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 REPLY BRIEF

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GLOSSARY OF ABBREVIATIONS

"FEC" .....Federal Election Commission

"PAC" ..... Political Action Committee

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

"URL".....Uniform Resource Locator

INTRODUCTION

The FEC approaches this case from a starting point that fundamentally violates the First Amendment. The agency contends that it may regulate the content of a political committee's website Uniform Resource Locator ('URLs'), Facebook page titles, and Twitter handles, and prohibit a committee from using certain words or phrases, so long as it refers to this content regulation as "disclosure." The FEC's regulation, however, is self-evidently a content-based speech restriction that permits a political opponent of Governor Huckabee to use the phrase "I loathe Mike Huckabee" in its website URL, Facebook page title, and Twitter handle, while Pursuing America's Greatness ('PAG') is prohibited from using the phrase "I like Mike Huckabee." To the FEC, the regulation presents no constitutional problem because PAG can speak "freely" elsewhere, and in any event, this prohibition of messages in PAG's website URL, Facebook page title, and Twitter handle is just "disclosure." Unfortunately for the FEC's position, the First Amendment prohibits the federal government from policing the content of speech on political issues.

The FEC concedes, as it must, that expressing support for Mike Huckabee in the title of a book or movie is perfectly acceptable – not because of basic First Amendment principles, but because the author's name would dispel any confusion over the author's identity. Somehow, the same is not true of the title of a Facebook

page, a website URL, or Twitter handle. Somehow, the FEC explains, the title of a book or movie is a "project or communication done under the committee's own name," whereas the title of a Facebook page is a "name under which a committee conducts activities." *See* (FEC Oppn. Br. at 60).[1] The FEC's "deliberately crystalline" regulation is, it now seems, anything but crystalline, and is instead simply a vesting of paternalistic authority to determine when American voters—already supplied with disclaimers and in possession their own common sense—can actually discern who is speaking to them. *See* (Op. Br. at 51).

None of the FEC's arguments converts the PAC Name Prohibition[2] from a content-based speech ban into a "disclosure" provision. No other disclosure provision prohibits PAG from communicating its support of Mike Huckabee in its website URL, Facebook page title, and Twitter handle while permitting other political committees to oppose Mike Huckabee in their website URLs, Facebook page titles, and Twitter handles. The reason is obvious: the PAC Name Prohibition is not disclosure; it is a content-based speech ban.

[1] Citations of the FEC's and PAG's briefs are to the ECF generated pagination.
[2] The PAC Name Prohibition is the regulation codified at 11 C.F.R. § 102.14(a) and (b)(3).

STATUTES AND REGULATIONS

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

SUMMARY OF THE ARGUMENT

The PAC Name Prohibition is a content-based speech ban and not a disclosure regulation. If an unauthorized political committee wants to communicate support of a candidate in its special project name, i.e., website URL, Facebook page title, or Twitter handle, then the regulation is applicable and prohibits the activity. *See* 11 C.F.R. § 102.14(a). But if the ideological opponents of that political committee want to communicate opposition in those same mediums, the regulation permits it. *See id*. § 102.14(b)(3). Essentially, PAG cannot have www.ilikemikehuckabee.com but its ideological opponent can have www.iloathemikehuckabee.com.

The PAC Name Prohibition is not a disclosure regulation because it does prohibit political committees, like PAG, from communicating support for a political candidate in its special project names. The Supreme Court has consistently stated that disclosure regulations do not prohibit anyone from speaking.

The district court erred in that it did not analyze the PAC Name Prohibition under strict scrutiny because it is a content-based speech ban. Even the FEC's own

regulation confirms special project names can communicate political positions. *See* 11 C.F.R. § 102.14(b)(3) (permitting the use of a candidate's name in a special project name if the special project name clearly communicates opposition to the candidate).

PAG has standing to bring this claim as PAG challenges the PAC Name Prohibition as a unified whole. The opposition exception is not severable because the FEC has not demonstrated that it intended the regulation to be severable. Furthermore, when the FEC amended the regulation in 1994, it added the opposition exception because the PAC Name Prohibition prohibited too much speech. This demonstrates that the FEC did not intend the PAC Name Prohibition to be severable but intended it to operate as a coherent whole.

The Supreme Court's recent opinion in *Reed v. Town of Gilbert* controls the outcome of this case. To determine whether the PAC Name Prohibition applies, the FEC is required to look at the content of a political committee's special project name to determine if it uses a candidate's name and then whether it communicates support or opposition for that candidate. If the special project name communicates support, the FEC prohibits it. If the special project name communicates opposition, the FEC permits it. Under *Reed*, this is a content-based speech ban.

The FEC's PAC Name Prohibition is a prior restraint because PAG is restrained from expressing its support for Mike Huckabee in its website URL,

Facebook title page, and Twitter handle. Due to the FEC's advisory opinion issued to Collective Actions PAC, PAG is on notice for criminal sanctions for knowing and willful violations of the PAC Name Prohibition. PAG is therefore forced to choose between foregoing First Amendment speech or risking protracted litigation, civil penalties, and criminal sanctions. As the Supreme Court recognized in *Citizens United*, this is the functional equivalent of a prior restraint and is prohibited under the First Amendment.

PAG is irreparably harmed because it cannot communicate its support of Mike Huckabee in its website URL, Facebook page title, and Twitter handle. An injunction is in the public's interest because the time to speak is now, as the presidential primaries are ongoing. The FEC's excuse that its PAC Name Prohibition should not be upended so close to a presidential election should be rejected because it is contrary to the First Amendment's protection of political speech.

ARGUMENT

I. THE PAC NAME PROHIBITION IS A SPEECH BAN AND NOT A DISCLOSURE REGULATION.

The Supreme Court recently explained that a regulation is content-based if the regulation, on its face, makes distinctions based on the message the speaker conveys. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). A regulation that cannot be applied without reference to the message conveyed is a content-

based regulation. *See id*. *See also* (Op. Br. at 46-51). The PAC Name Prohibition regulates speech on the basis of content because it applies only to unauthorized committees who communicate support for a particular candidate in their "special project names." *See* 11 C.F.R. § 102.14(a). If another unauthorized committee communicates opposition to the same candidate, the PAC Name Prohibition does not apply. *Id*. § 102.14(b)(3). Under *Reed*, the PAC Name Prohibition qualifies as a content-based speech regulation.

While the statutory provision from which the PAC Name Prohibition stems has been referred to as supplementary to FECA's disclosure provisions, *Common Cause v. FEC*, 842 F.2d 436, 442 (D.C. Cir. 1988), the PAC Name Prohibition, in and of itself, is not a disclosure provision. Eight Supreme Court justices agreed that disclosure does not prevent anyone from speaking. *See Citizens United v. FEC*, 558 U.S. 310, 366 (2010) ("Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities *and do not prevent anyone from speaking*.") (emphasis added) (internal quotation marks and citations omitted). The PAC Name Prohibition *prevents* PAG from communicating its support of Mike Huckabee through its website URL, Facebook page title, and Twitter handle. *See* 11 C.F.R. § 102.14(a). Worse, the PAC Name Prohibition *permits* PAG's political opponents to use the phrase "I loathe Mike Huckabee" in the very same mediums. *See id*. § 102.14(b)(3). This is not

disclosure. *See* PAG Op. Br. at 51-53. This is a content-based speech ban. *See id.* at 46-51.

The FEC insists that the PAC Name Prohibition is simply a disclosure regulation. (FEC Oppn. Br. at 36-39). The FEC cites *Common Cause* and *Galliano* because, according to the FEC, those cases held that the PAC Name Prohibition is a disclosure regulation. (FEC Oppn. Br. at 36-37). Of course, both *Galliano* and *Common Cause* were decided six years *before* the current PAC Name Prohibition was adopted, and both cases considered only the FECA provision at 2 U.S.C. § 432(e)(4) (now, 52 U.S.C. § 30102(e)(4)) that requires that an unauthorized "political committee shall not include the name of any candidate in its name." Neither decision considered, or has any bearing on, the content-based distinctions found in the existing PAC Name Prohibition. The FEC's interpretation of the current regulatory PAC Name Prohibition was not before the court.

At best, the language cited by the FEC was dicta. In neither case was the court asked whether FECA's PAC naming provision was a disclosure provision, and in neither case was the court presented with a case in which the FEC regulated committees' "special project names" differently on the basis of their content. The issue before the court in *Common Cause* has been extensively briefed. The issue in *Galliano* was whether specific FECA provisions regarding "the names and disclaimers of unauthorized political committees" trumped the Postal Service's

general false representation statute, as applied to mailed solicitations of an unauthorized political committee that the Postal Service found "misrepresentational." *See Galliano v. U.S. Postal Service*, 836 F.2d 1362, 1367-69 (D.C. Cir. 1988).

First, and most fundamentally, the FEC confuses the source of the description contained in the *Galliano* opinion that the FECA's statutory PAC naming provision is part of the FECA's disclosure regime. *See* (FEC Oppn. Br. at 36 and 38). The FEC claims that the *court* in *Galliano* characterized the FECA's PAC naming provision as part of FECA's disclosure requirements and that the FECA's PAC naming provision is part of FECA's specific disclosure requirements. *Id*. In fact, it appears that it was the FEC's and appellant's briefs that described FECA's PAC naming provision as a disclosure statute, and the court merely recounted the FEC's and appellant's position. *Galliano*, 836 F.2d at 1368. The *Galliano* court did not hold that the FECA's PAC naming provision is part of FECA's disclosure regime. Rather, the Court held, unremarkably, that the FEC "[i]s the exclusive administrative arbiter of questions concerning the name identifications and disclaimers of organizations soliciting political contributions." *Id*. at 1370.

Second, even if the court did describe FECA's PAC naming provision as part of FECA's disclosure provisions, that passing reference was dicta because it

was not necessary to determine that FECA vests the FEC with exclusive civil enforcement authority with respect to federal campaign finance laws. *See Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592 n.5 (1993) (describing dicta as that which is "uninvited, unargued, and unnecessary to the court's holding."). Whether or not FECA's PAC naming provision, much less the current regulatory PAC Name Prohibition, is a disclosure provision has no bearing on whether FECA's civil enforcement procedures in FECA preempt the postal fraud statute.

Next, the FEC relies on this Court's decision in *Common Cause*. (FEC Oppn. Br. at 36-37). While PAG has acknowledged that this Court described FECA's PAC naming provision as a supplement to FECA's disclaimer requirements, the FEC does not address PAG's primary point that no court has ruled that FECA's PAC naming provision, or the FEC's regulatory PAC Naming Prohibition, is *itself* a disclosure regulation subject to exacting scrutiny. *See id*. The U.S. District Court for the Eastern District of Virginia agreed with the *Common Cause* court that FECA's PAC naming provision supplemented FECA's disclosure regime. But the *Stop Hillary PAC* court did not rule that FECA's PAC naming provision was *itself* a disclosure regulation. (FEC Oppn. Br. at 89). Furthermore, the Eastern District of Virginia adopted the FEC's mischaracterization of *Galliano* by suggesting that it was this Court, rather than the FEC itself, that characterized

the PAC Name Prohibition as part of FECA's disclosure requirements. (FEC Oppn. Br. at 36-37, 89).[3] Moreover, the *Stop Hillary PAC* court's reliance on *Buckley*, *McConnell*, *Citizens United*, and *McCutcheon* is misplaced because those cases concerned only the disclosure of information about the sources of candidate or committee funding and "paid for by" disclaimers. *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (disclosure of campaign contributions); *McConnell v. FEC*, 540 U.S. 93, 200-02 (2003) (disclosure of contributors who contributed $1,000 or more annually when the recipient committee spends $10,000 or more on electioneering communications); *Citizens United*, 558 U.S. at 366-67 (disclosure and disclaimer requirements for electioneering communications); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (disclosure of contributions). (FEC Oppn. Br. at 90). The FEC's current regulatory PAC Name Prohibition does not provide any information to readers; it simply prohibits PAG from conveying the message "I Like Mike Huckabee" via its website URL, Facebook page title, and Twitter handle.

The PAC Name Prohibition is a content-based speech ban and this Court should declare it unconstitutional. *See Common Cause*, 842 F.2d at 448 (the FEC "[m]ust allow the maximum of first amendment freedom of expression in political

[3] Additionally, we note that *Stop Hillary PAC* is a somewhat different case than the challenge PAG brings. First, Stop Hillary PAC is directly challenging the constitutionality of the statutory PAC naming provision. PAG only challenges the FEC's application of its PAC Name Prohibition. Furthermore, PAG's name does not include the name of a candidate.

campaigns commensurate with Congress' regulatory aims)." The FEC's regulation permits political committees to communicate opposition to a candidate, but prohibits committees from communicating support. This is a content-based restriction of First Amendment freedoms.

Finally, even if FECA's PAC Name Prohibition is a disclosure regulation, this Court should still analyze it as a content-based speech restriction under strict scrutiny. *See Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012) (*en banc*). It is possible that FECA's statutory PAC naming provision passes constitutional muster while the FEC's regulatory PAC Name Prohibition does not. This case does not challenge FECA's statutory provision – it challenges only the FEC's current interpretation and application of the regulatory PAC Name Prohibition to PAG's website URL, Facebook page title, and Twitter handle. With respect to PAG's website URL, Facebook page title, and Twitter handle, the effect of the FEC's PAC Name Prohibition is not to provide information to the public, but to prohibit certain speech because it does not "clearly and unambiguously show[] opposition to the named candidate." 11 C.F.R. § 102.14(b)(3).

II. THE DISTRICT COURT ERRED IN NOT ANALYZING THE PAC NAME PROHIBITION UNDER STRICT SCRUTINY BECAUSE THE REGULATION IS A CONTENT-BASED SPEECH BAN.

The FEC contends that PAG's speech is not limited by the PAC Name Prohibition because the FEC is only regulating PAG's "special project names." (FEC Oppn. Br. at 57). This is, of course, a limitation on PAG's speech, even if the FEC believes it to be a minor or insignificant one. The FEC refuses to recognize that PAG uses its website URL, Facebook page title, and Twitter handle to convey a message. Ironically, the FEC's opposition exception itself recognizes that special project names communicate messages as that exception permits political committees to use a candidate's name if the message conveyed is one of opposition. *See* 11 C.F.R. § 102.14(b)(3).

The FEC also attempts to rewrite the regulatory record by claiming that the PAC Name Prohibition is not a "ban." (FEC Oppn. Br. at 55). The FEC itself referred to the PAC Name Prohibition as a "*total ban*" in 1992, and then explained that the 1994 rulemaking operated by "exempting from *the ban* those titles that clearly indicate opposition to the named candidate." *See* FEC Final Rule on Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 57 Fed. Reg. 31,424, 31,425 (July 15, 1992) (emphasis added); FEC Final Rule on Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 59 Fed. Reg. 17,267, 17,268 (April 12, 1994)

(emphasis added); (*see also* JA 15). The FEC has twice justified the PAC Name Prohibition as a "ban" in the Federal Register.

A. PAG HAS STANDING TO BRING THIS CLAIM.

The FEC claims that PAG lacks standing to challenge the PAC Name Prohibition because even if PAG were successful and the PAC Name Prohibition's opposition exception were declared unconstitutional, this would not redress PAG's challenge since PAG wishes to express support for Mike Huckabee, not opposition. (FEC Oppn. Br. at 53-54).

First, the FEC mischaracterizes the nature of PAG's challenge. PAG's challenge is to the FEC's PAC Name Prohibition as a whole, which makes content-based regulatory distinctions based on whether an unauthorized committee uses a candidate's name in a "special project name or other designation," or in the "title of a special project name or other communication," in a manner that shows support or opposition. PAG has never, in any document filed during this litigation, limited its challenge to the opposition exception at 11 C.F.R. § 102.14(b)(3).

Second, the FEC argues that Section 102.14(b)(3) is severable from the remainder of the PAC Name Prohibition. This is not the case because the underlying requisite intent for severability is absent. *See MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001). The FEC's 1994 rulemaking, which yielded the current PAC Name Prohibition, 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. at 17,269. Accordingly, the FEC took the position in 1994 that the PAC Name Prohibition cannot function properly (in its view) without the opposition exception. The current version of the regulation operates as a coherent whole because the exemption at subsection (b)(3) attempts to tailor the regulation to the government's claimed interests. It is this coherent whole that PAG challenges.

In its opposition brief, the FEC does not assert that the agency intended the opposition exception to be severable. The FEC merely asserts that the opposition exception was an attempt to narrowly tailor the regulation. (FEC Oppn. Br. at 54). Based on the current administrative record, subsection (b)(3) cannot be regarded as severable. *See MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 22. The PAC Name Prohibition, including its opposition exception, must be taken together as a whole, and declaring the FEC's current interpretation of the PAC Naming Prohibition (with its content-based regulation of "special projects names") unconstitutional would redress PAG's injuries.

B. THE REGULATION IS A CONTENT-BASED SPEECH BAN.

It is difficult to comprehend how a regulation that censors speech that communicates support of a candidate, but permits speech in opposition to a candidate, is "disclosure."

i. The PAC Name Prohibition Is Not A Disclosure Regulation.

The FEC fancifully analogizes its PAC Name Prohibition to this Court's rules concerning the assignment of the color blue to the briefs from appellants and red to appellee's briefs. (FEC Oppn. Br. at 56). The FEC contends that its PAC Name Prohibition is like the color of briefs that help identify who is speaking. (*Id*.) But this Court's assignment of cover colors in briefs is based solely on whether the party won or lost at the district court below.

By contrast, the PAC Name Prohibition distinguishes based on the content of the message conveyed. The FEC would permit PAG's ideological opponents to maintain a website URL of www.iloathemikehuckabee.com, because "I loathe Mike Huckabee" is a clear expression of opposition. But the FEC prohibits PAG from using www.ilikemikehuckabee.com solely because the message "I like Mike Huckabee" communicates support for Mike Huckabee. The FEC has no authority to license those who oppose candidates to use candidate's names at will while prohibiting those expressing support for candidates from using the same candidate's name. *See R. A. V. v. St. Paul*, 505 U.S. 377, 392 (1992) ("[The FEC]

has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

The FEC also analogizes the PAC Name Prohibition to the FEC's regulation that provides a "safe harbor" procedure to treasurers using their best efforts to obtain required identifying information from contributors. *See* 11 C.F.R. § 104.7(b)(2); *see also* (FEC Oppn. Br. at 56-57) (relying on *Republican Nat'l Comm. v. Federal Election Comm'n*, 76 F.3d 400 (D.C. Cir. 1996)). *RNC v. FEC* is materially distinguishable because the safe harbor provision at issue was not *mandatory*. Treasurers are required to use their "best efforts" to obtain, maintain, and report certain contributors' names, addresses, occupations, and employers' names on disclosure reports submitted to the FEC. *See* 52 U.S.C. § 30102(i). Congress did not define "best efforts." The FEC created a "safe harbor" that provides an *optional* method that committee treasurers may use to inoculate themselves from accusations that they failed to use their "best efforts" to obtain donor information. *RNC*, 76 F.3d at 409. The Court reasoned that if the *Buckley* Court upheld mandatory disclosure requirements, then an *optional* safe harbor pertaining to these disclose requirements also passed constitutional muster. *Id*. The court treated safe harbor regulation as content-neutral because it applies to all committees equally, without regard to any messages conveyed. *See id*. at 410. By contrast, the PAC Name Prohibition is not a safe harbor, but a mandatory

prohibition that applies to committees that express support for a candidate in a special project title, but not to a committee expressing opposition.

The PAC Name Prohibition prohibits political committees like PAG from using its website URL, title of its Facebook page, and Twitter handle to communicate support of the committee's preferred candidate. Any other person could use the identifiers that PAG is prohibited from using. At the same time, a similar unauthorized political committee is permitted to express opposition to a candidate with a website entitled www.iloathemikehuckabee.com, the I Loathe Mike Huckabee Facebook page, and the Twitter handle "ILoatheHuckabee." Because the PAC Name Prohibition prohibits PAG's expression of support for Mike Huckabee, it is a content-based regulation and is therefore unconstitutional. *See* (Op. Br. at 48-51).

ii. *Reed* Controls the Outcome Of This Case.

The FEC contends that *Reed v. Town of Gilbert* is inapplicable because the PAC Name Prohibition permits PAG to discuss candidates and use the candidate's name throughout the communication and even highlight the candidate's name. (FEC Oppn. Br. at 57). The FEC fails to recognize *Reed*'s most basic points. This case is not about what PAG is permitted to say on its web page, on its Facebook page, or in its Twitter feed. Rather, this case is about what PAG is prohibited from saying in its website URL, Facebook page title, and Twitter handle. The Supreme

Court did not condition its decision in *Reed* on the availability of other speech outlets.

iii. The PAC Name Prohibition Is Not Analogous To Disclaimers

The FEC contends that the PAC Name Prohibition is no different than FECA's compelled speech disclaimers. (FEC Oppn. Br. at 55 and 59). What distinguishes compelled speech disclaimers from the PAC Name Prohibition is that the compelled speech disclaimers apply to all unauthorized political committees regardless of the content of the message. *See* 52 U.S.C. § 30120(a)(3). By contrast, the PAC Name Prohibition applies only to political committees that do not unambiguously show opposition to a candidate in a special project name. *See* 11 C.F.R. § 102.14(b)(3).

iv. There Is No Distinction Between Regulating Website URLs, Facebook Page Titles, Or Twitter Handles And The Title Of A Book.

The FEC turns the supposedly "crystalline" PAC Name Prohibition into an indecipherable regulatory morass in an effort to explain why its PAC Name Prohibition does not apply to book or documentary titles. (FEC Oppn. Br. at 60). After reading the FEC's explanation, it is altogether unclear why a website URL, Facebook page title, or Twitter handle is a "special project" whereas a book or movie title is not.

According to the FEC, PAG could in fact "legally produce a book or movie titled 'I Like Mike Huckabee.' First, the FEC explains that the PAC Name Prohibition "refers to 'any *name* under which a committee *conducts activities*.'" *Id.* (emphasis in original). However, the PAC Naming Prohibition "does not apply to every project or communication done *under the committee's own name*." *Id.* (emphasis in original). A book or movie is, apparently, the latter. For example, "'Hillary: The Movie' was a film produced *by* Citizens United, and was not a name under which Citizens United was conducting activities." *Id.* at 60 n. 10 (emphasis in original).

The FEC also explains that "PAG's hypothetical book or movie 'I Like Mike Huckabee' would not be confusing with respect to who is speaking, because unless PAG (fraudulently) uses Mr. Huckabee's name as the author of the book or script, it would not be understood to be *by* Mr. Huckabee; it would be *by* PAG." (FEC Oppn. Br. at 60) (emphasis in original). The exact same rationale could be applied to PAG's website URL, Facebook page title, and Twitter handle, and it is entirely unclear why the FEC respects the intelligence of the American people enough to determine who produced a book or movie, but not enough to determine who produced a webpage, Facebook page, or Twitter account. PAG's website URL—just like the title of a book—could not cause confusion because PAG puts at the bottom of its web page the disclaimer 'Paid for by Pursuing America's

Greatness. Not authorized by any candidate or candidate's committee. www.ilikemikehuckabee.com.' This disclaimer serves the exact same function as the identification of the author at the bottom of a typical book cover. In neither case would anyone mistake the title for the author. *Cf.* (FEC Oppn. Br. at 60). The same is true of a Facebook page title or Twitter handle – neither serves as the "name under which a committee conducts activities."

Furthermore, the FEC contends that "the Commission has never determined that a published book (or chapter in a book) or feature-length film like 'Hillary: The Movie' is a special project of a committee." (FEC Oppn. Br. at 60). That the FEC has never considered the issue is no guarantee that it will not apply its regulation to book and movie titles in the future. The FEC contends that there is no record in the 1992 rulemakings or in the 1994 rulemakings that the PAC Naming Prohibition was intended to regulate books. (*Id.*). Of course, there is also no record in those rulemakings of any consideration of websites, Facebook pages, or Twitter handles. Yet, in the Collective Actions PAC advisory opinion, the FEC nevertheless applied the PAC Name Prohibition to a website URL, Facebook page title, and Twitter handles. The FEC made this decision despite the fact that the 1992 and 1994 rulemakings never addressed internet communications, despite a 2006 rulemaking that announced a general policy of non-regulation of the internet, and despite a regulation that does not require disclaimers on most internet

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). *See* (Op. Br. at 65).

The FEC's stumbling response makes clear that there is no principled distinction to be made between book and movie titles, and website URLs, Facebook page, and Twitter handles. Yet the PAC Name Prohibition somehow requires different results. This Court should declare the PAC Name Prohibition unconstitutional.

Moreover, it is—to say the least—confusing when the government says that in order to prevent fraud and confusion, a committee may not use a candidate's name to communicate support for that candidate in the URL of a website or title of a Facebook pages, but the committee may use the candidate's name in the title of a book or movie. In this case, the FEC's own hypothetical clearly and plainly demonstrates that the FEC's position in this case is wholly inconsistent with what is permissible under the First Amendment. The FEC's *litigating* position with respect to whether the PAC Name Prohibition applies to book and movie titles is entirely different from its *legal* position in the Collective Actions PAC advisory opinion regarding website URLs, Facebook page titles, and Twitter handles. It cannot be that the former are not "special project names" while the latter are. This irreconcilable difference strongly suggests that one or the other position is

arbitrary and capricious. *See Citizens United*, 558 U.S. at 326 (stating that courts must decline to draw constitutional lines based on the media used to disseminate speech from a particular speaker).

Finally, the FEC contends that courts have declined to apply *Reed* to campaign finance statutes. (FEC Oppn. Br. at 57-58) (citing *Wagner v. FEC* 793 F.3d 1 (D.C. Cir. 2015) and *Stop Hillary PAC*). As PAG noted in its opening brief, (Op. Br. at 55 n.16), the parties in *Wagner* did not brief *Reed* or its application to the case. In cases where Reed is plainly applicable, courts have applied *Reed*'s framework, including in cases involving statutes that seek to regulate speech in order to prevent fraud. *See, e.g., U.S. v. Swisher*, No. 11-35796, 2016 U.S. App. LEXIS 375 *40 (9th Cir. Jan. 11, 2016) (*en banc*).

Once it is determined that the PAC Name Prohibition is content-based, the prohibition must be subjected to strict scrutiny, and declared unconstitutional. Fighting words, defamation, and obscenity are the only types of content-based regulations the Supreme Court has allowed. *See R.A.V.*, 505 U.S. at 382-83. The PAC Name Prohibition is not any of these.

III. THE PAC NAME PROHIBITION IS A PRIOR RESTRAINT BECAUSE THE REGULATION IS VAGUE REQUIRING POTENTIAL SPEAKERS TO SEEK AN ADVISORY OPINION PRIOR TO SPEAKING.

PAG is restrained from communicating its support of Mike Huckabee in its website URL, Facebook page, and Twitter handle. The FEC's argument that the

PAC Name Prohibition does not prevent PAG from speaking—as evidenced by PAG's published communications—is not correct. (FEC Oppn. Br. at 25-26, 61). PAG is not challenging its ability to speak on its website and Facebook page. PAG is challenging the FEC's regulation that prohibits PAG from communicating its support for Mike Huckabee in its website address, and Facebook page title, and potentially with the Twitter handle @ ilikemikehuckabee. The PAC Name Prohibition restrains PAG's speech on its website URL, Facebook page, and Twitter handle.

Second, an FEC advisory opinion is an administrative order that constitutes final agency action and provides a safe harbor to those in materially indistinguishable circumstances. *See* 52 U.S.C. § 30108(c)(1-2); *see Unity08 v. FEC*, 596 F.3d 861, 864-65 (D.C. Cir. 2010); *FEC v. NRA of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001) ("[A]dvisory opinions have binding legal effect on the Commission"). The Collective Actions PAC Advisory Opinion—which apparently contradicts FEC regulations exempting internet communications from disclosure and disclaimer rules, 11 C.F.R. § 110.11(a)—constitutes final agency action. Because PAG is in a materially indistinguishable position, PAG is on notice for potential criminal sanctions for willful and knowing violations. *See* 52 U.S.C. § 30109(d); *see* (Op. Br. at 67). Thus, PAG's desire to communicate its support for

Mike Huckabee through PAG's website URL, Facebook page, and Twitter handle is restrained.

The FEC does not deny this line of reasoning. Instead, the FEC advances its own reasoning that prior restraints rely on the distinction between barring speech in the future and penalizing past speech. (FEC Oppn. Br. at 62). But this distinction does not address PAG's concern that the FEC issued a final administrative order that could be used as evidence against PAG for a knowing and willful violation if PAG were to continue using www.ilikemikehuckabee.com as its website address. PAG is forced to choose between foregoing speech or risking protracted litigation, civil penalties and criminal sanctions. *See 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....").

Further, the FEC mistakenly relies on *Buckley*'s determination that the disclosure requirements do not constitute a prior restraint. But as *Buckley* itself made clear, the disclosure regulations do not impose a ceiling on campaign related activities, *Buckley*, 424 U.S. at 64, and do not prevent anyone from speaking. *Citizens United*, 558 U.S. at 366. Reliance on *Buckley* here is misplaced because

the PAC Name Prohibition does prohibit PAG from communicating its support for Mike Huckabee on its website URL, Facebook page title, and Twitter handle.

Although—as PAG acknowledged in its opening brief at 63-64—it is true that the Supreme Court in *Citizens United* determined that the regulation at issue there was not a prior restraint, the Court still said that the regulation *functioned* "[a]s the equivalent of prior restraint…." *See Citizens United*, 558 U.S. at 335. The FEC's sole defense to this point is that the regulation at issue in *Citizens United* was a two-part 11-factor balancing test. By contrast, according to the FEC, the PAC Name Prohibition is "deliberately crystalline." (FEC Oppn. Br. at 63).

But as PAG demonstrated in its opening brief, and the FEC demonstrated in its opposition brief, the PAC Name Prohibition is not crystalline. The PAC Name Prohibition, as applied in the Collective Actions PAC Advisory Opinion, now applies to websites where previously disclosure and disclaimer regulations did not apply. *See* 11 C.F.R. § 110.11(a); 11 C.F.R. § 100.26;[4] Final Rule on Internet Communications, 71 Fed. Reg. 18,589 (April 12, 2006). Furthermore, the FEC now says that books and movies would not be regulated because the 1992 and

[4] The FEC contends that 11 C.F.R. 110.11 does not conflict with the PAC Name Prohibition because nothing in that regulation exempts PAG from compliance with the PAC Name Prohibition. (FEC Oppn. Br. at 66). PAG's point here is if the FEC is correct that the PAC Name Prohibition is a disclosure regulation, then the FEC cannot regulate PAG's internet activities because the FEC has largely exempted website communications from the disclosure requirements.

1994 administrative records did not discuss regulating book titles and movies. (FEC Oppn. Br. at 60-61). But the record is also bereft of applying the PAC Name Prohibition to the internet. Finally, the FEC says that it would not regulate books because it would be clear to the reader that the author of I Like Mike Huckabee is not Mike Huckabee. (FEC Oppn. Br. at 60). But the same could be said of the website URL that is www.ilikemikehuckabee.com coupled with the disclaimer at the bottom of the website that reads "Paid for by Pursuing America's Greatness. Not authorized by any candidate or candidate's committee. www.ilikemikehuckabee.com." It is not clear what is covered under the PAC Name Prohibition and thus speakers must silence themselves or seek an advisory opinion. This is functionally a prior restraint.

IV. PAG WILL BE IRREPARABLY HARMED ABSENT THE ISSUANCE OF AN INJUNCTION.

It is undisputed 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). The PAC Name Prohibition bars PAG from communicating its support for Mike Huckabee in its website URL, Facebook page title, and Twitter handle. This deprivation of its First Amendment rights is irreparable harm to PAG. *Cf. Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

The FEC's contention that PAG may speak through direct mail or other websites that comply with the PAC Name Prohibition is of no constitutional significance. (FEC Oppn. Br. at 70-71). *See Carey v. FEC*, 791 F. Supp. 2d 121, 134 (D.D.C. 2011) (rejecting the FEC's argument that Plaintiff could convey its message in four obvious ways that would comply with FEC regulations because it required Plaintiff to forego First Amendment rights). PAG wishes to communicate support for Mike Huckabee in its website URL, Facebook page title, and Twitter handle. The FEC prohibits this while permitting others to oppose Mike Huckabee in those same mediums. The First Amendment does not condone the imposition of different rules for people supporting competing candidates for the same office. *Cf. Davis v. FEC*, 554 U.S. 724, 744 (2008); *see also Reed*, 135 S. Ct. at 2227. This issue cannot be resolved by changing the subject to whether PAG may speak in other ways, and PAG's inability to communicate support through certain avenues that are open to others constitutes irreparable harm. *See Elrod*, 427 U.S. at 373.

V. ISSUING AN INJUNCTION IS IN THE PUBLIC'S INTEREST AND THE BALANCE OF THE HARMS WEIGHS IN FAVOR OF PAG.

The FEC offers two harms as reasons for why it is in the public's interest for this Court to deny PAG's request for an injunction.

First, the FEC claims there is already confusion as evidenced in the comments left on the Facebook page, and makes the baseless accusation that what

PAG really seeks is the ability to "imply authorization by using Mr. Huckabee's name." (FEC Oppn. Br. at 59, 71). Neither PAG nor the FEC knows whether persons who posted these comments were actually confused by PAG's Facebook page. PAG has done absolutely nothing to mask itself as the source of any of its communications, and before the FEC issued the Collective Actions PAC advisory opinion, PAG's Facebook page even included a disclaimer identifying PAG as the payor that was not legally required. The FEC's suggestion that PAG wishes to actively foster confusion is without any evidence. This Court should not ascribe constitutional significance to comments posted on a Facebook page in order to justify government restrictions on speech. To do so would simply open a new avenue for the government to regulate social media communications.

Second, the FEC claims that enjoining the FEC from enforcing this regulation during the presidential election season would be imprudent. (FEC Oppn. Br. at 72). Courts have rejected the excuse that a campaign finance regulation was challenged during the presidential campaign season because "[s]tifling citizens' speech rights during a Presidential campaign runs contrary to the entire history of First Amendment jurisprudence in this country." *Carey*, 791 F. Supp. 2d at 132-133 (enjoining the FEC from enforcing contribution limits against a hybrid PAC 17 months prior to the presidential election). The fact that the presidential election

is eleven months away, and the first primaries are less than two weeks from now, only means that the opportunity to speak is now. *See id*. at 134.

CONCLUSION

For these reasons and for those stated in PAG's opening brief, this Court should enjoin the FEC's enforcement of its PAC Name Prohibition against PAG's website URL, Facebook title page, and Twitter handle.

Respectfully submitted January 20, 2016:

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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 6,522 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
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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2016, 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: January 20, 2016

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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. § 30102(i)

Reports and records, compliance with requirements based on best efforts. When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with 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.].

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.

52 U.S.C. § 30120(a)(3)

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

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.

11 C.F.R. § 104.7

(a) When the treasurer of a political committee shows that best efforts have been used to obtain, maintain and submit the information required by the Act for the political committee, any report of such committee shall be considered in compliance with the Act.

(b) With regard to reporting the identification as defined at 11 CFR 100.12 of each person whose contribution(s) to the political committee and its affiliated political committees aggregate in excess of $ 200 in a calendar year (or in an election cycle in the case of an authorized committee) (pursuant to 11 CFR

104.3(a)(4)), the treasurer and the political committee will only be deemed to have exercised best efforts to obtain, maintain and report the required information if:

(1)

(i) All written solicitations for contributions include a clear request for the contributor's full name, mailing address, occupation and name of employer, and include an accurate statement of Federal law regarding the collection and reporting of individual contributor identifications.

(A) The following are examples of acceptable statements for unauthorized committees, but are not the only allowable statements: "Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed $ 200 in a calendar year;" and "To comply with Federal law, we must use best efforts to obtain, maintain, and submit the name, mailing address, occupation and name of employer of individuals whose contributions exceed $ 200 per calendar year."

(B) The following are examples of acceptable statements for authorized committees, but are not the only allowable statements: "Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed $ 200 in an election cycle;" and "To comply with Federal law, we must use best efforts to obtain, maintain, and submit the name, mailing address, occupation and name of employer of individuals whose contributions exceed $ 200 per election cycle."

(ii) The request and statement shall appear in a clear and conspicuous manner on any response material included in a solicitation. The request and statement are not clear and conspicuous if they are in small type in comparison to the solicitation and response materials, or if the printing is difficult to read or if the placement is easily overlooked.

(2) For each contribution received aggregating in excess of $ 200 per calendar year (or per election cycle, in the case of an authorized committee) which lacks required contributor information, such as the contributor's full name, mailing address, occupation or name of employer, the treasurer makes at least one effort after the receipt of the contribution to obtain the missing information. Such effort shall consist of either a written request sent to the contributor or an oral request to the contributor documented in writing. The written or oral request must be made no later than thirty (30) days after receipt of the contribution. The written or oral request shall not include material on any other subject or any additional solicitation, except that it may include language solely thanking the contributor for the contribution. The request must clearly ask for the missing information, and must include the statement set forth in paragraph (b)(1) of this section. Written requests must include this statement in a clear and conspicuous manner. If the

request is written, it shall be accompanied by a pre-addressed return post card or envelope for the response material;

(3) The treasurer reports all contributor information not provided by the contributor, but in the political committee's possession, or in its connected organization's possession, regarding contributor identifications, including information in contributor records, fundraising records and previously filed reports, in the same two-year election cycle in accordance with 11 CFR 104.3; and

(4)

(i) If any of the contributor information is received after the contribution has been disclosed on a regularly scheduled report, the political committee shall either:

(A) File with its next regularly scheduled report, an amended memo Schedule A listing all contributions for which contributor identifications have been received during the reporting period covered by the next regularly scheduled report together with the dates and amounts of the contribution(s) and an indication of the previous report(s) to which the memo Schedule A relates; or

(B) File on or before its next regularly scheduled reporting date, amendments to the report(s) originally disclosing the contribution(s), which include the contributor identifications together with the dates and amounts of the contribution(s).

(ii) Amendments must be filed for all reports that cover the two-year election cycle in which the contribution was received and that disclose itemizable contributions from the same contributor. However, political committees are not required to file amendments to reports covering previous election cycles.