ORAL ARGUMENT SET FOR FEBRUARY 23, 2016

No. 15-5264

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PURSUING AMERICA'S GREATNESS,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

APPELLANT PURSUING AMERICA'S GREATNESS OPENING BRIEF

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December 16, 2015

I. Parties and Amici

Pursuing America's Greatness ("PAG") and the Federal Election Commission ("FEC") were parties before the District Court. PAG appeared as the Plaintiff before the District Court, while the FEC appeared as the defendant. Before this Court, PAG appears as the Appellant and the FEC is the Appellee.

No *amicus curiae* entered an appearance or filed briefs with the District Court.

Pursuant to Circuit Rule 26.1, PAG certifies that no publicly-held company owns ten percent or more of PAG. Furthermore, PAG itself has no parent company as that term is defined in the Circuit Rules. PAG filed Articles of Incorporation as a non-profit corporation in the State of Arkansas on March 5, 2015. PAG registered with the FEC as an unauthorized, independent expenditure-only political committee on March 11, 2015 by filing FEC Form 1 (Statement of Organization). PAG operates pursuant to Internal Revenue Code Section 527 as a "political organization" for federal tax purposes.

II. Rulings Under Review

On September 24, 2015, the District Court issued an order and memorandum opinion in case number 15-1217 denying Plaintiff Pursuing America's Greatness' Motion for Preliminary Injunction. JA257; JA258. The District Court's order appears at Dist. Ct. Dkt. 22. JA257. On October 2, 2015, the District Court denied

PAG's motion for an injunction pending appeal in a brief order at Dist. Ct. Dkt. 27. JA333.

III. Related Cases

PAG is not aware of any current related case as strictly defined by Circuit Rule 28. However, the FEC (*Defendant-Appellee* in this matter) is also the defendant in *Stop Hillary PAC et. al. v. Federal Election Commission* (Case No. 1:15-cv-01208-GBL-IDD, filed September 22, 2015) pending in the Eastern District of Virginia. The Plaintiffs in *Stop Hillary PAC* challenge the constitutionality of 52 U.S.C. § 30102(e)(4). Pursuant to the special review provisions of 52 U.S.C. § 30110, Plaintiffs seek certification of constitutional questions to the United States Court of Appeals for the Fourth Circuit for resolution *en banc*.

The United States District Court for the Eastern District of Virginia held a hearing on December 4, 2015 to address the Motion for Certification of Constitutional Claims to *En Banc* Circuit Court and plaintiff's motion for a preliminary injunction. No opinion or order has issued.

If a decision on whether *Stop Hillary PAC* will be certified to the United States Court of Appeals for the Fourth Circuit *en banc* is made while this matter is pending, and if Plaintiff's motion is granted, this case would fall within the disclosure requirements of Circuit Rule 28. Counsel intends to monitor the

proceedings in *Stop Hillary PAC v. FEC* and will notify this Court of the outcome of the pending motion in that case.

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"FEC" ..... Federal Election Commission

"PAG" ..... Pursuing America's Greatness

"PAC" ..... Political Action Committee

INTRODUCTION

The Federal Election Commission ("FEC")[1] prohibits Pursuing America's Greatness's ("PAG") speech advocating for the nomination and election of Mike Huckabee for President. The FEC prohibits PAG from using Mike Huckabee's name in its URL website address, Facebook page, and Twitter handle. PAG used—and wishes to use again—Mike Huckabee's name in PAG's efforts to advocate the election of Governor Mike Huckabee for President of the United States.

Just as a regulation prohibiting the use of Mike Huckabee's name in the title of a book or in the chapter headings contained in that book would be declared unconstitutional, so too should this Court declare unconstitutional the FEC's regulation prohibiting the use of Mike Huckabee's name in PAG's website addresses, Facebook page, and Twitter handles.

PAG requests that this Court enjoin the FEC from applying its political committee naming prohibition at 52 U.S.C. § 30102(e)(4) and 11 C.F.R. § 102.14 (the "PAC Naming Prohibition") to PAG's website Uniform Resource Locator ("URL") and social media accounts in a manner that restricts PAG's ability to communicate with its supporters about matters related to the election of candidates to federal office. The FEC's regulation is a complete ban on speech that inhibits

[1] The FEC is the independent federal regulatory agency tasked with civil enforcement of the Federal Election Campaign Act of 1971, as amended ("FECA").

the ability of certain political committees to engage in constitutionally-protected independent expenditures. The FEC's recent Advisory Opinion interpreting and applying the PAC Naming Prohibition violates the Administrative Procedure Act (APA), as well as the First Amendment insofar as it is a prior restraint and a content-based speech restriction.

As more fully set forth below, the FEC's announced interpretation of a certain regulation prohibits PAG from maintaining a Facebook page with the title "I Like Mike Huckabee"; prohibits PAG from maintaining a corresponding website at www.ilikemikehuckabee.com; and prohibits PAG from establishing a Twitter account with an identifying "handle" that incorporates some or all of the name "Mike Huckabee."

First, the FEC's PAC Naming Prohibition, as applied to PAG's communications, is a content-based speech restriction that cannot withstand the applicable level of constitutional scrutiny under the Supreme Court's analysis in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Since the Court's *Reed* decision, every court that has considered an election or political advocacy-related case involving restrictions on the content of speech – with the notable exception of the lower court in this case – has found that *Reed*'s framework controls. This Court should review the PAC Naming Prohibition under the analytical framework set forth in *Reed*.

Second, the FEC recently issued an Advisory Opinion that prohibits political committees like PAG from using the name of a federal candidate in a website URL address, Facebook page heading, or Twitter handle, unless the FEC believes the communication adequately evidences opposition to the named candidate. This interpretation and application of the PAC Naming Prohibition acts as a prior restraint of PAG's speech, because if PAG maintains and uses its website, Facebook page, and Twitter handles, it will be subject to criminal penalties for knowing and willful violations. It is well established that prior restraints on protected speech are presumptively invalid.

Third, the FEC's Advisory Opinion, a final agency action, violated the Administrative Procedure Act because it was arbitrary, capricious, an abuse of discretion, and contrary to law. The Collective Actions PAC Advisory Opinion for the first time, and without rulemaking notice and comment, applied the PAC Naming Prohibition to the Internet and social media platforms in a manner never before contemplated by the FEC, and in a manner inconsistent with the FEC's approach to Internet regulation since 2006.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). PAG timely filed its notice of appeal on September 28, 2015, four days after the denial of PAG's Motion for a preliminary injunction. JA296; JA257. The District Court

had jurisdiction pursuant to 28 U.S.C. § 1331.

STANDING

PAG has standing to bring its constitutional and APA claims. The FEC's PAC Naming Prohibition prohibits PAG from using Governor Huckabee's name in its website address, Facebook page heading, and Twitter handles. Thus, the FEC's prohibition injures PAG's First Amendment rights. Additionally, the FEC Advisory Opinion at issue in this case for the first time, without rulemaking notice and comment, expands the PAC Naming Prohibition to website addresses, Facebook pages, and Twitter handles. The Advisory Opinion, a final agency action, directly impacts PAG's speech.

STATEMENT OF THE ISSUES

In the decision below, the United States District Court for the District of Columbia failed to apply strict scrutiny to a content-based government prohibition on speech, and denied a preliminary injunction. This prohibits PAG from engaging in its preferred speech in advance of the rapidly approaching presidential primary elections. PAG has indicated it will not fundraise on the web pages and social media outlets it desires to use. Nevertheless, the FEC has imposed a prohibition under threat of criminal penalties on PAG's use of certain words in its web addresses and social media identifiers.

First, under the First Amendment of the United States Constitution, did the

District Court err when it failed to analyze the FEC's PAC Naming Prohibition under the Supreme Court's *Reed v. Town of Gilbert* ruling—and consequently not issue the injunction—because the FEC's regulation is a content-based speech restriction that prohibits the use of a candidate's name in PAG's website URL address, Facebook page heading, and Twitter handle, in communications that support the candidate's election, but allows other committees to use the candidate's name in the same manner so long as the committees' communications evidence opposition to the candidate?

Second, under the First Amendment of the United States Constitution, does the FEC's Advisory Opinion issued to Collective Actions PAC act as an unconstitutional prior restraint wherein it prohibits PAG from using a candidate's name in a website URL address, Facebook page, and Twitter handle?

Third, did the District Court err when it ruled that PAG was not irreparably harmed, and that the public was not harmed, when it denied PAG's motion to enjoin the FEC from applying the PAC Naming Prohibition to PAG's specified communications?

Fourth, under the Administrative Procedure Act, did the FEC act arbitrarily and capriciously, and/or abuse its discretion, or act contrary to law when, without rulemaking notice and comment, it applied the PAC Naming Prohibition to Internet and social media platforms in a manner not previously contemplated or

announced by the FEC, and in a manner inconsistent with the approach taken by the FEC to Internet regulation since 2006?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory History

Before the District Court, PAG sought a preliminary injunction enjoining enforcement of 52 U.S.C. § 30102(e)(4) and 11 C.F.R. § 102.14(a), as interpreted and applied by the FEC in Advisory Opinion 2015-04 (collectively, the "PAC Naming Prohibition"), against PAG's website URL, Facebook page, and Twitter handles. *See* FEC Advisory Opinion 2015-04 and Advisory Opinion Request of Collective Actions PAC. JA13; JA12. Under Advisory Opinion 2015-04, the PAC Naming Prohibition prohibits PAG from maintaining a Facebook page titled "I Like Mike Huckabee," and a corresponding website with the web address www.ilikemikehuckabee.com, and PAG may not establish a Twitter account with an identifying or locating "handle" that includes all or part of the name "Mike Huckabee."

A. PAG's Intended Speech

PAG registered with the FEC as an independent expenditure-only committee on March 11, 2015. JA22, 23 at ¶6. PAG is not authorized by any candidate or candidate's committee, and the FEC classifies PAG as an "unauthorized" political committee.

PAG seeks to exercise its First Amendment rights by advocating for the nomination and election of Mike Huckabee as President of the United States. The FEC's Advisory Opinion 2015-04 chills PAG's speech insofar as it prohibits PAG from maintaining and operating a Facebook page titled "I Like Mike Huckabee," a corresponding website with a URL address of www.ilikemikehuckabee.com, and a Twitter account with a "handle" that incorporates all or some of the name "Mike Huckabee." PAG faces the threat of an enforcement action, with potential criminal penalties, if it exercises its First Amendment rights as described. *See* 52 U.S.C. § 30108(c)(1-2); *see also Unity08 v. FEC*, 596 F.3d 861, 864-865 (D.C. Cir. 2009); *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001) ("[A]dvisory opinions have binding legal effect on the Commission.").

On or about July 9, 2015, and prior to the FEC's issuance of Advisory Opinion 2015-04, PAG began operating and maintaining a Facebook page titled "I Like Mike Huckabee" and a corresponding website with the address www.ilikemikehuckabee.com, as part of PAG's independent efforts in support of

the presidential campaign of Governor Mike Huckabee. JA22, 24 at ¶11. Through these platforms, PAG can advocate the nomination and election of Mike Huckabee by communicating with large numbers of individual, grassroots supporters of Governor Huckabee. PAG wishes to develop a related Twitter account that incorporates some or all of the name "Mike Huckabee." JA22, 24 at ¶13. PAG has not used, and does not intend to use, any of these platforms to solicit contributions or to otherwise engage in fundraising activities.

B. History of the PAC Naming Prohibition Regulation

FECA provides: "In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name." 52 U.S.C. § 30102(e)(4).[2] 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.[3] 11 C.F.R. § 102.14(b)(2). The FEC's regulations

[2] This provision was adopted as part of the 1979 amendments to FECA.
[3] 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).

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

From 1980 to 1992, the FEC took the position that the PAC Naming Prohibition meant what it said. That is, the FEC interpreted the provision to prohibit an unauthorized political committee from including a federal candidate's name in the committee's actual name under which its registers.[4] *See* Federal Election Commission Final Rule on Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 59 Fed. Reg. 17,267 (April 12, 1994) ("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

[4] 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.

> 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 Naming Prohibition against a challenge brought by Common Cause, which argued that the provision must be read to extend beyond the PAC's formal (registration) name and also include "any title under which such a committee holds itself out to the public for solicitation or propagandizing purposes." *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, ultimately concluded that "[i]t seems downright unlikely that Congress would have enacted so broad a reform affecting the projects of unauthorized committees without a single word of explanation or debate," and the FEC's interpretation "is the better interpretation." *Id*. at 444, 448.

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

In 1992, the FEC conducted a rulemaking and adopted the position it litigated against in *Common Cause v. FEC*, despite having been told by the D.C. Circuit in 1988 that the agency's longstanding interpretation of the PAC naming provision was "the better interpretation." *See* Federal Election Commission Final Rule on Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 57 Fed. Reg. 31,424 (July 15, 1992). The 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:

> [T]he 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 FEC explained that it] has decided to adopt in its final rule a *ban* on the use of candidate names in the titles of all communications by unauthorized committees.

Id. at 31,425 (emphasis added).

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

The FEC dismissed comments that raised First Amendment objections, noting 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." *See* Federal Election Commission Final Rule on Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 59 Fed. Reg. 17,267 (April 12, 1994); 11 C.F.R. § 102.14(b)(3). 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. *Id*. at 17,267. The FEC "acceded to the petitioner's main concern, amending the rules to

permit the American Ideas Foundation to use the names of federal candidates in titles that clearly indicate opposition to such candidates." *Id*. at 17,269.[5] Less than two years after insisting that a "total ban" was necessary, the Commission changed its mind and "recognize[d] that the potential for fraud and abuse is significantly reduced in the case of such titles [that clearly indicate opposition]." *Id*.

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

Neither FECA, nor the FEC's regulations, nor the explanations and justifications contained in the FEC's Final Rules referenced above contain any

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

mention of the use of a candidate's name in a website URL or social media platform.

4. FEC Application of PAC Naming Prohibition to Website URLs

In 1995, NewtWatch PAC requested an advisory opinion from the FEC regarding the operation of a website and fundraising operations conducted on that website. NewtWatch PAC operated a website located at www.cais.com/newtwatch. NewtWatch PAC did *not* ask the FEC for its opinion on the application of 11 C.F.R. § 102.14(a) – (b) to its activities.[6] 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 Naming Prohibition. The FEC wrote:

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

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

Advisory Opinion 1995-09 (NewtWatch PAC).

The FEC did not issue another advisory opinion considering the application of the PAC Naming Prohibition to an unauthorized committee's activities until 2015. To the best of counsel's knowledge, the FEC has never undertaken enforcement action against a political committee for using the name of a candidate in a 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.[7]

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

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

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

FEC Final Rule on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,072 (July 29, 2002). In response to 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.[8] Generally speaking, Internet-based "social media" remains unregulated.[9]

In 2011, in Matter Under Review 6399 (Yoder), the FEC's six Commissioners divided over the scope of the PAC Naming Prohibition – leaving

[8] *See* FEC Final Rules on 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.").

[9] *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).

its application entirely unclear. The FEC's Office of General Counsel and three Commissioners supported applying the PAC Naming Prohibition to an *authorized* campaign committee, Yoder for Congress, that operated a website located at www.StepheneMoore.com (Stephene Moore was Kevin Yoder's general election opponent). Three Commissioners rejected this position on the grounds that the PAC Naming Prohibition, by its own terms, applies only to *unauthorized* political committees. *See* MUR 6399 (Yoder), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen (June 23, 2011). 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. 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 Naming 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 Naming Prohibition in the future.

C. Collective Actions PAC's Advisory Opinion Request

Collective Actions PAC is an unauthorized, independent expenditure-only political committee whose goal is "to help Sen. Bernie Sanders in his bid to win the Democratic nomination for President." JA12.[10] On or about June 3, 2015, Collective Actions PAC filed a written advisory opinion request with the FEC asking if the PAC's inclusion of the word "Bernie" in certain website URLs and in the titles of two social media accounts it operates is permissible under the PAC Naming Prohibition. *See* Advisory Opinion Request of Collective Actions PAC. JA12. 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." JA12. Collective

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

Actions PAC specified that it did not wish to use these platforms to raise money or solicit contributions. Rather, the PAC "hope[d] to reach millions of voters and believe[d] being active online is the way to achieve our goal." JA12.

The FEC accepted the Advisory Opinion Request for review, designated the matter Advisory Opinion Request 2015-04, and posted it to the FEC's website for public comment. On July 13, 2015, the FEC's Office of General Counsel issued a draft Advisory Opinion in response to Collective Action PAC's Advisory Opinion Request. The draft Advisory Opinion, labeled Draft A, concluded that Collective Action PAC's use of website URLs, a Facebook page, and Twitter handles that include the word "Bernie" violate the PAC Naming Prohibition. JA22, 56.

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

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

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

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

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

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

Following Commissioner Goodman's statements, the FEC voted 6 to 0 to adopt Advisory Opinion 2015-04, Draft A (Agenda Document No. 15-39-A) (there was no mention of MUR 6399 (Yoder) at the FEC's hearing, or of certain Commissioners' conclusion in that matter that a website URL is not subject to the PAC Naming Prohibition). 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." JA13, 14. Citing Advisory Opinion 1995-09, the FEC asserts that "[a] committee's online activities are 'projects' that fall within the scope of section 102.14." JA13, 15. Accordingly, "[b]ecause the names of [Collective Action PAC's] websites and

social media accounts that include Senator Sanders's name do not clearly express opposition to him, those sites and accounts are impermissible under 11 C.F.R. § 102.14." JA13, 16.

While the FEC asserts in Advisory Opinion 2015-04 that Advisory Opinion 1995-09 determined that "[a] committee's *online activities* are 'projects' that fall within the scope of section 102.14" (emphasis added), this is, in fact, 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.[11] Advisory Opinion 2015-04 is a significant expansion of Advisory Opinion 1995-09, and is, in fact, the first instance in which the FEC has considered the application of the PAC Naming Prohibition 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.

As a result of Advisory Opinion 2015-04, the FEC has now formally opined that its regulations do not permit Collective Actions PAC to communicate with supporters through websites with URLs of www.RunBernieRun.com,

[11] 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.

www.ProBernie.com, www.BelieveInBernie.com, or speak via a Facebook page titled "Run Bernie Run," or Twitter accounts with the handles of "@Bernie_Run" and "@ProBernie." Under Advisory Opinion 2015-04, it makes no difference whether Collective Actions PAC utilizes these online assets for advocacy purposes, fundraising efforts, or some other purpose; rather, it is simply the inclusion of the word "Bernie" in the titles or headings of these webpages and social media accounts that is deemed offensive and not permitted under FEC regulations, which impose a "total ban" on Collective Actions PAC's proposed uses of the word "Bernie."[12]

D. 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

[12] Advisory Opinion 2015-04 emphasizes that the 1992 version of the PAC Naming Prohibition was "a 'total ban' on the use of candidate names in committee names." JA13, 15.

to any sanction provided by this Act ….” 52 U.S.C. § 30108(c)(2).

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

Pursuant to its contract with Strategic Media 21, PAG began operating www.ilikemikehuckabee.com and the Facebook page “I Like Mike Huckabee” on or about July 9, 2015. PAG wishes to develop a related Twitter account that utilizes and incorporates the “I Like Mike Huckabee” branding of the website and Facebook page into a Twitter “handle” (such handle would include the name

"Mike Huckabee" or "Huckabee"). PAG has not, and does not intend to use any of these platforms to solicit contributions or to otherwise engage in fundraising activities. PAG wishes to use these platforms solely as a means of communicating with supporters to advocate the election of Mike Huckabee.

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

II. Procedural History

On September 24, 2015, the District Court declined to enter an order enjoining the FEC from applying its regulation to PAG's communications. JA257;

JA258. Four days later, PAG filed a Notice of Appeal and shortly thereafter sought a Motion for Injunction Pending Appeal from the District Court. JA296.

The District Court denied this motion by Order dated October 2, 2015. JA333. On November 18, 2015, this Court denied a Motion for Injunction Pending Appeal and instead granted expedited review, and on November 23, 2015, this Court set oral argument for February 23, 2016. JA334. On December 1, 2015, the United States Supreme Court denied PAG's emergency application for an injunction pending appeal. JA336.

SUMMARY OF THE ARGUMENT

The District Court erred when it failed to apply strict scrutiny to the FEC's content-based PAC Naming Prohibition, as the Supreme Court required in *Reed v. Town of Gilbert*.

First, the PAC Naming Prohibition is a content-based speech regulation. A regulation is content-based if it requires those in charge of enforcing the statute to "[e]xamine 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 Naming Prohibition permits "unauthorized" political committees to use the name of a candidate in its website address, Facebook page, and Twitter handle so long as those communications evidence opposition to the named candidate. To determine whether the PAC Naming Prohibition applies, the FEC is required to

examine the content of the communication to discern whether the speech opposes or supports the candidate whose name appears in the communication. Under Advisory Opinion 2015-04, PAG is prohibited from using Governor Huckabee's name in a website address, Facebook page, or Twitter handle because PAG's communications are (or would be) in *support* of the nomination and election of Mike Huckabee for President. PAG's speech is restricted on the basis of its content.

The District Court erred when it ruled that the PAC Naming Prohibition was a disclosure regulation. Disclosure regulations require the dissemination of information whether in the form of reports or in the form of compelled speech. The PAC Naming Prohibition is not a form of disclosure; it is a form of censorship. As the Supreme Court has recognized since *Buckley*, disclosure provides information, imposes no ceiling on speech, and does not prevent anyone from speaking. *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *Citizens United v. FEC*, 558 U.S. 310, 366 (2010). The PAC Naming Prohibition does not satisfy this formulation.

Had the District Court analyzed the PAC Naming Prohibition under *Reed*'s framework it would have found the restriction unconstitutional. The PAC Name Prohibition is a "total ban" that is not narrowly tailored. The FEC's only justification for imposing a "total ban" is administrative convenience.

Finally, the PAC Naming Prohibition is a speech ban. Permitting the FEC's PAC Naming Prohibition to stand makes the FEC the arbiters of how speakers may permissibly present and frame their messages. The PAC Naming Prohibition could be applied with equal force to the titles and chapter headings of books or documentary movies. Under this regulation, the FEC could prohibit PAG from publishing a book entitled "I Like Mike Huckabee," while it was (presumably) permissible for Citizens United—another unauthorized political committee—to produce a documentary film entitled "Hillary: The Movie," because that film evidenced clear opposition to Hillary Clinton. In short, the PAC Naming Prohibition is an unconstitutional content-based speech prohibition.

Second, the PAC Naming Prohibition functions as an unconstitutional prior restraint of PAG's speech. The Supreme Court has warned of the dangers of regulatory regimes that function as prior restraints due to the complex regulations that grant substantial discretion to the responsible agency. This is the case here. The FEC characterizes the PAC Naming Prohibition as 'deliberately crystalline' but Collective Actions PAC still sought an advisory opinion to determine if the PAC Naming Prohibition permitted certain speech through specific website addresses, Facebook pages, and Twitter handles.

Because advisory opinion are final agency actions and have binding effect on those who are in materially indistinguishable circumstances, the consequences

of the FEC ensnaring PAG in an enforcement proceeding that could include criminal sanctions are onerous. Thus, for PAG and any other political committee to use a candidate's name and avoid the FEC enforcement process, those potential speakers will need to first obtain an advisory opinion.

Third, because the PAC Naming Prohibition constitutes an unconstitutional content-based speech prohibition and because it constitutes an unconstitutional prior restraint, the District Court should have found that PAG was likely to succeed on the merits of its First Amendment claims. The District Court should have found that absent granting PAG's requested injunction, PAG would suffer irreparable harm, that the balance of the hardships tips decidedly in PAG's favor, and that granting the injunction is in the public interest. This Court should enjoin the FEC from enforcing its PAC Naming Prohibition against PAG's speech.

Fourth, the FEC's advisory opinion violates the Administrative Procedure Act. In Advisory Opinion 2015-04, the FEC, for the first time, prohibited the use of a candidate's name in a website address, Facebook page, and Twitter handles. This application of the PAC Naming Prohibition expands the PAC Naming Prohibition beyond the asserted justification and intent expressed in prior rulemakings. Finally, even if the PAC Naming Prohibition is a "mere" disclosure provision, the application of the PAC Naming Prohibition in Advisory Opinion 2015-04 is contrary to law because the FEC does not require the placement of

disclaimers on Internet communications that do not constitute paid advertising placed on third party websites.

STANDARD OF REVIEW

"The denial (or grant) of a preliminary injunction is classified as an immediately appealable interlocutory order. 28 U.S.C. § 1292(a)(1)." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). "The factors to be considered in determining whether injunctive relief pending appeal is warranted are: (1) the likelihood that the party seeking the injunction will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent an injunction; (3) the prospect that others will be harmed if the court issues the injunction; and (4) the public interest." *Population Institute v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). The Court of Appeals "review[s] a district court's weighing of the four preliminary injunction factors and its ultimate decision to issue or deny such relief for abuse of discretion...Legal conclusions...are reviewed *de novo*." *Davis*, 571 F.3d at 1291. "[I]f the district court's decision 'rests on an erroneous premise as to the pertinent law,' we will review the denial *de novo* 'in light of the legal principles we believe proper and sound.'" *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869, 875 (D.C. Cir. 2008) (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001)).

ARGUMENT

This appeal presents three questions that this Court should unequivocally resolve in favor of free speech.

First, the decision of the District Court in this case is not consistent with the Supreme Court's decision in *Reed*, and is inconsistent with decisions rendered by at least two Circuit Courts and several district courts since June 2015 that follow *Reed*. The District Court failed to properly analyze a content-based restriction on speech.

Second, the Supreme Court has cautioned the FEC against imposing prior restraints on speech, whether through regulations that operate as prior restraints "in the strict sense" or through regulations that "[a]s a practical matter … function as the equivalent of prior restraint by giving the FEC power equivalent to licensing laws." *See Citizens United v. FEC*, 558 U.S. 310, 335 (2010). Yet, in this case, the FEC's interpretation of its rules does precisely what the Supreme Court has prohibited. The government has acted as a censor, and has prohibited speech in advance under threat of criminal sanction. *See* 52 U.S.C. § 30109(a)(5)(C) (stating that the Commission can refer knowing and willful violations of FECA to the Attorney General for criminal prosecution).

Third, the FEC violated the Administrative Procedure Act when it, for the first time, and without rulemaking notice and comment, applied the PAC Naming

Prohibition to the Internet and social media platforms in a manner never before contemplated by the FEC, and in a manner inconsistent with the approach taken by the FEC to Internet regulation since 2006.

I. The FEC's Interpretation of the PAC Naming Prohibition Restricts Speech Based Upon the Content of the Speech and Cannot Survive Strict Scrutiny.

"Content-based laws...are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226; *see also Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("A content-based restriction must meet strict constitutional scrutiny to stand, i.e., the restriction must be necessary to serve a compelling state interest...[and be] narrowly drawn to achieve that end.").

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

> This commonsense meaning of the phrase 'content based requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys...Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore are subject to strict scrutiny.

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

A content-based regulation does not satisfy judicial scrutiny where the government's proffered interest is merely a paternalistic one. *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96-97 (1977) (declaring unconstitutional a local ordinance banning real-estate 'For Sale' signs that the township enacted with the paternalistic purpose of reducing public concern over increasing home sales); *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 790-791 (1988) (holding that the government may not substitute its judgment for that of speakers and listeners); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1987) (criticizing State's claimed interest in protecting the Republican Party on the ground that it viewed a particular expression as unwise or irrational); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 and n.31 (1978) (declaring unconstitutional Massachusetts criminal statute prohibiting banks and corporations from making independent expenditures and rejecting Massachusetts' 'highly paternalistic' rationale and ruling that "[t]he people in our democracy are entrusted

with the responsibility for judging and evaluating the relative merits of conflicting arguments.").

A. The FEC's PAC Naming Prohibition Is a Content-Based Speech Prohibition.

The FEC's PAC Naming Prohibition is self-evidently a content-based speech ban and the agency's paternalistic rationale of preventing general confusion is insufficient to satisfy strict scrutiny. Under the PAC Naming Prohibition, an unauthorized 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," but not if the title demonstrates support for that candidate. 11 C.F.R. § 102.14(a) – (b). Appellant's "I Like Mike Huckabee" Facebook page, corresponding website at www.ilikemikehuckabee.com, and any Twitter account handle that includes all or part of the name "Mike Huckabee" are, according to the FEC, titles of special project names which do not demonstrate opposition to Governor Huckabee's candidacy, and are therefore banned by the PAC Naming Prohibition. *See* JA13. If Appellant sought to oppose Mike Huckabee's election, a completely different result would obtain.

In *Reed*, the Town of Gilbert created various sign categories, including "ideological," "political," and "temporary directional" signs, and applied different regulatory standards to these different types of signs, based on their content. *See*

Reed, 135 S. Ct. at 2224-25. Here, the FEC has created two categories of speech: (1) speech that shows opposition; and (2) speech that does not show opposition. Oppositional speech is permitted, while non-oppositional speech is prohibited. In *Reed*, "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." *Reed*, 135 S. Ct. at 2227. The same is true of the FEC's PAC Naming Prohibition – restrictions apply based "entirely on the communicative content of the" political committee's speech.

The District Court disregarded the content-based speech prohibition inherent in the PAC Naming Prohibition, and instead treated the PAC Naming Prohibition as a simple disclosure provision. According to the District Court, "[t]he Name Identification Requirement simply (i) requires a political committee to disclose whether that committee is authorized or unauthorized, and (ii) dictates that such disclosure be made in the name of the committee itself, or in any name under which the committee conducts activities, including a special project name." JA258, 281. This innocuous sounding summary of the PAC Naming Prohibition omits any mention of what the FEC's regulation actually does: impose upon unauthorized committees a "total ban" on the use of a candidate's name in a special project title, except when the use of that name evidences opposition to the candidate.

The District Court arrived at its conclusion even after acknowledging that the PAC Naming Prohibition does, in fact, impose a content-based "burden" on

speech. *See* JA258, 282 (the PAC Naming Prohibition "burdens speech slightly by restricting a limited class of speech (candidate names)"). The District Court nevertheless concluded that "[t]he Name Identification Requirement is therefore best construed as a disclosure provision." JA258, 281. This constitutes clear error by the District Court in light of the Supreme Court's opinion in *Reed*.

The District Court analogized the PAC Naming Prohibition to two cases having nothing to do with disclosure: *Burson v. Freeman*, 504 U.S. 191 (1992), regarding a state law barring campaign speech within 100 feet of a polling place, and *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148 (D.C. Cir. 1990), regarding a parade route shortened due to concerns for violence.

In the District Court's view, "[t]he absence here of a total denial of *any* speech rights," and the characterization of the PAC Naming Prohibition as a "disclosure" mechanism, serves to immunize the PAC Naming Prohibition from *Reed*'s required strict scrutiny analysis. *See* JA258, 285 (emphasis added). No such exception exists in *Reed*, nor does Supreme Court precedent support excusing "slight" burdens on speech. *See U.S. v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 812 (2000) ("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.").

PAG acknowledges that the D.C. Circuit previously described 52 U.S.C. § 30102(e)(4) as "mainly supplement[ing]" FECA's statutory disclaimer provisions. *See Common Cause*, 842 F.2d at 442. This description of a statutory provision that "mainly supplements" a disclaimer requirement is not, however, a conclusion that 52 U.S.C. § 30102(e)(4) is *itself* a disclosure provision that is indistinguishable from FECA's disclaimer and reporting requirements. *Common Cause* did not consider either version of the FEC's PAC Naming Prohibition regulation,[13] and this Court has never held that the FEC's current regulation, which imposes a ban on speech on the basis of content, should be scrutinized as "mere disclosure" rather than as a content-based restriction on speech that is subject to strict scrutiny.

B. The PAC Naming Prohibition Is Not a Disclosure Provision; Rather, the PAC Naming Prohibition Is a Content-Based Speech Prohibition.

The PAC Naming Prohibition may serve some indirect, supplemental disclosure value, but any "disclosure" obtained from this speech ban is highly attenuated at best, and the allegedly "disclosed" information is conveyed only through the non-use of certain words in certain situations. A court's focus should not fall on what the PAC Naming Prohibition *may* perhaps do, or even on what it is allegedly *intended* to do, but rather, on what it very clearly and actually does. The

[13] In fact, the regulation before that court in 1988 mirrored the statutory language (which Appellant is not challenging) – namely, the direct prohibition on the use of a candidate's name in the name of a committee that is not an authorized committee of a candidate.

PAC Naming Prohibition bans speech by prohibiting unauthorized committees from using the names of federal candidates in a certain manner.

The District Court seized on the perceived need for the "disclosure" that occurs when an unauthorized committee refrains from using Mike Huckabee's name in a website URL, Facebook page, or Twitter handle, which in turn supposedly rescues the general public from being confused about the source of the communication. According to the District Court, such confusion was evidenced in Facebook posts that, ostensibly, directed comments to Mike Huckabee. JA258, 273-4 n.3, 275, and 287. The Supreme Court has declared similar speech bans unconstitutional and found that the proper response to the government's concerns is not censorship but more speech. *See Linmark Associates, Inc.*, 431 U.S. at 96-97; *Riley*, 487 U.S. at 790-791; *Tashjian*, 479 U.S. at 224.

Furthermore, the idea that the non-use of certain words constitutes "disclosure" is contrary to Supreme Court precedent. No Supreme Court case has ever recognized that a prohibition on the use of certain words constitutes a disclosure of information. Rather, "disclosure" exists in two forms: (1) disclaimers required to be included on communications; and (2) public reports filed that disclose a person's or committee's address, directors/officers, contributions, and expenditures. *See Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976); *Citizens United*, 558 U.S. at 366-67. FECA's disclosure provisions require additional speech in the

form of a written or oral disclaimer, or through the filing of a contribution/expenditure report. These provisions do not, however, regulate the content of the underlying speech. No disclaimer or reporting provision prohibits the use of certain words, and no disclosure provision seeks to "inform the public" by censoring what may be communicated to the public.[14] The Supreme Court made this clear in *Citizens United v. FEC*, when it explained that disclosure requirements "impose no ceiling on campaign-related activities … and *do not prevent anyone from speaking*." *Citizens United*, 558 U.S. at 366 (emphasis added). By contrast, the PAC Naming Prohibition imposes a ceiling on campaign-related activities and prevents speech unless the content of that speech expresses opposition to a candidate. *Citizens United* makes clear that disclosure is the dissemination of information, not the suppression of speech.

C. The District Court Committed Reversible Error When It Did Not Apply Strict Scrutiny to the PAC Naming Prohibition.

Every court that has addressed restrictions on the content of speech following *Reed* in the election context has found that *Reed* controls. In each of these cases, the court struck down the challenged provision.

[14] As was noted at oral argument before the District Court, and highlighted in its Memorandum Opinion denying the injunction below, a traditional disclosure requirement would allow specified language to be included in the communication (a disclaimer) or a document to be filed with the FEC (a disclosure report). *See* JA212. In this case, these options are simply not present, and the FEC instead prohibits the speech at issue.

On August 6, 2015, the United States Court of Appeals for the Fourth Circuit applied the Supreme Court's *Reed* framework to South Carolina's ban on political robocalls, and declared that prohibition unconstitutional. *See Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015). On August 11, 2015, the United States District Court for the District of New Hampshire declared New Hampshire's ban on so-called "ballot selfies" unconstitutional under *Reed*. *Rideout v. Gardner*, No. 14-489, 2015 U.S. Dist. LEXIS 105194 (D.N.H. Aug. 11, 2015). The United States District Court for the Northern District of Indiana reached the same conclusion. *Indiana Civil Liberties Union v. Indiana Secretary of State*, No. 15-01356, Slip Op. (S.D. Ind. Oct. 19, 2015) (Dkt. No. 32) (granting preliminary injunction enjoining enforcement of 'ballot-selfie' prohibition under *Reed* framework).

Other courts have struck down governmental restrictions on speech beyond the signage context in *Reed*. *See, e.g., Dana's R.R. Supply v. AG,* No. 14-14426, 2015 U.S. App. LEXIS 19201 (11th Cir. Nov. 4, 2015) (analyzing credit card discount/surcharge restrictions under *Reed,* but striking down the restriction without relying on *Reed*);[15] *Rosemond v. Markham*, No. 13-42, 2015 U.S. Dist. LEXIS 134214 (E.D. Ky. Sept. 30, 2015) (prohibiting state board from regulating advice column and striking the restriction under *Reed*). This case is the only case

[15] Judge Sentelle participated on the panel deciding this case.

where a clearly content based restriction in the election context has been upheld following this Court's decision in *Reed*.[16]

D. The PAC Naming Prohibition Does Not Satisfy Strict Scrutiny.

The PAC Naming Prohibition must be narrowly tailored in order to withstand strict scrutiny. The PAC Naming Prohibition does not satisfy this standard. The FEC's interest in preventing confusion, fraud, and abuse in the fundraising context is not implicated by Appellant's communications, because PAG does not seek to solicit funds through the communications at issue. JA13. What remains is an asserted interest in preventing general confusion. If preventing general confusion is a "compelling interest,", which is far from self-evident, the PAC Naming Prohibition is not narrowly tailored to advance this interest.

i. The PAC Naming Prohibition Is Not Narrowly Tailored.

Both the FEC's 1992 and 1994 rulemakings premise the PAC Naming Prohibition on "the *legitimate* governmental interest in minimizing the possibility of fraud and abuse in this situation." *See* 1992 Final Rule, 57 Fed. Reg. at 31,425; 1994 Final Rule, 59 Fed. Reg. at 17,268 (emphasis added). The 1994 rulemaking indicates that "this situation" is the situation in which "potential contributors often confuse an authorized committee's registered name with the names of its

[16] This Court cited *Reed* in a footnote for a different proposition of law in *Wagner v. FEC*, 793 F.3d 1, 28 n.33 (D.C. Cir. 2015). The parties in *Wagner* did not provide any analysis under *Reed* in their respective briefs.

fundraising projects and wrongly believe that their contributions will be used in support of the candidate(s) named in the project titles." 1994 Final Rule, 59 Fed. Reg. at 17,268 (The reference to "this situation" in the 1992 rulemaking is less clear). Other language in the 1992 and 1994 rulemakings suggest the FEC rule is somehow related to "the government's interest in protecting the integrity of the electoral process." 1992 Final Rule, 57 Fed. Reg. at 31,425; 1994 Final Rule, 59 Fed. Reg. at 17,267.

In Advisory Opinion 2015-04, the FEC explained: "To limit 'the potential for confusion' and 'minimize[e] [sic] the possibility of fraud and abuse,' the Act and Commission regulations generally prohibit an unauthorized committee from including the name of a candidate in the name of the committee." JA13, 15.

To the extent that the FEC has clearly identified the government interest that allegedly justifies the PAC Naming Prohibition, it appears to have expressed and identified an interest solely in preventing of fraud, abuse, and confusion among "potential donors [who] think they are giving money to the candidate named in the project's title, when this is not the case." 1992 Final Rule, 57 Fed. Reg. at 31,424. The title of the FEC's 1992 and 1994 rulemakings ("Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees") reinforces this

focus on fundraising, as do the examples included in the two Final Rules.[17] In spite of this emphasis on fundraising fraud, the Commission nevertheless,

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

1992 Final Rule, 57 Fed. Reg. at 31,425 (emphasis added). But there is nothing in the 1992 or 1994 rulemakings, other than conclusory assertions, about "confusion" outside the fundraising context. In the context of regulating charitable

[17] *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.").

solicitations, the Supreme Court recently noted that its cases draw a line "'between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process.'" *Illinois ex rel. Madigan v. Telemarketing Assocs*., 538 U.S. 600, 619-620 (2003) *citing Secretary of Maryland v. Joseph H. Munson Co*., 467 U.S. 947, 969-970 (1984). The FEC's PAC Naming Prohibition appears to fall in the latter category.

The 1992 rulemaking contains two justifications for expanding the PAC Naming Prohibition beyond the fundraising context. First, the FEC explained that under its original interpretation of the PAC Naming Prohibition, "a candidate who objected to the use of his or her name in this manner . . . or who disagreed with the views expressed in the communication was largely powerless to stop it." 1992 Final Rule, 57 Fed. Reg. at 31,424. This concern cannot justify a speech ban. An independent expenditure, of course, cannot be limited or banned because a candidate disagrees with the message. Second, the FEC cited administrative convenience. *Id*. at 31, 425 ("A total ban is … easier to monitor and enforce…."). "Administrative convenience" is not a valid justification for a ban on speech. *See U.S. v. National Treasury Employee Union*, 513 U.S. 454, 473 (1995) ("A blanket burden of speech of nearly 1.7 million federal employees requires a much stronger justification than the Government's dubious claim of administrative convenience."); *Police Dep't of Chicago*, 408 U.S. at 102 n. 9 ("This attenuated

interest, at best a claim of small administrative convenience and perhaps merely a confession of legislative laziness, cannot justify the blanket permission given to labor picketing and the blanket prohibition applicable to others."); *Memorial Hospital*, 415 U.S. at 267-269 (concluding that convenient prevention of fraud did not justify denying health care benefits to all out of state immigrants in the first year of residency); *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1545 (11th Cir. 1993) ("[A]ny City interest in the administrative convenience of dispensing with an individualized determination concerning the sincerity of particular religious beliefs is not compelling). Administrative convenience is the only concrete justification the FEC has offered in support of extending the PAC Name Prohibition beyond the fundraising context. *See* JA13, 15. ("The Commission therefore determined that a "total ban" on the use of candidate names in committee names was more "responsive to the problem, *as well as easier to monitor and enforce*.") (emphasis added).

In this matter, the FEC's asserted governmental interest is not present. PAG does not wish to use the website www.ilikemikehuckabee.com, the Facebook page "I Like Mike Huckabee," or any associated Twitter handles to solicit funds, meaning there is no possibility whatsoever that any person might be confused by a fundraising solicitation. In the absence of any identified governmental interest, the FEC's ban on PAG's speech cannot withstand scrutiny.

The FEC maintains that it must ban *all* references to candidates in special project titles where the use of the candidate's name does not evidence opposition to prevent public confusion about the source of the communication and whether or not the communication was authorized by the named candidate. This complete and indiscriminate speech ban is not narrowly tailored. *See, e.g., McCutcheon v. FEC*, 134 S. Ct. 1434, 1457-58 (2014) (rejecting FEC's argument that aggregate contribution *limits* are sufficiently tailored to prevent the recontribution of funds because "[t]he indiscriminate ban on all contributions above the aggregate limits is disproportionate to the Government's interest in preventing circumvention."); *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003) (holding that the FEC violated the First Amendment rights of appellants because "the Commission failed to tailor its disclosure policy to avoid unnecessarily infringing upon First Amendment rights.").

The FEC has never attempted to clarify the actual cause of the allegedly rampant confusion it claims exists, although the FEC indirectly acknowledged in its 1994 rulemaking that it is not the use of a candidate's name *per se* that may cause confusion, but rather, it is the context or manner in which that candidate's name is used that may lead to confusion. The 1994 rulemaking, in which the FEC permitted the use of a candidate's name where opposition was clearly shown, undermines the FEC's claims that its categorical approach is narrowly tailored

because it is a frank acknowledgment that any "confusion" is the result of the reader's reaction to the use of a candidate's name as presented in the full context of the communication. It logically follows, then, that a narrowly tailored approach to this supposed problem would seek to identify and target the specific contexts in which the use of a candidate's name causes confusion. It cannot be that *any and all* non-oppositional uses of a candidate's name by an unauthorized committee in a project title necessarily leads to confusion.

E. The PAC Naming Prohibition Is Akin to Government Regulation of Book Titles and Is Unconstitutional Under the First Amendment.

The PAC Naming Prohibition's content-based regulation of website URLs, Facebook pages, and Twitter handles makes the FEC the arbiter of how speakers may permissibly present and frame their messages. PAG wishes to use the website www.ilikemikehuckabee.com, the Facebook page "I Like Mike Huckabee," and a Twitter handle that incorporates some or all of the name "Mike Huckabee" to attract participants in the marketplace of ideas to hear PAG's message. For an individual seeking information about Mike Huckabee on the Internet or on social media platforms, the most logical way to find that information is by searching the term "Mike Huckabee." If PAG cannot use the name "Mike Huckabee" in the titles to, and headings of, its internet-based materials, those materials cannot be easily found. Similarly, one would locate a book about Mike Huckabee by

searching for "Mike Huckabee" in the card catalog; books with "Mike Huckabee" in the title would be easily found.

If the FEC can dictate that PAG may not use certain words in its website URL, Facebook page headings, and Twitter handles, then there is no reason the PAC Naming Prohibition would not also apply with equal force to the titles of books or documentary movies. Under the PAC Naming Prohibition, PAG cannot legally produce a book or movie titled "I Like Mike Huckabee," although Citizens United (also an unauthorized political committee) is free to produce "Hillary: The Movie," because that film evidenced clear opposition to Hillary Clinton. *See Citizens United v. FEC*, 558 U.S. 310 (2010).

II. The FEC's PAC Naming Prohibition Functions As a Prior Restraint on Speech.

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

any governmental action that would prevent a communication from reaching the public."). The Supreme Court Reporter is replete with decisions invalidating prior restraints.[18]

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

> This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes

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

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

Citizens United v. FEC, 558 U.S. 310, 335 (2010) (internal citations omitted) (emphasis added). The PAC Naming Prohibition, coupled with necessity of seeking an advisory opinion from the FEC in order to understand the contours of the regulation, creates precisely the same situation the Supreme Court found intolerable in *Citizens United*.

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

A. The FEC Wrongly Described the PAC Naming Prohibition As Providing for Subsequent Punishment Instead of Requiring Clarification and Permission Prior to Speaking.

The FEC attempts to distinguish the PAC Naming Prohibition from the 11-factor test at issue in *Citizens United*. (Dist. Ct. Dkt. 13) (FEC Oppn. to Pl.'s Mot. Prelim. Inj. at 38). Despite the FEC's confidence in its 'deliberately crystalline' regulation, (Dist. Ct. Dkt. 13) (FEC Oppn. to Pl.'s Mot. Prelim. Inj. at 39), Collective Actions PAC still felt compelled to obtain an Advisory Opinion because the FEC had never before applied its PAC Name Prohibition regulation to Facebook Pages and Twitter handles. In fact, the CAP Advisory Opinion was shocking since—assuming the PAC Naming Prohibition is a disclosure provision—disclosure requirements do not apply to internet communications. This is because those communications are not considered public communications where no third-party advertising is involved. *See* 11 C.F.R. § 110.11(a); 11 C.F.R. § 100.26; Final Rule on Internet Communications, 71 Fed. Reg. 18,589 (April 12, 2006). A 'deliberately crystalline' regulation should not conflict with another regulation.

The FEC also contends that the PAC Naming Prohibition is not a prior restraint because the Prohibition provides for subsequent punishment. JA258, 279. The FEC continues noting that temporary restraining orders, permanent injunctions

and administrative orders forbidding certain speech are classic examples of prior restraints. (Dist. Ct. Dkt. 13) (FEC Oppn. to Pl.'s Mot. Prelim. Inj. at 37-38).

But this is precisely what the PAC Naming Prohibition does, particularly the Collective Actions Advisory Opinion. *First*, the Advisory Opinions are final agency actions. *See Unity08,* 596 F.3d at 864-865; *Nat'l Rifle Ass'n of Am.*, 254 F.3d at 185 ("[A]dvisory opinions have binding legal effect on the Commission"). "[A]gency advisory opinions are final agency action where they 'constitute[] final and authoritative statements of position by the agencies to which Congress ha[s] entrusted the full task of administering and interpreting the underlying statutes.'" *Unity08*, 596 F.3d at 865).

Second, those acting in reliance on an FEC Advisory Opinion in materially indistinguishable circumstances are not subject to an enforcement action. *See* 52 U.S.C. § 30108(c)(1-2). Consequences of violating FECA are onerous and include FEC enforcement actions, federal criminal actions, and private party complaints. *See generally* 52 U.S.C. § 30109(a). Thus, FEC advisory opinions provide a safe harbor or forecast warnings. *See Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 415 (E.D. Va. 2012); *see also Citizens United*, 558 U.S. at 335 (noting that because federal campaign finance regulations are complex, and that courts show great deference to FEC determinations, the speaker who wishes to avoid criminal prosecution and expenses of defending oneself in an FEC

proceeding "[m]ust ask a governmental agency for prior permission to speak...."). Thus, an FEC advisory opinion is an administrative order and, in the case of the Collective Actions PAC Advisory Opinion, the FEC explicitly prohibited Collective Actions PAC from using Bernie Sanders name in the URL, on subject headings, and the Twitter handles. Because PAG is in a materially indistinguishable position, the Collective Actions PAC Advisory Opinion, an administrative final order of the FEC, applies with equal force to PAG. Therefore, if PAG speaks, it is subject to criminal prosecution for knowing and willful violations. *See* 52 U.S.C. § 30109(d).

PAG has therefore stopped speaking to avoid potential enforcement actions. This has harmed not only PAG's First Amendment rights, but the public as well who is deprived of PAG's speech. *See Citizens United*, 558 U.S. at 335. The PAC Naming Prohibition is a prior restraint on speech just as the Supreme Court feared in *Citizens United*.

III. The FEC Should Be Enjoined From Applying the PAC Naming Prohibition to PAG's Communications.

The PAC Naming Prohibition is an unconstitutional content-based speech prohibition, and the District Court erred in ruling that the PAC Naming Prohibition does not irreparably harm PAG. As both the Supreme Court and this Court have recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*,

427 U.S. 347, 373 (1976); *see also Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'").

Further, "[S]ecuring First Amendment rights is in the public interest." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). "The public interest is supported by protecting the right to speak, both individually and collectively." *Carey v. FEC*, 791 F. Supp.2d 121, 136 (D.D.C. 2011). This Court should therefore enjoin the FEC from applying its PAC Naming Prohibition to PAG's speech.

IV. The FEC's Application of the PAC Naming Prohibition in Advisory Opinion 2015-04 Is Invalid Under the Administrative Procedure Act.

A court "shall … hold unlawful and set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706. While "substantial deference" is afforded "to an agency interpretation's of its own regulations," courts "must defer to the [agency's] interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.'" *Thomas Jefferson*

Univ. v. Shalala, 512 U.S. 504, 512 (1994) (citing *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)).

The FEC issued an administrative final order prohibiting—for the first time and without rulemaking notice and comment—the use of a candidate's name in a website URL address, Facebook page heading, and Twitter handles. The FEC impermissibly interpreted and applied the PAC Naming Prohibition to Collective Action PAC's Internet assets in Advisory Opinion 2015-04 in a manner that goes far beyond the FEC's asserted justification and intent expressed in two rulemakings. The FEC's application of the PAC Naming Prohibition to a context where there is no potential for fundraising fraud, abuse or confusion, is arbitrary, capricious, an abuse of discretion, and contrary to law. The FEC previously evidenced no intent to apply the PAC Naming Prohibition to modern social media platforms, and subsequently expressed an intent *not* to regulate such Internet communications.

In addition, if the PAC Naming Prohibition is a "disclosure" provision, as the FEC contends and the District Court concluded, then it cannot be applied to PAG's Facebook or Twitter communications. Disclaimers are required only on "public communications," and internet communications on Facebook and Twitter that do not involve paid third party advertising (such as Appellant's) are not "public communications." *See* 11 C.F.R. § 110.11(a); 11 C.F.R. § 100.26; Final

Rule on Internet Communications, 71 Fed. Reg. 18,589 (April 12, 2006). Advisory Opinion 2015-04 is contrary to law.

CONCLUSION

The FEC's prohibition of PAG's use of Mike Huckabee's name in PAG's website addresses, Facebook page, and Twitter handle(s) is an unconstitutional prohibition on speech based solely on the content of that speech. This is an anathema to the First Amendment. Just as this Court would not permit governmental censorship in the contexts of books or movies, it should not allow the FEC to declare that certain speakers may not use certain words in their web addresses, Facebook page headings, and Twitter handles. This Court should enjoin the FEC from enforcing the PAC Naming Prohibition against PAG's speech.

Respectfully submitted December 16, 2015:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(b)(i) because it contains 13,460 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Jason Torchinsky
Jason Torchinsky

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2015, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

Dated: December 16, 2015

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ADDENDUM

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FEDERAL STATUTES

52 U.S.C. § 30102(e)(4)

The name of each authorized committee shall include the name of the candidate who authorized such committee under paragraph (1). In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name.

52 U.S.C. § 30108(c)

(c) Persons entitled to rely upon opinions; scope of protection for good faith reliance.

(1) Any advisory opinion rendered by the Commission under subsection (a) 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.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) 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 or by chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.].

52 U.S.C. § 30109(a) and (d)

(a) Administrative and judicial practice and procedure.

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.] has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged

in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clauses [clause] (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission

to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], the Commission shall make public such determination.

(C) (i) Notwithstanding subparagraph (A), in the case of a violation of a qualified disclosure requirement, the Commission may--

(I) find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and

(II) based on such finding, require the person to pay a civil money penalty in an amount determined, for violations of each qualified disclosure requirement, under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by

filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

(iv) In this subparagraph, the term "qualified disclosure requirement" means any requirement of--

(I) subsections (a), (c), (e), (f), (g), or (i) of section 304 [52 USCS § 30104]; or

(II) section 305 [52 USCS § 30105].

(v) This subparagraph shall apply with respect to violations that relate to reporting periods that begin on or after January 1, 2000, and that end on or before December 31, 2018.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.] has been committed, a conciliation agreement entered into by the Commission under paragraphs (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $ 5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.] has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $ 10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 320 [52 USCS § 30122], which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $ 50,000 or 1,000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $ 5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $ 5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.].

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing a willful violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], the court may impose a civil penalty which does not exceed the greater of $ 10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 320 [52 USCS § 30122], which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $ 50,000 or 1,000 percent of the amount involved in the violation).

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who

are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) [Repealed]

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $ 2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $ 5,000

Subsection (d)

(d) Penalties; defenses; mitigation of offenses.

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure--

(i) aggregating $ 25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both; or

(ii) aggregating $ 2,000 or more (but less than $ 25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

(B) In the case of a knowing and willful violation of section 316(b)(3) [52 USCS § 30118(b)(3)], the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $ 250 or more during a calendar year. Such violation of section 316(b)(3) [52 USCS § 30118(b)(3)] may incorporate a violation of section 317(b), 320, or 321 [52 USCS § 30119(b), 30122, or 30123].

(C) In the case of a knowing and willful violation of section 322 [52 USCS § 30124], the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $ 1,000 or more is involved.

(D) Any person who knowingly and willfully commits a violation of section 320 [52 USCS § 30122] involving an amount aggregating more than $ 10,000 during a calendar year shall be--

(i) imprisoned for not more than 2 years if the amount is less than $ 25,000 (and subject to imprisonment under subparagraph (A) if the amount is $ 25,000 or more);

(ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of--

(I) $ 50,000; or

(II) 1,000 percent of the amount involved in the violation; or

(iii) both imprisoned under clause (i) and fined under clause (ii).

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission

under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.], the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether--

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

FEDERAL REGULATIONS

11 C.F.R. § 102.14

(a) The name of each authorized committee shall include the name of the candidate who authorized such committee. 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.

(b)(1) A delegate committee, as defined at 11 CFR 100.5(e)(5), shall include the word delegate(s) in its name and may also include in its name the name of the presidential candidate which the delegate committee supports.

(2) A political committee established solely to draft an individual or to encourage him or her to become a candidate may include the name of such individual in the name of the committee provided the committee's name clearly indicates that it is a draft committee.

(3) An unauthorized political committee may include the name of a candidate in the title of a special project name or other communication if the title clearly and unambiguously shows opposition to the named candidate.

(c) The name of a separate segregated fund established pursuant to 11 CFR 102.1(c) shall include the full name of its connected organization. Such fund may also use a clearly recognized abbreviation or acronym by which the connected organization is commonly known. Both the full name and such abbreviation or acronym shall be included on the fund's Statement of Organization, on all reports filed by the fund, and in all notices required by 11 CFR 109.11 and 110.11. The fund may make contributions using its acronym or abbreviated name. A fund established by a corporation which has a number of subsidiaries need not include the name of each subsidiary in its name. Similarly, a separate segregated fund established by a subsidiary need not include in its name the name of its parent or another subsidiary of its parent.

11 C.F.R. § 100.26

Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.

11 C.F.R. § 110.11

(a) Scope. The following communications must include disclaimers, as specified in this section:

(1) All public communications, as defined in 11 CFR 100.26, made by a political committee; electronic mail of more than 500 substantially similar communications when sent by a political committee; and all Internet websites of political committees available to the general public.

(2) All public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications, as defined in 11 CFR 100.26, by any person that solicit any contribution.

(4) All electioneering communications by any person.