UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case is about whether an independent committee named Pursuing America's Greatness ("PAG") may operate a Facebook page titled "I Like Mike Huckabee" (or a similar Twitter handle), or a website with the URL www.ilikemikehuckabee.com, to communicate with supporters without asking them for any money. This case is *not* about whether an independent political committee may include the name of a candidate in its own committee name, such as the "Reagan Political Victory Fund" or TrumPAC. This case is *not* about using a candidate's name as part of a fundraising project. PAG uses all disclaimers the FEC requires, and PAG has never sought to hide the fact that its activities were never authorized by Mike Huckabee. Unfortunately, these basic facts must be made clear at the outset because the FEC's Motion for Summary Judgment conflates all of these critical distinctions as its presents a hyperbolic parade of horribles in support of a content-based speech ban.

The question before the court is whether the FEC's PAC Name Prohibition, which "is a restriction on PAG's political speech, not a disclosure requirement," survives strict scrutiny analysis. *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 508 (D.C. Cir. 2016). The D.C. Circuit determined that 11 C.F.R. § 102.14(a) (the "PAC Name Prohibition") is a content-based speech restriction, *id*. at 509-510, that must be narrowly tailored to address a compelling governmental interest. The D.C. Circuit found that "there is a substantial likelihood that section 102.14 is not the least restrictive means to achieve the government's interest," *id*. at 510, but the appeals court determined that the FEC's lack of evidence regarding the efficacy or burdens of different disclaimer requirements made it "'difficult to assess' the merits of the FEC's conclusions." *Id*. at 511. The FEC's burden in this case is a daunting one, as it must prove that a disclaimer requirement would be ineffective and that its speech ban is necessary to achieve the

government's compelling interests. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000). Any such argument, however, is precluded by the Supreme Court's conclusion "that disclosure is a less restrictive alternative to more comprehensive regulations of speech[]" and "disclaimers *avoid confusion by making clear that the ads are not funded by a candidate or political party*." *Citizens United v. FEC*, 558 U.S. 310, 368-69 (2010) (emphasis added). After convincing eight justices of the U.S. Supreme Court of this position, the FEC now seeks to backtrack and argue that disclaimers are ineffective.

The FEC's dismissive stance toward disclaimers and disclosure in this litigation is understandable given its burden of proof, but it is perplexing as a broader matter. Here, the FEC characterizes disclaimers as "insufficient" and "fundamentally ineffective." FEC Br. at 39-41. However, when not defending content-based speech bans in litigation, the FEC is a reliable champion of the efficacy and value of disclaimers and disclosure. For instance, the agency is currently considering a rulemaking on how to improve disclaimer requirements for online advertising, and that effort is largely premised on the idea that improving disclaimer requirements would be effective in combatting foreign interference in U.S. elections. FEC Commissioner Ellen Weintraub wrote on September 7, 2017, "Given the revelations of the past few days regarding the secret purchase of thousands of internet political ads by foreign actors during the 2016 presidential election, there can no longer reasonably be any doubt that we need to revise and modernize our internet disclaimer regulations." *See* Letter from FEC Commissioner Ellen Weintraub to FEC Chairman Steve Walther, re: Internet Communications Disclaimers, REG 2011-02 at 1 (Sept. 7, 2017). It is altogether unclear why disclaimers would be considered effective in combatting foreign interference in U.S. elections, but "fundamentally

ineffective" when it comes to combatting supposed confusion stemming from the title of a Facebook page or website URL address.

The FEC attempts to answer the D.C. Circuit's demand to bolster the record to explain why "larger or differently worded disclosures would be less effective at curing fraud or abuse than a ban on speech," but it is unable to do so. *Pursuing America's Greatness*, 831 F.3d at 511. A review of the record evidence makes clear that the PAC Name Prohibition is a content-based speech-ban that must be invalidated because less restrictive alternatives are available and the agency is unable to demonstrate empirically that those less restrictive alternatives would be ineffective.

STANDARD OF REVIEW

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

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

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

Therefore, the judge's function at this stage of the proceedings is to determine whether there is a "genuine issue for trial." *See Liberty Lobby, Inc*., 477 U.S. at 249. There is no such issue absent "sufficient evidence favoring the nonmoving party" that would allow "for a jury to return a verdict for that party." *Id*. Thus, if the nonmoving party presents evidence that is only "merely colorable" or "not significantly probative," this Court may grant PAG's Motion for Summary Judgment. *Id*. at 249-250. Furthermore, although affidavits are permissible in summary judgment proceedings, evidence that constitutes hearsay is not permitted. *See Gleklen v. Democratic Congressional Campaign Comm., Inc*., 199 F.3d 1365, 1369 (D.C. Cir. 2000); *Ragsdale v. Holder*, 668 F. Supp. 2d 7, 15-16 (D.D.C. 2009).

Finally, because the FEC's PAC Name Prohibition is a content-based ban on speech, the FEC bears the burden of proving that the PAC Name Prohibition furthers a compelling governmental interest *and* is narrowly tailored to address that interest. *See Pursuing America's Greatness*, 831 F.3d at 510 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015); *Playboy Entm't Grp*., 529 U.S. at 816 ("[W]hen the government restricts speech, the government bears the burden of proving the constitutionality of its actions.")).

ARGUMENT

I. THE FEC CONFLATES THE ISSUE OF THE USE OF CANDIDATES' NAMES.

The FEC conflates the two distinct ways in which the FEC regulates the use of candidates' names by unauthorized committees. *First*, no unauthorized committee may use a candidate's name in its own committee name. *See* 52 U.S.C. § 30102(e)(4) ("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."); 11 C.F.R. § 102.14(a) ("no unauthorized committee shall include the name of any candidate in its name"). Under these provisions, "Pursuing America's Greatness" is a permissible unauthorized committee name, and PAG does not challenge this requirement. *Second*, the FEC decreed by regulation in 1992 that the word "name," as used in 11 C.F.R. § 102.14(a), "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). In 1994, the FEC decided that "[a]n 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). As interpreted and applied in Advisory Opinion 2015-04 (Collective Actions PAC), PAG's Facebook page "I Like Mike Huckabee" (and related Twitter handles) runs afoul of these "special project name" provisions. PAG's challenge is limited to the FEC's "special project name" provision, which the D.C. Circuit determined was a content-based speech restriction.

Much of the FEC's evidence, however, concerns the impermissible use of a candidate's name in an unauthorized committee's name, which of course is governed by the provisions that PAG does *not* challenge. For example, the FEC refers to a 1992 Dateline Report episode that

investigated the fundraising practices of the "Reagan Political Victory Fund." FEC Br. at 20. As far as the record indicates, the "Reagan Political Victory Fund" was the name of a political committee.[1] An unauthorized committee is not permitted to include the name of a candidate in its own name, and PAG does not seek to overturn that prohibition. This example has no bearing on the issue of special project names or titles such as the Pursuing America's Greatness Facebook page titled, "I Like Mike Huckabee."

In fact, of the 288 paragraphs in the FEC's Statement of Material Facts, 150 are about political committees that have used a candidate's name in some fashion. Of these paragraphs, 31 paragraphs involve instances in which the candidate's name appears in the unauthorized committee's name, and for that reason are irrelevant to this matter. *See, e.g.*, (FEC SMF ¶¶ 49, 56-68, 70, 83-84 132-135, 167-170, 175). The statutory prohibition of using a candidate's name in the name of the PAC is not at issue in this case and accordingly these facts are irrelevant. Furthermore, of the 119 paragraphs concerning special project names, 90 regarded solicitations or concerns about fundraising activities with an additional 19 concerning both solicitations and non-fundraising activities with the remaining ten paragraphs discussing neither. PAG has made clear in affidavits filed before this Court and the D.C. Circuit, as well in its deposition pursuant to Fed. R. Civ. P. 30(b)(6) that it is not fundraising through its special project name websites. PAG SMF ¶ 19.

II. THE FEC DOES NOT HAVE A COMPELLING INTEREST TO SUPPORT ITS REGULATION

As stated in PAG's opening brief, (PAG Op. Br. at 25-29), the FEC has not proven the existence of a problem in need of a content-based speech ban, namely, confusion among the

[1] It is unclear from the record whether the "Reagan Political Victory Fund" was a committee name or a project name.

electorate related to the use of candidate names in "special projects" that do not fundraise or solicit contributions. None of the FEC's exhibits concern special projects that do not fundraise on their special project websites. PAG's special project pages only contain information and advocacy. If someone wants to contribute to PAG, that person must first leave the special project website and go to PAG's website to make a contribution. *See* (PAG Dep. Tr. at 74:5-75:12).

But even if the FEC were able to prove that confusion exists among the electorate with respect to special project websites that do not solicit funds, it remains unclear whether preventing generalized confusion, fraud, and abuse are compelling interests.

First, the FEC relies on *Burson* for the proposition that the prevention of confusion, fraud, and abuse are compelling interests. (FEC Br. at 17). The Supreme Court's *Burson* opinion begins by distinguishing between its prior precedent declaring unconstitutional a complete criminal ban for "a newspaper editor to publish an editorial on election day urging readers to vote in a particular way[]" and the State's authority to regulate conduct in and around the polls. *Burson v. Freeman* 504 U.S. 191, 193 (1992). This distinction drives the Court's analysis and makes clear that *Burson* is grounded in the unique area of statutes regulating conduct at polling locations. *Burson* is therefore *sui generis* and is concerned with preventing a very specific variety of confusion, fraud, and abuse; namely, confusion, fraud, and abuse at the polls. *Burson* explicitly distinguishes its analysis from political speech cases generally. *See id*. at 209 n.11. The law considered in *Burson* was deemed to survive strict scrutiny because its reach was limited to those "last 15 seconds before its citizens enter the polling place [so that they are] as free from interference as possible." *Id*. at 210. This highly limited decision cannot be contorted to justify a blanket content-based prohibition on the use of candidate names in special project designations.

The FEC incorrectly asserts that *Burson* stands for the proposition that the government has a compelling interest in protecting voters from confusion and undue influence as a general matter and in all circumstances. (FEC Br. at 17). At most, *Burson* stands for the proposition that the government has a compelling interest in protecting voters from confusion and undue influence and narrow parameters established to protect another constitutional right, namely the right to vote. *See Burson*, 504 U.S. at 213 (Kennedy, J., concurring). *Burson* does not stand for the broad proposition that the FEC claims it does.

Second, in the arena of political speech, the U.S. Supreme Court recently held that the government does not have a compelling interest in preventing false speech. The Supreme Court explained that the government has an interest in limiting false speech only in limited circumstances where false statements are made for material gain or for purposes of perpetuating criminal conduct. *United States v. Alvarez*, 567 U.S. 709, 717-18 (2012) (government may proscribe the following forms of speech: speech that incites imminent unlawful action; obscenity; defamation; speech integral to criminal conduct; fighting words; child pornography; fraud; and speech "presenting some grave and imminent threat the government has the power to prevent"). The Supreme Court made clear, however, that the prevention of false statements alone is insufficient to proscribe speech. *See id*. at 718-19. Rather, statutes that criminalize perjury or criminalize making false statements to a law enforcement officer are permissible because such statements inhibit the truth-seeking function of law enforcement investigations and court proceedings. *See id*. at 720. However, false statement statutes do not grant the government general authority to regulate what can and cannot be said in the vigorous exchange of ideas in the public square. *See id*. at 717-20.

Third, when analyzing an Ohio disclosure statute, the U.S. Supreme Court did not characterize Ohio's interest in preventing fraudulent and libelous statements as compelling, but rather, merely "legitimate." *See McIntyre v. Ohio Elections Comm'n*, 514 US 334, 349-351 (1995). The Supreme Court also recognized that the disclaimer provision considered in *McIntyre* was not the state's primary means of preventing fraudulent and libelous statements because Ohio law also included a more specific statute that prohibited false statements. *Id*. at 350-51. Similarly here, Congress passed a more specific statute that prohibits precisely what the FEC fears, namely fraudulent fundraising. *See* 52 U.S.C. § 30124 (prohibiting unauthorized committees or persons from misrepresenting that the they are fundraising on behalf of the candidate).

The U.S. Supreme Court continues to view *Burson* as an exceptional case that is limited to polling places and the mechanics of voting and not as a general grant to revoke First Amendment speech rights any time the government claims to have a compelling interest in preventing general confusion, fraud, and abuse. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014) (declaring unconstitutional Massachusetts buffer zone outside of abortion clinics and distinguishing the buffer zone at issue in *Burson*); *see also McIntyre*, 514 U.S. at 344-46 (distinguishing, like *Burson*, between cases concerning the mechanics of the voting process itself and cases about free speech, holding that *McIntyre* involved a limitation on political speech itself, and rejecting the government's purported interest in preventing libel). This Court should not reduce *Burson* from an exceptional case that "force[s] us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government

proceedings," *Burson*, 504 U.S. at 198, and apply it to a case that does not involve competing constitutional rights.[2]

III. THE PAC NAME PROHIBITION IS NOT NARROWLY TAILORED.

"It is not enough to show that the Government's ends are compelling; the means must be *carefully tailored* to achieve those ends." *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989) (emphasis added). To survive the narrowly tailoring prong of strict scrutiny analysis, the FEC bears the burden of proving that the PAC Name Prohibition is the least restrictive means to achieve its asserted compelling interest. *See Playboy Entm't Grp., Inc.,* 529 U.S. at 816-17. A statute will be deemed narrowly tailored only if it "targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The FEC is not required to prove that its regulation is perfectly tailored, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015), but "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy Entm't Grp., Inc.,* 529 U.S. at 813. A less restrictive means is effective and must be used instead of a complete ban even if the less

[2] In attempt to bolster the evidentiary record that the FEC has a compelling interest, the FEC asserts that when it comes to political engagement, people are "cognitive misers" because people minimize the time and effort spent on evaluating candidates. (FEC Br. at 29). *First*, this is hearsay. The FEC did not identify an expert witness to testify and it is seeking to have this unsworn out of court statement to be admitted as truth that voters are cognitive misers who spend little time evaluating candidates. This is improper for summary judgment. *See* Fed. R. Evid. 802 adv. comm. n. (stating that in the summary judgment context, the lone hearsay exception is limited to affidavits). *See also Gleklen v. Democratic Congressional Campaign Comm., Inc.*, 199 F.3d 1365, 1369 (D.C. Cir. 2000); *Ragsdale v. Holder*, 668 F. Supp. 2d 7, 15-16 (D.D.C. 2009). Furthermore, the FEC did not do any independent study to verify whether this study is true. It is therefore insufficient to prove a compelling interest. Without the FEC independently verifying this information, it is insufficient to prove a compelling interest. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 823 (2000). In any event, the relevance of this study is negligible. It is not a study of whether disclaimers are effective. Even if this 1995 book—based on a 1991 study—was analyzing the effectiveness of disclaimers, the U.S. Supreme Court fifteen years later came to the opposite conclusion finding that, at the very least, disclaimers avoid confusion by making clear who is speaking. *See Citizens United v. FEC*, 558 U.S. 310, 368 (2010).

restrictive means are not foolproof. *See Sable Communications of Cal.*, 492 U.S. at 128-31 and n.10.

A regulation will not survive narrowly tailoring analysis on the grounds that it leaves available alternative channels of communication. (FEC Br. at 36 and n.8). In the context of strict scrutiny, "[i]t is of no moment that the statute does not impose a complete prohibition." *Playboy Entm't Grp., Inc.,* 529 U.S. at 812. "Content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Playboy Entm't Grp., Inc.,* 529 U.S. at 812. (*See* PAG Op. Br. at 35). Whether alternative avenues of communication are available is relevant only when considering statutes that are facially content-neutral under the intermediate scrutiny standard. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Reed*, 135 S. Ct. at 2229 (stating that *Ward*'s framework "applies only if a statute is content neutral."). Here, the FEC PAC Name Prohibition is a content-based speech ban and, accordingly, is subject to strict scrutiny. *See Pursuing America's Greatness*, 831 F.3d at 509-10 (describing the FEC's PAC Name Prohibition as "content-based discrimination pure and simple."). It is irrelevant that PAG admitted at its deposition that it could still communicate in favor of Mike Huckabee in other ways. (FEC Br. at 37). It is further irrelevant that other Super PACs have advocated for other candidates without using the candidate's name. (FEC Br. at 37).

The FEC attempts to save its content-based speech ban by arguing that the U.S. Supreme Court upheld Florida's ban on fundraising by judicial candidates because the ban—like the FEC's PAC Name Prohibition—still permitted judicial candidates to speak in other ways. (FEC Br. at 36 and n.8) (citing and quoting *Williams-Yulee*, 135 S. Ct. at 1670). The FEC takes the Court's comments out of context. In the cited language, the Supreme Court addressed Justice Kennedy's characterization of the statute's prohibition as "state censorship" imposing a "gag" on

candidates that "locks the First Amendment out." *See Williams-Yulee*, 135 S. Ct. at 1670 (quoting Justice Kennedy's dissent). The Supreme Court did not note alternative avenues of communication as proof that the statute is narrowly tailored, but rather, to take issue with Justice Kennedy's characterization of the statute. *See id*. The Court concluded that Florida's ban was narrowly tailored because most States had drawn the same line as Florida, namely, between prohibiting judicial candidates from personally soliciting funds but permitting committees to solicit funds. *See id*. at 1671. The Court also concluded that William-Yulee's alternative and more narrowly tailored approaches were unworkable. *See id*. at 1671-72. Nothing in the Supreme Court's analysis indicates a doctrinal shift that a regulation may survive strict scrutiny so long as the means chosen to serve a compelling interest leaves open ample alternatives for communication.

The FEC also attempts to lessen its burden by wrongly contending that it can prove its content-based speech ban is narrowly tailored through "common sense" and not empirical evidence. (FEC Br. at 30 and 39). For this proposition, the FEC again wrongly relies on *Burson*. The holding in *Burson* is limited to the question of whether a State has the power to "regulate conduct in and around the polls to maintain peace, order and decorum there." *Burson,* 504 U.S. at 193. The Court made clear that its "modified burden of proof"—in which it permitted "common sense" to satisfy strict scrutiny analysis rather than requiring empirical evidence—was a function of the case itself. As the Court explained, the modified burden of proof was necessary in *Burson* because most of the buffer zone statutes were enacted more than 100 years earlier, long before legislatures started holding hearings and gathering evidence for a legislative record. *Id*. at 208. Thus, it would be "difficult for the States to put on witnesses who can testify as to what would happen without" the buffer zone statutes. *Id*. at 208. The Court found that it was

"common sense" that "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter," *id*. at 207-208, but that it could not require empirical proof that a 100-foot boundary was "perfectly tailored" to address the state's interest in preventing voter intimidation and election fraud because obtaining such proof "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Id*. at 209. In other words, empirical proof would require the state to reduce the boundary until it could show that voters were being intimidated or election fraud was occurring, and the Court concluded that "we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of 'constitutional dimension.'" *Id*. at 209. Thus, the Court's use of this modified burden was a response to the highly unusual facts involved and is very clearly an exception to the general rule that strict scrutiny requires both evidence of a problem and empirical evidence that the means chosen are narrowly tailored. *See Playboy Entm't Grp., Inc.,* 529 U.S. at 813.

A. In 1992-1994, The FEC Did Not Have Any Evidence That Larger Disclaimers Were Ineffective At Preventing Confusion, Fraud, And Abuse.

The FEC devotes several paragraphs in its Statement of Material Facts attempting to demonstrate that it had empirical evidence supporting its conclusion that larger disclaimers are unworkable and that a content-based speech ban is narrowly tailored. *See, e.g.*, SMF ¶ 217; (FEC Br. at 32). A review of the record, however, reveals that the FEC did not reject the use of larger or different disclaimers after considering evidence suggesting that such disclaimers would be ineffective. Rather, the record indicates that the FEC dismissed the disclaimer approach on the basis of one unsupported statement from the agency's General Counsel. SMF ¶ 217; FEC Br. at 32. Specifically, the General Counsel advised the Commissioners that the disclaimer approach would result in complaints from political committees who would argue that the FEC was telling

them how to write their letters. This statement itself is not supported by the record, given that a highly specific disclaimer proposal was made by a national political party committee. Furthermore, the possibility that the FEC might receive complaints is not evidence concerning the efficacy of larger or different disclaimers. (FEC Br. at 32). This "evidence" is insufficient to prove a complete content-based ban is narrowly tailored.

To the extent the FEC considered the constitutional dimensions of its proposals, the record indicates that that consideration was only cursory. During consideration of the 1992 regulation, FEC Chairman Aikens stated, "[i]n looking over the responses to our original notice of proposed rulemaking, it seemed to me that most of them felt the ban was unconstitutional and were opposed to it. Is that not the case? This [final rule] document and your comments would not indicate that the majority of the commenters were opposed to a ban." *See* Sadio Decl., Ex. S, at 8 (Dkt. No. 40-91 at 9) (ECF pagination). A representative of the FEC's General Counsel's Office responded, "I think we indicate that the comments did oppose the ban on First Amendment grounds." *Id*. Later, Commissioner Elliot noted that that proposed ban on the use of candidate names in special project titles was not carefully considered or narrowly tailored: "I mean there is no moderation. I mean we've gone from hot to cold without anything in between." *Id*. at 16. The other Commissioners, however, dismissed this concern. Commissioner McDonald responded: "And it seems like to me, I think you are right, that all these issues will be challenged, as has the law been challenged on numerous occasions." *Id* at 10. Commissioner Potter adopted a similar cavalier position: "It may well be that our regulation today, if we adopt it, will be challenged. Fine. … A court may later determine that our attempt to solve this problem is impermissibly broad because of the First Amendment of the Constitution." *Id*. at 26-27. This "let the courts sort it out" approach does not suggest concern with narrow tailoring.

When an effort was made to better tailor the speech ban by including an exception for political parties, who, it was argued, are expected to speak on behalf of their candidates, the FEC's General Counsel advised against the exception, arguing that "the across the board ban is the easiest for us to defend." *Id*. at 15.

In 1994, Commissioner Aikens reiterated her concern that the PAC Name Prohibition was potentially unconstitutional: "I'm not sure we're not overstepping our Constitutional authority in passing these regulations. And I'm also not sure we have as strong a governmental interest in minimizing the possibility of fraud and abuse as this memo indicates. But we shall see." *See* Sadio Decl., Exhibit V, at 18; (Dkt. No. 40-94 at 19).

In 1994, the FEC noted that one commenter suggested that the disclaimer "be in as large and as bold a typeface as the largest, boldest use of the candidate's name anywhere in the communication." 59 Fed. Reg. 17267, 17268; *see also* FEC Ex. 68 (Dkt. No. 40-68). As noted above, the FEC abandoned its consideration of alternate disclaimer requirements after the FEC's General Counsel told the Commissioners that new disclaimer requirements would prompt complaints from the regulated community. (FEC Br. at 32).

The FEC, however, had before it a proposal from a leading member of the regulated community, the Democratic National Committee, that detailed a very specific disclaimer requirement that, on its face, would appear to impart exactly the information a reader would need to avoid the alleged confusion the FEC feared. The FEC claims, however, to have concluded that a disclaimer requirement would be "insufficient to deal with this situation." (FEC Br. at 103). This appears to be an entirely inaccurate summation, as there is no evidence in the record that the FEC considered whether disclaimers could sufficiently "deal with this situation." As noted, the only explanation in the record as to why the disclaimer approach was abandoned is the

General Counsel's dubious claim that the regulated community would find a new disclaimer requirement objectionable.

The FEC later asserted, again without any supporting evidence and against all logic, that larger disclaimers would be "more burdensome" than an outright speech ban. 59 Fed. Reg. at 17268. There is absolutely no evidence in the record that suggests the FEC rejected the disclaimer option on the basis of any empirical evidence showing that disclaimers would be ineffective, and there remains "no evidence that larger or differently worded disclosures would be less effective at curing fraud or abuse than a ban on speech." *Pursuing America's Greatness*, 831 F.3d at 511. To the contrary, what the record demonstrates is that the FEC had before it a more narrowly tailored alternative, proposed by a knowledgeable commenter, the Democratic National Committee, but that the FEC rejected that proposal for reasons having nothing to do with the effectiveness of that proposal. Specifically, the Democratic National Committee advised the FEC that:

> For the revised disclaimer rule to be effective, the disclaimer must be highly visible to the potential contributor. Therefore, there must be size and location requirements included in the revised changes. The DNC's position is that when an unauthorized committee solicits contributions for itself through a special fundraising project using the name of any candidate in its title, the disclaimer should be printed directly under or next to the name of the fundraising project. In addition, the disclaimer should be the identical type face and size as the name of the fundraising project. For example, letterhead with the name of the fundraising project would be required to include the disclaimer [in] this form:
>
> **AMERICANS FOR SMITH**
> **PAID FOR BY THE XYZ COMMITTEE;**
> **THIS SOLICITATION IS NOT AUTHORIZED BY PRESIDENT SMITH**
>
> When the name of the fundraising project appears in the text of a solicitation, the disclaimer requirement should be required to be included as a footnote following each mention of the project. For example, if the text read:
>
> > We need more committed citizens like you to help make our government work again. That's why Americans for Smith* is running advertisements ….

The footnote would state:

> * paid for by the XYZ Committee; this solicitation is not authorized by President Smith.

(FEC Br. at 103); FEC Ex. 68 (emphasis in original).

Without any evidence, and without any citation of authority, the FEC dismissed this proposal with one sentence: "The Commission *believes* that such an approach *could* be more burdensome than the current ban, while still not solving the potential for fraud and abuse in this area." 59 Fed. Reg. at 17268 (emphasis added). This comment in the Federal Register and Mr. Noble's comment are precisely the same conjecture that the U.S. Supreme Court has previously rejected as insufficient to prove that a statute is narrowly tailored and it fails to address the precise question in this analysis, namely, whether a plausible less restrictive alternative would be effective. *See Playboy Entm't Group*, 529 U.S. at 820 (rejecting Government's expert report because Government made no attempt to verify the accuracy of the expert's assertions through field tests or surveys); *see also id*. at 822 (rejecting as sufficient evidence a sole conclusory statement by legislator because it does not show how effective or ineffective an alternative less intrusive regulation is); *see also Sable Communications,* 492 U.S. at 129-130 ("Aside from conclusory statements during the debates by proponents of the bill, . . . the congressional record presented to us contains no evidence as to how effective or ineffective the . . . regulations were or might prove to be.").

After reviewing the FEC's 1992 and 1994 Explanations and Justifications, the D.C. Circuit rightly noted this deficiency in the record, noting that "without more reasoning, it is difficult to assess the merits of the FEC's conclusions." *See Pursuing America's Greatness*, 831 F.3d at 511 (quoting *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (plurality opinion)).

The FEC's one-line rejections of a more narrow approach constituted mere "anecdote" and "supposition," both of which are insufficient to satisfy strict scrutiny. *See id*. (citing *Playboy Entm't*, 529 U.S. at 822; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000)). Because the FEC's Explanation and Justification, along with the rest of the record, is silent as to whether larger or differently worded disclaimers were just as effective, the FEC is compelled to adopt the less restrictive standard. *See id*. at 510 (citing *Playboy Entm't*, 529 U.S. at 826).

Although the FEC discussed in detail the evidence it had before it during the rulemaking in 1992 and 1994, (FEC Br. at 31-34), the FEC did not further supplement the record as to the precise question at issue, namely, whether "larger or differently worded disclosures would be less effective at curing fraud or abuse than a ban on speech." *See Pursuing America's Greatness*, 831 F.3d at 511. In all of their 288 paragraphs of the statement of material facts, the FEC responds to the D.C. Circuit's request for more evidence with a single, one sentence comment from the FEC's General Counsel that did not even purport to address the relative effectiveness of larger or different disclaimers. (FEC Br. at 32).

When the FEC did consider the efficacy of disclaimers, however briefly, it did *not* consider larger or differently worded disclaimers. Rather, the FEC considered only the then-existing disclaimer requirements. For instance, the FEC referred to the disclaimers used in the "American's for Reagan" and "Americans for Dole" cases (FEC Br. at 31-32), but only to suggest that the disclaimers already required under FEC regulation were somehow inadequate. Even if true, this consideration in no way demonstrates that a content-based ban is more effective than a *different disclaimer requirement* in preventing confusion, fraud, and abuse.

Similarly, in the 1992 Explanation and Justification, the FEC gave the example of the XYZ committee establishing a special project called Americans for Q. (FEC Br. at 33). The FEC

posited that even if the special project contained the proper disclaimer, a potential donor "might believe he or she was contributing to Q's campaign." (FEC Br. at 33) (emphasis added). The "proper disclaimer" referenced was the disclaimer required by FEC regulations at the time. Again, this example tells us nothing about whether confusion could be alleviated by the use of larger or differently worded disclaimers. Instead, this example simply demonstrates that the FEC believed its current disclaimer was not adequate in this situation.

The D.C. Circuit required the FEC to supplement the record to demonstrate that a larger or differently worded disclaimer requirement would be less effective at curing fraud or abuse than a content-based speech ban. The FEC failed to supplement the record on this point. The result should be the same.

B. The FEC's More Recent Evidence Does Not Demonstrate That Larger Disclaimers Are Less Effective Than A Complete Content-Based Speech Ban.

The more recent evidence submitted by the FEC also does not demonstrate that larger or differently worded disclaimers, in addition to the currently required disclaimers, would not be as effective at preventing confusion, fraud, or abuse as a content-based ban.

The NRCC's Defeat Alex Sink for Congress website complies with all applicable laws and regulations, but is nevertheless far different from what PAG proposes.[3] The NRCC's website contains all of the FEC's required disclaimers. *See* (FEC Br. Ex. 15) (Dkt. No. 40-15 at

[3] The NRCC's Alex Sink website appears to have used the official Alex Sink for Congress campaign logo, which is a republication of campaign material. (FEC Br. Ex. 15) (Dkt. No. 40-15 at 8). Under FEC regulations, such republication by a third party is permissible when the campaign materials are incorporated into a communication that advocates the defeat of the candidate that prepared the material. *See* 11 C.F.R. § 109.23(b)(2). In the present case, Pursuing America's Greatness would not be able to republish any Mike Huckabee campaign materials because republication in support of a candidate is treated as coordination. *See* 52 U.S.C. 30116(a)(7)(B)(iii); 11 C.F.R. § 109.23. PAG does not challenge this prohibition and does not intend to republish any official campaign materials on its special project websites in support of candidates for office. In addition, the NRCC's webpage included a fundraising aspect, which PAG does not propose to include on its special project websites.

10-11); *see* 11 C.F.R. § 110.11. Furthermore, the NRCC's website falls within the opposition exception at 11 C.F.R. § 102.14(b)(3) as it very clearly states "Make a Contribution Today to Help Defeat Alex Sink and candidates like her." *See id*. at 8. The individual claiming to be confused, Dr. Bellamy, readily admits in his affidavit that he did not "*read every word on the page* because the website looked legitimate and [he] was ready to contribute." *Id*. at 3, ¶ 8 (emphasis added). This example does not demonstrate that disclaimers are less effective than a content-based speech ban. It demonstrates that Dr. Bellamy failed to read large, bolded text that would have cured his confusion, and to the extent he was confused after not reading the webpage, he was confused *in spite of* the FEC's PAC Name Prohibition, which specifically allows what FEC claims is the source of confusion here (Dr. Bellamy's failure to read notwithstanding). Narrowly tailoring does not require the less restrictive means to be foolproof. *See Sable Communications of Cal.*, 492 U.S. at 128-31 and n.10 (rejecting the Government's position that only a total ban could prevent minors from accessing indecent commercial telephone communications because credit cards, access codes, and scrambling rules could prevent children from accessing these messages, despite acknowledging that this less restrictive alternative was not foolproof).

This example, therefore, does not demonstrate that larger or differently worded disclaimers would be less effective at preventing confusion, fraud, and abuse. *See Playboy Entm't Group*, 529 U.S. at 823.

Next, the FEC points to the "Bet on Bernie" website (FEC Br. at 34); SMF ¶¶ 265-66; (FEC Ex. 35) (Dkt. No. 40-35). Again, the individual that the FEC claims was confused admitted to not reading the webpage. Mr. Sherman states in his affidavit that "As I looked to efficiently make my contribution, I did not notice any language on the website indicating that it

was not Bernie Sander's campaign website." (Dkt. No. 40-35 at 3, ¶ 7). If Mr. Sherman had read the materials more closely, he may have cured his own confusion. In any event, a larger, more prominent, or differently worded disclaimer requirement – such as the one proposed by the Democratic National Committee – could have conveyed very clearly to Mr. Sherman that the Americans Socially United website was not Bernie Sander's authorized campaign website, while still allowing Americans Socially United to speak freely by urging people to "Bet on Bernie."

Finally, the Conservative StrikeForce Exhibit 50 is irrelevant. Like other mailers,[4] Conservative StrikeForce's mailer uses Mr. Cuccinelli's image, but his name is not used in the PAC's name—Conservative StrikeForce—or in the special project name—Virginia Victory Money Bomb. (Dkt. No. 40-50 at 5). This mailer does not implicate the FEC's PAC Name Prohibition. Contrary to the FEC's assertion (FEC Br. at 34), Ms. Maloney's affidavit does not assert that she overlooked Conservative Strike Force's disclaimer that it was not raising funds in conjunction with any campaign. That disclaimer does not appear anywhere on the mailer (Dkt. No. 40-50 at 2 ¶ 5) (stating that the banner on the attached email is "similar" to the mailer Ms. Maloney responded to); *see also* (Dkt. No. 40-50 at 5). Nor does this disclaimer appear in the response email Ms. Maloney received after her contribution. This exhibit is irrelevant to the regulatory provisions at issue, and in no way demonstrates that a larger or differently worded disclaimer would be ineffective at preventing confusion, fraud, and abuse. If anything, this exhibit suggests that an additional disclaimer requirement would be helpful.

[4] *See Will NRA ads in Virginia's U.S. Senate race help or hurt Ed Gillespie*, Jenna Portnoy, *Washington Post* (Aug. 23, 2014) (showing an NRA mailer with Ed Gillespie's image prominently displayed) *available at* https://www.washingtonpost.com/local/virginia-politics/will-nra-ads-in-virginias-us-senate-race-help-or-hurt-ed-gillespie/2014/08/23/88882bf4-286b-11e4-8593-da634b334390_story.html?utm_term=.1c6a0f0862f3

The Conservative Strike Force fundraiser emails in Exhibit 49 are also irrelevant. The emails included in Exhibit 49 do not implicate the FEC's PAC Name Prohibition because they do not use a candidate's name in a special project title. If anyone was confused by these fundraising solicitations, it was in spite of the PAC Name Prohibition. In addition, and as noted repeatedly above, PAG does not propose to engage in fundraising through its special project websites. If someone wishes to donate to PAG, that person must leave the special project website and go to PAG's main website to contribute. *See* (PAG Dep. Tr. at 74-75, 95).

Exhibit 49 is irrelevant to the regulatory provisions at issue, and in no way demonstrates that a larger or differently worded disclaimer would be ineffective at preventing confusion, fraud, and abuse. If anything, this exhibit suggests that an additional disclaimer requirement would be helpful.

Even if the Conservative Strike Force emails were somehow relevant to the question of disclaimer effectiveness, it is worth noting that the FEC has had an opportunity to take enforcement actions against several so-called "scam PACs," including the subject of Exhibits 49 and 50, but declined to apply the statutory prohibition against the fraudulent solicitation of funds where it clearly could have done so. *See*, *e.g.*, MUR 6633 (Republican Majority Campaign PAC); MUR 6641 (The Coalition of Americans for Political Equality PAC); MUR 6643 (Patriot Super PAC); MUR 6645 (The Conservative StrikeForce). In these case, the FEC voted 4-2 to adopt an exceedingly narrow view of 52 U.S.C. § 31024(b), which provides that "[n]o person shall … fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations." Relevant judicial precedent explains that for purposes of this provision, "[e]ven absent an express misrepresentation, a representation is fraudulent if it

was reasonably calculated to deceive persons of ordinary prudence and comprehension." *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010). The FEC dismissed the complaints filed against these "scam PACs" so that they may continue to operate. It is ironic that the FEC now relies on its own inaction to "demonstrate[] the danger of unauthorized committees raising funds using the names of galvanizing candidates such as Donald Trump and Bernie Sanders." (FEC Br. at 24). The FEC had the opportunity to exercise a statutory tool that directly targets the activity that the FEC complains is the source of numerous problems, and the FEC declined to use that tool. The continued existence of "scam PACs" like the Conservative StrikeForce is evidence only of the FEC's failure to enforce the law; it is not evidence of the necessity of a speech ban that was not even at issue in the cases noted above.

Finally, the FEC contends that comments posted to the "I Like Mike Huckabee" Facebook page proves that people are confused. (FEC Br. at 35). The D.C. Circuit found the FEC's record evidence deficient as to why larger or differently worded disclaimers would be ineffective despite having the FEC's Facebook evidence before it. *See Pursuing America's Greatness,* 831 F.3d at 510-11; *see Pursuing America's Greatness v. FEC*, No. 15-5264 (D.C. Cir.) (JA at 68-106). In fact, the D.C. Circuit never cited the Facebook evidence. The FEC infers from the D.C. Circuit's silence about the Facebook posts that the D.C. Circuit did not disturb this Court's factual filings. (FEC Br. at 26). Even if true, the D.C. Circuit still found that the PAC Name Prohibition was not narrowly tailored and that PAG was substantially likely to succeed on its First Amendment claim. *See Pursuing America's Greatness v. FEC*, 831 F.3d 500, 510-12 (D.C. Cir. 2016).

Furthermore, the FEC does not know whether any of these individuals were actually confused about the identity of the person to whom they were commenting. Perhaps these were—

as amicus stated—parasocial interactions where one person interacts with celebrities or public figures through social media not expecting a response. *Pursuing America's Greatness,* No. 15-5264, Br. of *amici curiae* Pacific Legal Foundation and the James Madison Center for Free Speech at 14-15 (D.C. Cir. Dec. 23, 2015) (Doc. No. 1590287); (PAG Op. Br. at 28). This is similar to people interacting with fictional characters or yelling at the television set during a sports game. Br. of *amici curiae* at 14-15. The FEC did not supplement the record with an affidavit from any one of the individuals who posted comments on the I Like Mike Huckabee Facebook page to refute this point. The FEC, therefore, has not proven that those person's posting on the I Like Mike Huckabee Facebook page were actually confused.

C. PAG's Proposed Larger Disclaimer At The Top Of Its www.ilikedavidyoung.com Page Is A Plausible Less Restrictive Alternative.

In its opening brief, PAG proposed larger disclaimers to be placed at the top of the special project website. (PAG Op. Br. at 31); *see also* 59 Fed. Reg. at 17268. Thus, for example, the www.ilikedavidyoung.com website would have this disclaimer at the top:

THIS WEBSITE IS NOT DAVID YOUNG'S AUTHORIZED[5] CAMPAIGN WEBSITE.

Then, the website would have its content advocating for David Young. At the bottom of the page, in 12 point font, using contrasting color in a clear and conspicuous manner, and contained in a box would be following:

> Paid for by Pursuing America's Greatness. Not authorized by any candidate or candidate's committee. www.pagpac.weebly.com.

[5] The FEC asserts that the D.C. Circuit's use of the word "official" in its proposed disclaimer "This Website Is Not Candidate Doe's Official Website" creates confusion because official denotes the officeholder's duties, not the person's capacity as a candidate. (FEC Br. at 39 n.10). PAG would have no objection to using the word "authorized" rather than "official," or any other word that conveys the same or similar meaning.

See 11 C.F.R. § 110.11 (outlining disclaimer requirements); *see also Pursuing America's Greatness*, 831 F.3d at 510. (The 1992 Democratic National Committee proposal is another viable alternative.) Eight Justices of the U.S. Supreme Court recently ruled that disclaimers prevent the very confusion the FEC claims as its compelling interest. *See Citizens United*, 558 U.S. at 368 ("At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party."). The larger disclaimer at the top of the page that PAG is proposing is in *addition* to what the Supreme Court in *Citizens United* deemed sufficient to dispel confusion.[6]

The FEC does not directly respond to PAG's proposal (just as it brushed aside the Democratic National Committee's proposal in 1992). Instead, the FEC conflates the statutory prohibition preventing unauthorized political committees from using a candidate's name in the committee's official name. (FEC Br. at 39). What PAG proposes is nothing like a situation involving a committee named "Reagan for President" accompanied by a disclaimer stating "Paid for by Reagan for President, Not Authorized by President Reagan." FEC Br. at 39. Instead, PAG proposes to use a website URL and/or a Facebook page titled "I Like David Young." Rather than being banned from using the words "David Young," PAG proposes that the FEC could instead require PAG to place a disclaimer at the top of the page, using a larger font than is used at the bottom of the page. This additional disclaimer would read "This Is Not David

[6] The FEC seizes upon PAG's Dunkin Donuts example about the importance of branding. (FEC Br. at 24 n.5). First, this statement is taken out of context. PAG was referring to the importance of keeping the "I Like Mike Huckabee" name for its Facebook page because it had already accumulated a following and changing the name risked losing what had already been built. *See* (PAG Dep. Tr. at 49:4-50:9; 66:11-25). Second, what PAG is proposing would dispel the FEC's concern here because, to use the coffee cup example, a disclaimer would appear at the top saying "This is Not Dunkin Donuts Coffee" and at the bottom saying "Not Authorized by Dunkin Donuts."

Young's Authorized Campaign Website" or "This Is Not David Young's Authorized Campaign Facebook Page," or any other wording that clearly conveys the message that the user has not landed on David Young's office or authorized campaign page.

The FEC's concerns about "Trump For President's Official Campaign Page" accompanied by a disclaimer stating the opposite presents a situation not before the Court. If there is any confusion caused by "I Like David Young" in the website URL or in on the title of the Facebook page, that confusion would be effectively eliminated by the proposed new disclaimer coupled with the existing disclaimer requirement.

D. The FEC Cannot Prove That Linked Disclaimers Or Roll-Over Disclaimers For Social Media Make PAG's Plausible Less Restrictive Alternative Ineffective.

As PAG stated in its opening brief, the FEC has, to date, been unable to determine what disclaimer, if any, is required on a paid Facebook advertisement. (PAG Op. Br. at 33-34).[7] PAG will, however, voluntarily provide a link on its sponsored (paid) advertisement to its full disclaimer. (PAG Op. Br. at 34). Alternatively, PAG will provide its disclaimer using rollover technology so that if the person reviewing the link simply scrolls over the Facebook advertisement, the disclaimer will appear. *See* FEC AO 2011-09 Draft C at 2-3, 9 (Facebook, Inc) (stating that Facebook advertisements with linked disclaimers or roll-over disclaimers satisfies 11 C.F.R. § 110.11).[8] To succeed in defending the PAC Name Prohibition, the FEC must adduce evidence and prove that either of these plausible, less restrictive alternatives is

[7] The FEC misunderstands PAG's proposed less restrictive alternative. (FEC Br. at 42-43). PAG was not proposing to solely rely on Facebook's blue checkmark verification program. Rather, PAG mentioned the Facebook verification program as in addition to PAG's proposed larger disclaimer. PAG did not intend to propose the Facebook blue checkmark verification program as a separate and independent less restrictive alternative. (PAG Op. Br. at 32-33).

[8] *Available at* https://www.fec.gov/files/legal/aos/77162.pdf (last visited Nov. 27, 2017).

ineffective. *Playboy Entm't Group*, 529 U.S. at 823; *Pursuing America's Greatness*, 831 F.3d at 510-11.

The FEC also contends that there is a low click through rate for online advertisements. (FEC Br. at 41). But the FEC's evidence is flawed. At its most fundamental, none of the eighteen industries that WordStream studied involved politics or campaigns. Furthermore, whether or not someone clicks on a disclaimer is not the same as whether or not someone is confused by what he or she is viewing. Moreover, if someone wants to learn more after reviewing a character limited Facebook advertisement, or even contribute, that person would be required to click the Facebook link that would then direct her to both the larger disclaimer at the top of the page and the already required disclaimers at the bottom of the page. But the FEC's evidence suffers additional flaws.

First, Exhibit 43 is not about click through rates for Facebook advertisements, rather, Exhibit 43 purports to analyze the click through rates of Google advertisements, both advertisements that appear after you conduct a search and advertisements that appear in your Gmail account or when you open Google. *See* FEC Ex. 43 at 3.

Second, although the FEC presents Exhibit 44 as a study of Facebook click through rates across 18 industries, FEC Br. at 41, Exhibit 44 makes clear that WordStream's data set is limited to a *sample* of WordStream's 243 *clients*. *See* Ex. 44 (Dkt. No. 40-44 at 18) ("This report is based on a *sample* of 256 US-based WordStream client accounts…"). WordStream's data is therefore not reliable proof that PAG's disclaimer's are ineffective.[9]

[9] Exhibit 45 is even worse as it is hearsay on top of hearsay and is therefore inadmissible. *See* Fed. R. Evid. 802 adv. comm. n. (stating that an exception to hearsay is limited to affidavits filed in support of summary judgment). *See also Gleklen*, 199 F.3d at 1369; *Ragsdale*, 668 F. Supp. 2d at 15-16. The author of Exhibit 45 states that the information provided is simply a "compilation" of other studies on the internet, including WordStream's study of its "customers" Facebook

Furthermore, the FEC did not do any independent analysis to determine if WordStream's low click through rate is accurate. For purposes of narrowly tailoring analysis, the FEC must prove that these numbers are accurate. *See Playboy Entm't Group*, 529 U.S. at 823 (rejecting the Government's expert who produced a spreadsheet demonstrating why a less restrictive alternative was ineffective because "the Government made no attempt to confirm the accuracy of its estimate through surveys or other field tests."). To show that PAG's plausible, less restrictive alternative is ineffective, the Government must *prove* its case. The FEC cannot present a single unverified report about the click through rate success of a sample of WordStream's clients and claim it as proof. Furthermore, this Court should not even consider this evidence because it is inadmissible hearsay. *See* Fed. R. Evid. 802 adv. comm. n. (stating that, in the summary judgment context, an exception to hearsay is limited to affidavits filed in support of summary judgment). *See also Gleklen*, 199 F.3d at 1369; *Ragsdale*, 668 F. Supp. 2d at 15-16.

Third, even if there is a low click through rate on Facebook sponsored advertisements, that is not the same as proof of confusion. Even if PAG's linked disclaimer or roll-over disclaimer is not completely foolproof, that is not sufficient to defend the regulation. *See Sable Communications of Cal.*, 492 U.S. at 128-31 and n.10 (rejecting the Government's position that only a total ban could prevent minors from accessing indecent commercial telephone communications because credit cards, access codes, and scrambling rules could prevent children from accessing these messages, despite acknowledging that this less restrictive alternative was not foolproof). PAG proposes to provide additional disclaimers that the FEC cannot show will be ineffective at stemming confusion. In a variety of other contexts, the FEC—with the Supreme

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click through rate, that the author put together. (Ex. 45, Dkt. No. 40-45 at 2 and 11-12); (SMF ¶ 113.) Without the FEC independently verifying this information, it is insufficient to prove larger disclaimers are not effective. *See Playboy Entm't Group*, 529 U.S. at 823.

Court's strong approval—relies on disclaimers and disclosure to impart important information to citizens. This reliance, however, is premised is on a small detail that no agent of the government can control: the government can require a disclaimer, but the government cannot require any individual to actually read that disclaimer. If people choose to ignore a disclaimer, the government's paternalistic interests can serve to satisfy strict scrutiny. *See, e.g.*, *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[]" and further stating that if the people cannot evaluate the arguments made by a speaker, "it is a danger contemplated by the Framers of the First Amendment."); *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).

PAG's proposed alternative would place a disclaimer in a location more likely to be seen by readers than what the FEC currently requires. This is a less restrictive, and likely *more* effective, alternative than a content-based speech ban if the government's interest is preventing confusion. PAG has presented a plausible, less restrictive alternative and it is the FEC's burden to show that that alternative would be ineffective. *Playboy Entm't Group*, 529 U.S. at 823;

Pursuing America's Greatness, 831 F.3d at 510-11. The FEC has presented no evidence that demonstrates that a larger, differently worded, or differently placed disclaimer, coupled with the currently required disclaimers, would be are ineffective at preventing confusion.[10]

IV. THE FEC'S PAC NAME PROHIBITION FAILS EVEN IF THIS COURT SEVERS THE OPPOSITION EXCEPTION BECAUSE IT REMAINS A CONTENT-BASED SPEECH BAN.

The FEC asserts that the opposition exception contained in subsection 11 C.F.R § 102.14 (b)(3) is severable. (FEC Br. at 44-45). That section is not severable from the general naming prohibition at 11 C.F.R § 102.14(a).

First, the requisite intent to have severability is not present. *See MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) ("Whether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision."). The FEC's 1994 rulemaking expressly acknowledged that the 1992 version of the regulation was overbroad and applied to situations in which the government's purported interests were not advanced – namely, where an unauthorized political committee uses the name of a candidate in project titles that demonstrate opposition to that candidate. *See* 1994 Final Rule, 59 Fed. Reg. 17,267, 17,269 (April 12, 1994) ("As stated in its summary of the petition ... 'There is no danger of confusion or abuse inherent in the use of a candidate's name by a committee or project which opposes the

[10] The FEC contends that PAG argued inappositely when PAG stated "Not one of the six Commissioners even suggested prohibiting Facebook sponsored ads due to fear of confusion because a disclaimer was not readily visible on the sponsored ad itself." (PAG Op. Br. at 34) (FEC Br. at 41 n.12). The point here is that disclaimers prevent confusion, *Citizens United*, 558 U.S. at 368, and three Commissioners thought that either a link or roll over display of the disclaimer for Facebook advertisements satisfied 11 C.F.R. § 110.11. The remaining three Commissioners thought no disclaimer was required at all. *See* FEC AO 2011-09, Draft B at 1; FEC AO 2011-09, Draft C. PAG's proposed link or roll-over disclaimer should dispel any concerns about confusion.

candidate.' The Commission recognizes that the potential for fraud and abuse is significantly reduced in the case of such titles, and has accordingly revised its rules to permit them.").

Second, as is demonstrated *supra*, the FEC's content-based speech ban is not narrowly tailored because disclaimers are not ineffective at addressing the FEC's purported compelling interest. Severing the opposition exception would not cure this deficiency. Without the opposition exception, the PAC Name Prohibition is still a content-based speech ban because the prohibition prevents PAG from using a candidate's name in its speech. To enforce the ban would require the FEC to examine the content of PAG's message and whether that message contains a candidate's name. *See McCullen*, 134 S. Ct. at 2531. Severing the opposition exception does not cure the FEC's content-based problem.

CONCLUSION

Even if the FEC has proven that it has a compelling interest, its PAC Name Prohibition is not narrowly tailored. It prohibits PAG from having a Facebook page entitled "I Like David Young" but permits PAG's opponents to have a Facebook page entitled "I Loathe David Young." The First Amendment cannot permit one side of the debate to fight freestyle while compelling the other side to fight by the Marquis of Queensberry rules. *R. A. V. v. St. Paul*, 505 U.S. 377, 392 (1992).

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

Respectfully Submitted,

November 27, 2017

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Certificate of Service

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

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