use these pages for soliciting contributions. SMF ¶ 19. It was also revolutionary because PAG would use these special projects to speak in a positive manner. SMF ¶ 11. In fact, PAG intended to brand and market the "I Like Mike Huckabee" website and Facebook page as well as develop a strategy for the page's positive messaging. SMF ¶ 11. A Super PAC developing a strategy around positive messaging for a candidate it supports is a unique approach in today's political climate. SMF ¶ 11.

Approximately one week later, however, the FEC issued its advisory opinion to the Collective Actions PAC. The FEC concluded that Collective Actions PAC—a pro-Bernie Sanders Super PAC—was prohibited from using Bernie Sander's name in its special project website URLs, Twitter handles, and Facebook page names under the PAC Name Prohibition.

SMF ¶ 13. Because the advisory opinion involved substantially similar material facts, PAG immediately halted all speech through its special project name websites, Facebook page, and Twitter handle. SMF ¶¶ 12-14, 16-17.

On July 27, 2015, PAG filed its verified complaint in this Court seeking a declaratory judgment that 11 C.F.R. § 102.14(a) and (b)(3) are unconstitutional under the First Amendment. SMF ¶ 15. PAG also sought to enjoin the FEC from enforcing its unconstitutional regulation. SMF ¶ 15. The FEC opposed PAG's Motion for Preliminary Injunction. SMF ¶ 15.

On September 24, 2015, this Court declined to enter an injunction because the Court found that PAG had not demonstrated that it was likely to succeed on the merits of its Administrative Procedure Act ("APA") or First Amendment claims. (Dkt. No. 21); *Pursuing America's Greatness v. FEC*, 132 F. Supp. 3d 23, 36, 42 (D.D.C. 2015). Four days later, PAG filed its Notice of Appeal. (Dkt. No. 23).

Nearly one year later, and approximately six months after Governor Mike Huckabee withdrew from the Republican presidential primary contest, the United States Court of Appeals for the District of Columbia Circuit reversed this Court's denial of the injunction and ordered this Court to enter an injunction "enjoining the application of 11 C.F.R. ¶ 102.14(a) against PAG's websites and social media pages." *See Pursuing America's Greatness*, 831 F.3d at 512.

On remand, on October 12, 2016, this Court entered an injunction prohibiting the FEC from enforcing 11 C.F.R. § 102.14(a) against PAG's websites and Facebook pages titled ilikekellyayote.com, ilikerichardburr.com, ilikedavidyoung.com, and any other similar ilike[name of candidate for federal office].com formulation. SMF ¶ 18. Following the issuance of the injunction, PAG's special project name websites were activated and became viewable to the public. SMF ¶ 18.

Both before and after the initiation of this lawsuit, PAG has not received any evidence suggesting that persons who visited PAG's special project websites using the "I Like [Name of Candidate for Federal Office]" formulation have ever confused those websites as being authorized, controlled, or operated by the named candidate or that candidate's campaign. SMF ¶ 20. Additionally, PAG has never received any cease or desist demand letter from Mike Huckabee, Kelly Ayotte, David Young, or Richard Burr. SMF ¶ 20. PAG still operates ilikedavidyoung.com and has the clear and definite intent to use the "I like [Name of Candidate for Federal Office]" located at the www.ilike[name of candidate for federal office].com formulation in the future. SMF ¶¶ 24-25.

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Although the facts in the summary judgment proceedings are viewed in the light most favorable to the nonmoving party, the nonmoving party only obtains this favorable standard if there is a genuine dispute as to those facts. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). The mere allegation of a factual dispute is insufficient; the factual dispute must be genuine. *Id*. This means that even if the parties tell two completely different stories, but the record contradicts one story such that "no reasonable jury could believe it," this Court should not view that version of events in the light most favorable to the nonmoving party. *Id*. Thus a dispute is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

Likewise, facts are material only if those facts "might affect the outcome of the suit under the governing law[,] . . . [f]actual disputes that are irrelevant or unnecessary will not be counted." *Id*.; *see also Wheeler v. Georgetown Univ. Hosp*., 812 F.3d 1109, 1113 (D.C. Cir. 2016); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006) ("A fact is 'material' if a dispute over it might affect the outcome of a suit under governing law[.]").

Therefore, the judge's function at this stage of the proceedings is to determine whether there is a "genuine issue for trial." *See Liberty Lobby, Inc*., 477 U.S. at 249. There is no such issue absent "sufficient evidence favoring the nonmoving party" that would allow "for a jury to return a verdict for that party." *Id*. Thus, if the nonmoving party presents evidence that is only "merely colorable" or "not significantly probative," this Court may grant PAG's Motion for Summary Judgment. *Id*. at 249-250.

Finally, because the FEC's PAC Name Prohibition is a content-based ban on speech, the FEC bears the burden of proving that the PAC Name Prohibition furthers a compelling governmental interest and is narrowly tailored to address that interest. *See Pursuing America's Greatness*, 831 F.3d at 510 (citing *Reed*, 135 S. Ct. at 2231); *Playboy Entm't Grp*., 529 U.S. at 816 ("[W]hen the government restricts speech, the government bears the burden of proving the constitutionality of its actions.").

ARGUMENT

The First Amendment requires that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Pursuing America's Greatness*, 831 F.3d at 508 (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). The First Amendment is "[p]remised on mistrust of governmental power.

. . stand[ing] against attempts to disfavor certain subjects or viewpoints." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). The First Amendment prohibits the government from restricting speech "because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). Thus, "restrictions distinguishing among different speakers, allowing speech by some but not others" is prohibited. *Citizens United*, 558 U.S. at 340. Similarly, laws that "target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. Content-based speech bans are presumptively unconstitutional because the government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R. A. V. v. St. Paul*, 505 U.S. 377, 392 (1992). This presumption is so strong that once a law is shown to be content-based, that determination is ordinarily all but dispositive. *See Sorrell v. IMS Health Inc*., 564 U.S. 552, 571 (2011).

The FEC's PAC Name Prohibition prohibits unauthorized political committees from using:

> [T]he 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). There is, however, an "opposition" exception to the PAC Name Prohibition. An unauthorized committee may use a candidate's name in its special project name if "the title clearly and unambiguously shows opposition to the named candidate." 11 C.F.R. § 102.14(b)(3).

In practice, the PAC Name Prohibition permits a PAC to maintain and use a special project website titled www.iloathedavidyoung.com, while banning PAG from using the website

www.ilikedavidyoung.com. Another PAC may develop and use a Facebook page titled "I Loathe Richard Burr," but PAG is banned from using a Facebook page titled "I Like Richard Burr." To enforce the PAC Name Prohibition, the FEC must necessarily "examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014). The PAC Name Prohibition is therefore a content-based speech ban, "pure and simple." *Pursuing America's Greatness*, 831 F.3d at 509-10.

I. HISTORY OF THE PAC NAME PROHIBITION

The Federal Election Campaign Act ("FECA") provides, "[i]n 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) (2012).[1] This statutory language is implemented by FEC regulation at 11 C.F.R. § 102.14. Specifically,

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

11 C.F.R. § 102.14(a). Under paragraph (b), so-called "draft committees" are excepted from this prohibition.[2] 11 C.F.R. § 102.14(b)(2). The FEC's regulations also create an exception for certain uses of candidate names where opposition to that candidate is demonstrated: "An unauthorized political committee may include the name of a candidate in the title of a special project name or other communication if the title clearly and unambiguously shows opposition to the named candidate." 11 C.F.R. § 102.14(b)(3).

[1] This provision was adopted as part of the 1979 amendments to FECA.
[2] A "draft committee" is "[a] political committee established solely to draft an individual or to encourage him or her to become a candidate . . . ." 11 C.F.R. § 102.14(b)(2).

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

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

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

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

In 1988, the D.C. Circuit upheld the FEC's original understanding of the PAC Name Prohibition against a challenge brought by Common Cause, which argued that the provision must be read to extend beyond the PAC's formal (registration) name and also include "any title under which such a committee holds itself out to the public for solicitation or propagandizing purposes." *Id*. at 441. The D.C. Circuit determined that Common Cause's preferred construction was "not a totally implausible interpretation of the statute's language," but after extensively reviewing the legislative history of the relevant statutory provision and determining that "[i]t

[3] For example, in 2012, unauthorized political committees could not register themselves with the FEC as "Americans for Obama PAC" or "United for Romney PAC." PAG does *not* seek to include any portion of the name "Mike Huckabee" in its registered PAC name.

seems downright unlikely that Congress would have enacted so broad a reform affecting the projects of unauthorized committees without a single word of explanation or debate[,]" the court ultimately concluded the FEC's understanding "is the better interpretation." *Id*. at 444, 448.

2. The FEC's 1992 Rulemaking Expanded the Scope of the PAC Name Prohibition.

In 1992, the FEC conducted a rulemaking and adopted the position it litigated against in *Common Cause v. FEC*, despite having been told by the D.C. Circuit in 1988 that the agency's longstanding interpretation of the PAC name provision was "the better interpretation." *See id*. at 448; *see also* Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 57 Fed. Reg. 31,424 (July 15, 1992). The FEC claimed that since the 1988 decision, "the Commission has become increasingly concerned over the possibility for confusion or abuse inherent in [the agency's original] interpretation." *Id.* at 31,424.

The FEC acknowledged that the *Common Cause* "court noted that the Commission has a responsibility to 'allow the maximum of first amendment freedom of expression in political campaigns commensurate with Congress' regulatory authority.'" *Id*. (citing *Common Cause*, 842 F.2d at 448). Nevertheless, the FEC's 1992 rule added new, restrictive language to 11 C.F.R. § 102.14, indicating that "'name' for the purpose of the 2 U.S.C. § 432(e)(4) [now 52 U.S.C. § 30102(e)(4)] prohibition . . . include[s] 'any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation.'" *Id*. at 31,425. The FEC explained that:

> [Since] the early 1980's . . . the use of candidate names in the titles of projects or other unauthorized communications has increasingly become a device for unauthorized committees to raise funds or disseminate information . . . a candidate who objected to the use of his or her name in this manner . . . or who disagreed with the views expressed in the communication, was largely powerless to stop it . . . . For this reason, the Commission has become more concerned about the potential for confusion or abuse when unauthorized committee uses a

> candidate's name in the title of a special fundraising project. . . . It is possible in these instances that potential donors think they are giving money to the candidate named in the project's title, when this is not the case . . . . [Accordingly,] the Commission has decided to adopt in its final rule a *ban* on the use of candidate names in the titles of all communications by unauthorized committees.

Id. at 31,424-25 (emphasis added).

The 1992 Final Rule applied not only to the fundraising scenarios that the FEC found troubling, but also to "all communications by unauthorized committees." *Id.* at 31,425. As the agency explained, "[t]he Commission believes the potential for confusion is equally great in all types of committee communications. . . . A *total ban* is also more directly responsive to the problem at issue, and easier to monitor and enforce" than other, less restrictive options considered. *Id*. (emphasis added). While the FEC's rule extended beyond fundraising appeals, nearly every rationale and example presented in the Final Rule involved potential fraud and confusion *in the specific context of fundraising*.

The FEC dismissed comments that raised First Amendment objections, noting without any analysis or further explanation that "it is well established that First Amendment rights are not absolute when balanced against the government's interest in protecting the integrity of the electoral process." *Id*. The FEC asserted that its new rule was "narrowly designed to further the legitimate governmental interest in minimizing the possibility of fraud and abuse in this situation." *Id*. As the FEC put it, "[c]ommittees are not barred from establishing specially designated projects: they are free to choose whatever project title they desire, as long as it does not include the name of a federal candidate." *Id*. Thus, committees were "free" to speak to their supporters, and "free" to title their projects as they wished, so long as they respected the FEC's new content-based restrictions.

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

In 1994, the FEC reconsidered its 1992 regulation, and adopted the exemption now found at 11 C.F.R. § 102.14(b)(3), which allows an unauthorized committee to "include the name of a candidate in the title of a special project name or other communication if the title clearly and unambiguously shows opposition to the named candidate." 11 C.F.R. § 102.14(b)(3); *see also* Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 59 Fed. Reg. 17,267 (April 12, 1994). The "opposition" exemption was adopted after the Commission received a request to which it was sympathetic in the form of a Petition for Rulemaking from "Citizens Against David Duke," a proposed project of the American Ideas Foundation. 59 Fed. Reg. at 17,267. The FEC "acceded to the petitioner's main concern, amending the rules to permit the American Ideas Foundation to use the names of federal candidates in titles that clearly indicate opposition to such candidates." *Id*. at 17,269.[4] Less than two years after insisting that a "total ban" was necessary, the Commission changed its mind and "recognize[d] that the potential for fraud and abuse is significantly reduced in the case of such titles [that clearly indicate opposition]." *Id*.

As was the case in the 1992 rulemaking, the 1994 rulemaking focused on the possibility of fraud and confusion in the context of fundraising. *See id*. at 17,268 ("The rulemaking record contains substantial evidence that potential contributors often confuse an unauthorized committee's registered name with the names of its fundraising projects, and wrongly believe that their contributions will be used in support of the candidate(s) named in the project titles."). The

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

FEC once again claimed that its regulatory scheme, which now included an exemption where opposition to a candidate is evident in a committee's speech, was "narrowly designed to further the legitimate governmental interest in minimizing the possibility of fraud and abuse." *Id*.

Importantly, the FEC merely asserted that it was adopting a complete ban as opposed to disclaimer requirements because it "believed that such an approach could be more burdensome than the current ban, while still not solving the potential for fraud and abuse in this area." *See id*. Without supporting this belief with sufficient evidence required to support its compelling interest burden – a demanding standard – *see Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011), the FEC promulgated a complete ban on using candidate's name in a special project name unless the special project unambiguously demonstrates opposition to the candidate. *See id*.

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

4. FEC Application of the PAC Name Prohibition to Website URLs.

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

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

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

Advisory Opinion 1995-09 (NewtWatch PAC).

The FEC did not issue another advisory opinion considering the application of the PAC Name Prohibition to an unauthorized committee's activities until 2015. To the best of counsel's knowledge, the FEC has never undertaken an enforcement action against a political committee for using the name of a candidate in a special project website URL or other Internet-based platform, including social media accounts, on the grounds that the use does not adequately demonstrate opposition to the named candidate.[6]

[6] The FEC has issued "Requests for Additional Information" to CARLY for America, which received this letter from the FEC: http://docquery.fec.gov/pdf/011/15330083011/15330083011.pdf. CARLY for America subsequently changed its name to Conservative, Authentic, Responsive, Leadership for You and for America (CARLY FOR AMERICA). These letters were issued by the FEC's Reports Analysis Division, which cannot take further enforcement action on its own. The Reports Analysis Division may refer potential violations to the Office of General Counsel, which may then consider enforcement action that the Commissioners must approve. This past February, the FEC entered into a conciliation agreement with an unauthorized committee whose official political committee name was Stop Hillary PAC. *See* Stop Hillary PAC, FEC MUR 7086 (Feb 23, 2017) (available at https://www.fec.gov/files/legal/murs/current/118627.pdf) (last visited Sept. 9, 2017) (noting that because the name of a candidate appeared in the name of the political committee, the committee violated 52 U.S.C. § 30102(e)(4)). This is distinct from the FEC's

In the years following 1995, the Commission explicitly adopted a "hands off" approach to the Internet. For example, in 2002, the Commission adopted new regulations defining the term "public communication," and expressly excluded the Internet from that definition. The FEC explained:

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

Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,072 (July 29, 2002). In response to litigation, the FEC revised its regulations slightly in 2006 to treat paid Internet advertising as a "public communication," but maintained its general policy of not regulating Internet communications.[7] Generally speaking, Internet-based "social media" remains unregulated.[8]

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regulatory prohibition that prevents unauthorized committees from using a candidate's name in a special project name, including a website URL, Facebook page name, and Twitter handle.

[7] *See* Internet Communications, 71 Fed. Reg. 18,589 (April 12, 2006) ("Through this rulemaking, the Commission recognizes the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach.").

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

In 2011, in Matter Under Review 6399 (Yoder), the FEC's six Commissioners divided over the scope of the PAC Name Prohibition, leaving its application entirely unclear. The FEC's Office of General Counsel and three Commissioners supported applying the PAC Name Prohibition to an *authorized* campaign committee, Yoder for Congress, that operated a website located at www.StepheneMoore.com (Stephene Moore was Kevin Yoder's general election opponent). Three Commissioners rejected this position on the grounds that the PAC Name Prohibition, by its own terms, applies only to *unauthorized* political committees. *See* MUR 6399 (Yoder), Statement of Reasons of Vice Chair Hunter and Commissioners McGahn and Petersen (June 23, 2011). Of particular significance to the present matter, these Commissioners also explained:

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

Id. at 4 n.16 (internal citation omitted). Two of the Commissioners who signed this Statement of Reasons subsequently voted in favor of Advisory Opinion 2015-04.

Thus, until 2015, the only FEC statement regarding the application of the PAC Name Prohibition to an Internet communication that reflected majority support was the unrequested dicta regarding websites found at the end of Advisory Opinion 1995-09, which was subsequently placed in question by the FEC's later rulemakings implementing the FEC's general policy of not regulating activities on the Internet. Then, in 2011, three Commissioners expressed the view that a website URL was *not* the "title of a special project," and read Advisory Opinion 1995-09 in a

way that did not apply to a website's URL, but to the website as a whole. Following this sequence of events, it was entirely unclear how a *majority* of the FEC would apply the PAC Name Prohibition in the future.

II. THE FEDERAL ELECTION COMMISSION'S CURRENT FORMULATION OF THE PAC NAME PROHIBITION AS APPLIED TO PLAINTIFF.

1. Collective Actions PAC's Advisory Opinion Request.

Collective Actions PAC is an unauthorized, independent expenditure-only political committee whose goal was "to help Sen. Bernie Sanders in his bid to win the Democratic nomination for President." FEC Advisory Opinion 2015-04 at 1.[9] On or about June 3, 2015, Collective Actions PAC filed a written advisory opinion request with the FEC asking whether the PAC's inclusion of the word "Bernie" in certain website URLs and in the titles of two social media accounts it operates is permissible under the PAC Name Prohibition. *See id*. at 2. Specifically, Collective Actions PAC's request inquired about its operation of three websites, "RunBernieRun.com," "ProBernie.com," "BelieveInBernie.com," the Facebook page "Run Bernie Run," and the Twitter accounts ("handles") "@Bernie_Run" and "@ProBernie." *See id*. Collective Actions PAC specified that it did not wish to use these platforms to raise money or solicit contributions but only to disseminate information about Senator Sanders's campaign. *See id*.

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

> The use of the name of a candidate in a URL website, that's not in our regulation, is it? That's the creation of a former advisory opinion applying the regulation. Am I right about that? As a general rule, treating a URL of a website as an activity . . . the regulation speaks of programs, activities, and what have you. The

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

> application of these terms that our regulation prohibits to the use of a URL that has the name "Newt" in it, or "Bernie," was an application out of an advisory opinion, right?

A representative from the FEC's Office of General Counsel responded, "[t]he first time that came up was in the NewtWatch advisory opinion."

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

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

Audio of the FEC's consideration of Advisory Opinion 2015-04, Draft A, is available at http://www.fec.gov/audio/2015/2015071604.mp3 (emphasis added).

Following Commissioner Goodman's statements, the FEC voted 6 to 0 to adopt Advisory Opinion 2015-04. Advisory Opinion 2015-04 (Collective Actions PAC) concludes that Collective Actions PAC "may not use Senator Sanders's name in the names of [Collective Actions PAC's] websites or social media pages." FEC AO 2015-04 at 2. Citing Advisory Opinion 1995-09, the FEC asserts "[a] committee's online activities are 'projects' that fall within the scope of section 102.14." *See id*. at 3. Accordingly, "[b]ecause the names of [Collective Actions PAC's] websites and social media accounts that include Senator Sanders's name do not clearly express opposition to him, those sites and accounts are impermissible under 11 C.F.R. § 102.14." *Id*. at 4.

While the FEC asserts in Advisory Opinion 2015-04 that Advisory Opinion 1995-09 determined that "[a] committee's *online activities* are 'projects' that fall within the scope of

section 102.14[,]" *id*. at 3 (emphasis added), this is actually a very broad reading of Advisory Opinion 1995-09. Advisory Opinion 1995-09 did not address "online activities" as that term is understood today. Facebook, Twitter, and other forms of "social media" did not exist in 1995.[10] Advisory Opinion 2015-04 is a significant expansion of Advisory Opinion 1995-09, and is the first instance in which the FEC has considered the application of the PAC Name Prohibition to "online activities" other than a traditional website. As noted above, the FEC has generally declined in recent years to apply heavy-handed regulation to political activity on the Internet. Advisory Opinion 2015-04 is at odds with this general trend.

In issuing Advisory Opinion 2015-04, the FEC formally opined that its regulations did not permit Collective Actions PAC to communicate with supporters through websites with URLs of www.RunBernieRun.com, www.ProBernie.com, www.BelieveInBernie.com, or speak via a Facebook page titled "Run Bernie Run," or Twitter accounts with the handles of "@Bernie_Run" and "@ProBernie." Under Advisory Opinion 2015-04, it made no difference whether Collective Actions PAC utilized these online assets for advocacy purposes, fundraising efforts, or some other purpose; rather, it was simply the inclusion of the word "Bernie" in the titles or headings of these webpages and social media accounts that was deemed offensive and not permitted under FEC regulations, which impose a "total ban" on Collective Actions PAC's proposed uses of the word "Bernie."[11]

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

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

2. Application of Advisory Opinion 2015-04 (Collective Actions PAC) to Plaintiff.

Under FECA,

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

52 U.S.C. § 30108(c)(1). Any person who relies upon an advisory opinion in this manner, "and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act . . . ." 52 U.S.C. § 30108(c)(2).

For purposes of 11 C.F.R. § 102.14(a)–(b), the website URLs www.ilikemikehuckabee.com or www.ilikedavidyoung.com and other "www.ilike[name of candidate for federal office].com," are materially indistinguishable from www.RunBernieRune.com, www.ProBernie.com, and www.BelieveInBernie.com. The Facebook page "I Like Mike Huckabee," "I Like David Young," and "I Like Richard Burr" are materially indistinguishable from the Facebook page "Run Bernie Run" for purposes of 11 C.F.R. § 102.14(a)–(b). A Twitter account that utilizes the "I Like Mike Huckabee" or "I Like David Young" branding of the website and Facebook page in its "handle" would be materially indistinguishable from the Twitter accounts "@Bernie_Run" and "@ProBernie" for purposes of 11 C.F.R. § 102.14(a)–(b). Thus, under Advisory Opinion 2015-04, the PAG activities discussed above are impermissible under the FEC's current interpretation of the PAC Name Prohibition. As a result, prior to the entry of the injunction on October 12, 2016, PAG ceased speaking through its candidate name special projects website, Facebook page names, and Twitter handles.

SMF ¶¶ 13-14, 16-17. PAG was therefore unable to implement its strategy of branding the I Like Mike Huckabee website and Facebook page and developing a strategy to disseminate positive messages through those special projects. SMF ¶¶ 11, 16-17.

III. THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT HELD THAT THE PAC NAME PROHIBITION IS A CONTENT-BASED SPEECH BAN AND THAT PAG WAS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS BECAUSE THE PAC NAME PROHIBITION IS NOT NARROWLY TAILORED.

The United States Court of Appeals for the District of Columbia Circuit reversed this Court's denial of PAG's request for a preliminary injunction. In its opinion, the D.C. Circuit rejected the argument that the PAC Name Prohibition was a disclosure provision. *See Pursuing America's Greatness*, 831 F.3d at 508. The PAC Name Prohibition "does not require PAG to provide somewhat more information than it otherwise would." *Id*. at 507. Instead, the PAC Name Prohibition "prevents PAG from conveying information to the public." *Id*. "Disclosure requirements . . . do not prevent anyone from speaking." *Id*. at 508 (quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003) (alteration in *Pursuing America's Greatness* opinion)). Thus, in enforcing the PAC Name Prohibition, the FEC "banned more speech than that covered by FECA's provisions requiring disclosure." *Id*. at 508. Therefore, the D.C. Circuit concluded "that section 102.14(a) is a restriction on PAG's political speech, not a disclosure requirement." *Id*.

The D.C. Circuit next concluded that the PAC Name Prohibition is a "content-based discrimination pure and simple," because on its face the PAC Name Prohibition "draws distinctions based solely on what PAG *says*." *Id*. at 509 (emphasis added). Under the PAC Name Prohibition, PAG cannot use Congressman David Young's name in its special project name, "ilikedavidyoung.com," but another PAC could use "iloathedavidyoung.com." *See id*. Thus, to enforce the PAC Name Prohibition, the FEC "must examine the content of the title of

PAG's website or Facebook page and ask whether the title supports or opposes the candidate." *Id*. (citing *McCullen*, 134 S. Ct. at 2531). Therefore, to survive PAG's constitutional challenge, the FEC must prove that it satisfies strict scrutiny. *See id*. at 510 ("Accordingly, the government must show the restriction is narrowly tailored to a compelling governmental interest.") (citing *Reed*, 135 S. Ct. at 2231).

The D.C. Circuit assumed that the FEC's PAC Name Prohibition satisfied the compelling interest prong of strict scrutiny. The FEC claims that the PAC Name Prohibition is necessary to avoid voter confusion because 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." *Pursuing America's Greatness*, 831 F.3d at 510. But the D.C. Circuit concluded that there is a substantial likelihood that the PAC Name Prohibition is "not the least restrictive means to achieve the government's interest." *Id*. Rather than a complete content-based speech ban, the FEC could achieve its interests requiring instead larger disclaimers at the top of special project websites that read "This Website Is Not Candidate Doe's Official Website." *Id*. The Supreme Court has repeatedly stated that disclaimer and disclosure requirements are "less restrictive alternatives to 'flat bans' on speech." *Id*. (citing *McCutcheon*, 134 S. Ct. at 1460).

Importantly, in its Explanations and Justifications proffered as the reasons for the PAC Name Prohibition the FEC rejected larger disclaimers, saying that it "believed that such an approach could be more burdensome than the current ban, while still not solving the potential for fraud and abuse in this area." *See id*. (quoting 59 Fed. Reg. at 17,268). But the FEC "offered no evidence that larger or differently worded disclosures would be less effective at curing fraud or abuse than a ban on speech." *See id*. at 510-11. Because the FEC "must present more than anecdote and supposition to support a regulation subject to strict scrutiny," the clear lack of

evidence provided by the agency is insufficient to support the ban. *Id*. at 511 (quoting *Playboy Entm't Grp.*, 529 U.S. at 822).

IV. THE FEC'S CONTENT-BASED PAC NAME PROHIBITION CANNOT SURVIVE STRICT SCRUTINY.

The D.C. Circuit ruled, "[o]n its face, section 102.14 'draws distinctions' based solely on what PAG says." *Pursuing America's Greatness*, 831 F.3d at 509. The PAC Name Prohibition prohibits PAG from having special project websites like "I Like David Young" but permits "I Loathe David Young." Thus, PAG's political adversaries can speak through their special project names but PAG cannot. Therefore, for the FEC to enforce the PAC Name Prohibition, the FEC must "examine the content of the message that is conveyed to determine whether a violation has occurred." *Id*. (quoting *McCullen*, 134 S. Ct. at 2531). Accordingly, the D.C. Circuit concluded that the PAC Name Prohibition is "content-based discrimination pure and simple." *Id*. Strict scrutiny therefore applies. *Id*. at 510.

1. The PAC Name Prohibition Is Disconnected From the FEC's Asserted Compelling Interest.

To demonstrate that an interest is compelling is a demanding standard. *See Brown*, 564 U.S. at 799. Here, the FEC must demonstrate that it identified an actual, recognizable problem that the government has a compelling interest in addressing, and that its content-based PAC Name Prohibition was enacted to specifically address that compelling interest. *See id.*; *see also Playboy Entm't Grp.*, 529 U.S. at 820-23 (stating that Congress did not sufficiently prove a nationwide problem to justify its nationwide daytime speech ban); *Burson v. Freeman*, 504 U.S. 191, 199-200 (1992) ("To survive strict scrutiny, however, a State must do more than assert a compelling state interest -- it must demonstrate that its law is necessary to serve the asserted interest."). Ambiguous proof is insufficient. *See Brown*, 564 U.S. at 800. The FEC must present

evidence that "an actual problem in need of solving" existed at the time it adopted the PAC Name Prohibition in order to satisfy the compelling interest standard. *See Playboy Entm't Grp.*, 529 U.S. at 820-23; *Brown*, 564 U.S. at 799 (to satisfy the compelling interest inquiry, the government must have evidence of "an actual problem in need of solving . . . and the curtailment of free speech must be actually necessary to the solution . . . ."); *cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented post hoc in response to litigation."). Conclusory statements, anecdotes, and supposition about the need to ban non-fundraising special project website names bearing the candidate's name will not satisfy the compelling interest standard. *Playboy Entm't Grp.*, 529 U.S. at 823; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . .").

The D.C. Circuit "assume[d] that the government has a compelling interest in avoiding the type of voter confusion identified by the FEC." *Pursuing America's Greatness*, 831 F.3d at 510 (citing *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion)). The D.C. Circuit stated "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*.

But the record is silent on the specific point at issue in this case, namely, the use of a candidate's name in a special project name that is not conducting fundraising. *See* SMF ¶ 19. The FEC does not provide sufficient evidence in support of applying the PAC Name Prohibition beyond the fundraising context. Rather, the FEC's so-called evidence that was identified during the rulemaking was limited to the use of candidate's names in special project names where fundraising was conducted. *See, e.g.*, 57 Fed. Reg. at 31,425 ("[T]he Commission has become

more concerned about the potential for confusion or abuse when an unauthorized committee uses a candidate's name in the title of a special *fundraising* project . . . .") (emphasis added); 59 Fed. Reg. at 17,268 ("The rulemaking record contains substantial evidence that potential *contributors* often confuse an unauthorized committee's registered name with the names of its *fundraising* projects, and wrongly believe that their contributions will be used in support of the candidate(s) named in the project titles.") (emphasis added). Even the title of the FEC's 1992 and 1994 rulemakings ("Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees") reinforces this focus on fundraising, as do the examples included in the two Final Rules.[12] Even when given an opportunity in its briefs before the D.C. Circuit, the FEC could not marshal examples of confusion or fraud not connected to fundraising. *See Pursuing America's Greatness v. FEC*, No. 15-5264, FEC Br. at 29, 32-33 (D.C. Cir. Jan. 13, 2016) (Doc. No. 1593393) (discussing rulemaking examples all related to fundraising and current examples, including Daniel Craig making a $50 million contribution to a Super PAC that Craig thought was

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

Bernie Sanders' campaign). The D.C. Circuit did not even address the FEC's contention that the comments made on the "I Like Mike Huckabee" Facebook page indicated that the commenters thought that the page was run by Mike Huckabee's campaign. *See id*. at 30. Neither PAG nor the FEC knows whether persons who posted these comments were actually confused by PAG's Facebook page. SMF ¶ 26. PAG has done absolutely nothing to mask itself as the source of any of its communications, and before the FEC issued the Collective Actions PAC advisory opinion, PAG's Facebook page even included a disclaimer identifying PAG as the payor that was not legally required. SMF ¶ 26.

The "actual problem" in need of correcting—confusion from special project names on social media websites and URL addresses that do not include fundraising—has not been proven by the FEC. *See, e.g.*, *Brown*, 564 U.S. at 799. The FEC's *asserted* problem in need of correcting appears to rest solely on conclusory assertions, anecdote, supposition, and administrative convenience. The FEC

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

1992 Final Rule, 57 Fed. Reg. at 31,425 (emphasis added). Administrative convenience does not save a content-based statute from the shoals of strict scrutiny. *See McCullen*, 134 S. Ct. at 2534 ("[B]y demanding a close fit between ends and means [in strict scrutiny], the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency."). Nor do conclusory assertions, supposition, and anecdotes. *Playboy Entm't Grp.*, 529 U.S. at 822-23, 25 (holding that conclusory assertions are insufficient to satisfy strict scrutiny); *Shrink Mo. Gov't PAC*, 528 U.S. at 392 ("We have never accepted mere conjecture as adequate to carry a

First Amendment burden . . . ."); *Pursuing America's Greatness*, 831 F.3d at 511. But there is nothing in the 1992 or 1994 rulemakings, other than conclusory assertions, about "confusion" outside the fundraising context.

The Explanations and Justifications cited above demonstrate conclusively that the FEC did not have record evidence sufficient to justify a content-based speech *ban* prohibiting unauthorized political committees from using candidate names in special project website URLs and social media websites where no fundraising was conducted. There is today no evidence to support a compelling interest in preventing the use of a candidate's name in website URLs and social media websites. The FEC is therefore without a compelling interest.

2. The PAC Name Prohibition Is Not Narrowly Tailored.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The legislation cannot be "underinclusive," meaning that it cannot leave appreciable damage to the government's purported interest unprohibited. *Reed*, 135 S. Ct. at 2232. Nor can it be overinclusive by "unnecessarily circumscrib[ing] protected expression." *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002) (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)). Additionally, "when the government restricts speech, the government bears the burden of proving the constitutionality of its actions." *Playboy Entm't Grp.*, 529 U.S. at 816. "If a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative." *Id*. at 813. "When a plausible, less restrictive alternative is offered to a content-based speech restriction it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Id*. at 816. "Where the record is silent as to the comparative effectiveness of . . . two alternatives"—one of which burdens more speech than the other—the

more burdensome restriction cannot survive strict scrutiny. *Pursuing America's Greatness*, 831 F.3d at 511 (quoting and citing *Playboy Entm't Grp.*, 529 U.S. at 826) (internal quotation marks omitted).

Where, as here, the government has enacted a speech ban, a court can uphold it "only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485. Accordingly, in the narrowly tailoring analysis, the FEC must provide sufficient evidence to justify that its content-based speech ban is narrowly tailored. Mere supposition, anecdote, and conclusory assertions are insufficient. *See Pursuing America's Greatness*, 831 F.3d at 511. Administrative convenience is also an insufficient justification. *See McCullen*, 134 S. Ct. at 2534.

The D.C. Circuit held that PAG was substantially likely to succeed on the merits in proving that the PAC Name Prohibition is not narrowly tailored because the FEC did not, in its Explanation and Justification for the PAC Name Prohibition, provide any evidence that disclaimer provisions were less effective at preventing confusion than the ban. *See Pursuing America's Greatness*, 831 F.3d at 510-11. Furthermore, the FEC did not adduce evidence that disclaimers were more burdensome than the ban. *See id*. at 510. Because the "'record is silent as to the comparative effectiveness of . . . two alternatives'—one of which burdens more speech than the other—the more burdensome restriction cannot survive strict scrutiny." *Id*. at 511 (citing and quoting *Playboy Entm't*, 529 U.S. at 826). Furthermore, the D.C. Circuit ruled that the PAC Name Prohibition is a ban and "[t]he Supreme Court regularly views such disclosure requirements as less restrictive alternatives to 'flat bans' on speech. *See id*. at 510 (citing *McCutcheon*, 134 S. Ct. at 1460).

i. The FEC Could Achieve Its Goals With Larger Disclaimers or More Precise Name Requirements.

As PAG maintained in its Rule 30(b)(6) deposition, the FEC could achieve its claimed goal of preventing voter confusion and fraud through additional or different disclaimer requirements. *See, e.g.*, SMF ¶ 21. For example, Congress or the FEC might require an additional disclaimer at the top of a website (in addition to the "paid for by" and "not authorized by any candidate or candidate's committee" disclaimers required at the bottom of the website) declaring: "This Website Is Not Candidate Doe's Official Website." *Pursuing America's Greatness*, 831 F.3d at 510; *see generally* 11 C.F.R. § 110.11 (requiring disclaimers on the internet websites of political committees and specifying the precise content and appearance of those disclaimers, including, *inter alia*, the phrase "not authorized by any candidate or candidate's committee," the requirement that the disclaimer be placed in a clear and conspicuous manner in a box set apart from the communication, and use contrasting color).

Additionally, as Amici suggested before the D.C. Circuit, the FEC could require that an unauthorized committee's use of a candidate's name must clearly indicate it is a third party. *See Pursuing America's Greatness v. FEC*, No. 15-5264, Br. of *amici curiae* Pacific Legal Foundation and the James Madison Center for Free Speech at 11 (D.C. Cir. Dec. 23, 2015) (Doc. No. 1590287). For example, the FEC could require that unauthorized committees use titles such as "Conservatives Who Like Mike Huckabee" or "Farmers Who Like David Young." This would indicate to the reader that the organization is not a campaign committee but a group supporting the candidate. This approach would also be less restrictive than a complete ban on using a candidate's name in a special project unless you clearly and unambiguously show opposition. The FEC has the burden to adduce sufficient evidence that these two less restrictive alternatives would be ineffective at preventing confusion. *See Playboy Entm't Grp.*, 529 U.S. at 813 ("If a

less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative."); *see also id*. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."); *Pursuing America's Greatness*, 831 F.3d at 511. The FEC has never attempted to do so, and when confronted with the issue, the FEC simply noted that it "believes the potential for confusion is equally great in all types of committee communications[,]" 57 Fed. Reg. at 31425, and in any event, a "total ban" is easier to monitor and enforce. *Id*.

Even without additional disclaimers or different project name wording requirements, PAG explained that Facebook and Twitter have both addressed confusion concerns arising from whether a Facebook page or Twitter handle is an "official page" of a public figure. Facebook and Twitter both indicate whether a Facebook page or Twitter handle is the official page or Twitter handle of a public figure by placing a blue check mark next to the page or handle name. SMF ¶ 22; *see also Pursuing America's Greatness v. FEC*, No. 15-5264, Br. of *amici curiae* Pacific Legal Foundation and the James Madison Center for Free Speech at 17 (D.C. Cir. Dec. 23, 2015) (Doc. No. 1590287) ("Someone interested in Mike Huckabee could type his name in the search bar and quickly find two pertinent pages—his verified page (indicated with the blue checkmark) and the now unused page, *I Like Mike Huckabee*, belonging to Pursuing America's Greatness."). Both of these policies have been in effect since at least 2013. SMF ¶ 22. Thus, a Facebook and/or Twitter user can quickly and easily know whether a page is Mike Huckabee's official page, David Young's official page or Richard Burr's official page because Facebook and Twitter would place a blue check mark next to these page names. These examples of technological innovation address the FEC's ostensible compelling interest in a manner that is effective and

which does not ban speech. It is the FEC's burden to prove these various less restrictive means are ineffective at preventing confusion and fraud. *See Playboy Entm't Grp.*, 529 U.S. at 813, 816.

ii. It Is Insufficient to Sustain the FEC's Content-Based Speech Ban Because Disclaimers on Facebook Sponsored Ads and Twitter are Impracticable.

During PAG's deposition, the FEC examined how disclaimers might work for Facebook sponsored advertisements and Twitter messages. *See generally* (PAG Dep. Tr. at 89-95). A sponsored advertisement from PAG through its "I like [name of candidate for federal office]" Facebook page would appear on a Facebook user's page as coming from "I Like [name of candidate for federal office]." SMF ¶ 23. Facebook's sponsored advertisements, like Twitter, are character limited, which prevents a full disclaimer from being placed in the sponsored post itself. SMF ¶ 23. However, an ad sponsor, such as PAG, would still provide a link within the sponsored ad for readers to click and that would then take the reader to the "I Like [name of candidate for federal office]" Facebook page or website where a full, FEC-compliant disclaimer would be located. SMF ¶ 23.

In FEC Advisory Opinion 2011-09 (Facebook, Inc.), all six Commissioners acknowledged the character limitations on Facebook sponsored messages. *See* FEC AO 2011-09, Draft B (three Commissioners finding that Facebook sponsored ads are character limited, which makes providing a disclaimer impracticable, and therefore such ads are exempt from the disclaimer requirements under 11 C.F.R. § 110.11(f)(1)(ii)); *see also* FEC AO 2011-09, Draft C (three Commissioners explained that Facebook sponsored ads are character limited but advertisement sponsors may satisfy the FEC's disclaimer requirements by providing a link to a website that contains the full disclaimer); *see also* FEC AO 2011-09 (Facebook) (June 17, 2011) (Certification stating that three Commissioners voted for Draft B and the remaining three Commissioners voted for Draft C). Notably, no Commissioner suggested that the solution to this

disclaimer issue was to ban political speech on Facebook. Rather, three Commissioners concluded that Facebook and Twitter messages fall within an exemption for disclaimers where placing a disclaimer on an item is impracticable. *See* FEC AO 2011-09, Draft B at 1. Three other Commissioners proposed that the disclaimer requirement could be satisfied by providing a link in a character-limited sponsored ad that would lead to a webpage that included a full, FEC-compliant disclaimer. PAG takes no position on which group of Commissioners is correct. PAG has never sought to confuse any reader and will voluntarily include a link to a webpage that includes a full, FEC-compliant disclaimer that would provide additional assurance that the public may know who is speaking.

Not one of the six Commissioners even suggested prohibiting Facebook sponsored ads due to fear of confusion because a disclaimer was not readily visible on the sponsored ad itself. Instead, the Commissioners disagreed over whether a disclaimer was required at all, or whether the disclaimer requirement could be satisfied by providing a link to a webpage that included a full disclaimer. *See also* AO 2010-19 (Google) (A unanimous Commission agreed that Google's proposed activity of allowing text ads—which are limited to 95 characters—on Google's search engine did not violate the FEC's disclaimer requirements when the text ad provided a link to a website containing the full disclaimer. The Commission did not, however, agree on the rationale). PAG's speech through its candidate name special projects should likewise not be prohibited because disclaimers cannot fit within a posting. Rather, any resulting potential confusion can be cured through less restrictive, alternate means.

iii. The FEC's Content-Based Speech Ban Is Not Saved Because PAG Still Actively Advocated for the Nomination and Election of Mike Huckabee for President, Despite Not Speaking Through the I Like Mike Huckabee Website and Facebook Page.

The FEC has previously argued that PAG did not suffer any injury because PAG spent millions of dollars advocating for Mike Huckabee during the Republican presidential nomination process. *See Pursuing America's Greatness v. FEC*, No. 15-5264, FEC Br.at 21, 58-59 (D.C. Cir. Jan. 13, 2016) (Doc. No. 1593393). During PAG's deposition, the FEC persisted with this point, that PAG spent $3.5 million in independent expenditures supporting Mike Huckabee's nomination. *See, e.g.*, (PAG Dep. Tr. at 69:15-18).

The fact that PAG was able to speak through its Facebook page, radio, and television advertisements and not through its special project website and Facebook page is a factual distinction without a legal difference. The Supreme Court has ruled that there is no difference between a content-based law that burdens speech and a content-based law that prohibits speech. Both must satisfy the same strict scrutiny analysis. *See Playboy Entm't Grp.*, 529 U.S. at 812 ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."). Furthermore, whether a person can speak through other avenues is a relevant inquiry only when a statute is content-neutral subject to intermediate scrutiny. *See, e.g.*, *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). But the D.C. Circuit has ruled that strict scrutiny applies to the FEC's PAC Name Prohibition because it is a content-based speech ban "pure and simple." *See Pursuing America's Greatness*, 831 F.3d at 509-10. The fact that PAG still spoke during the 2016 nomination process is irrelevant to this Court's analysis.

CONCLUSION

This Court should grant the Motion for Summary Judgment and hold that the FEC's PAC Name Prohibition is a content-based ban on speech that violates the First Amendment to the U.S. Constitution.

Respectfully Submitted,

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Certificate of Service

I hereby certify that the foregoing document was filed with the Clerk of the Court via the CM.ECF filing system which served the foregoing document on all counsel required to be served.

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