UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Jason Torchinsky (D.C. Bar No. 976033)
J. Michael Bayes (D.C. Bar No. 501845)
Shawn Sheehy
HOLTZMAN VOGEL JOSEFIAK PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Phone: (540) 341-8808
Fax: (540) 341-8809

Counsel for Plaintiff Pursuing America's Greatness

Pursuant to Federal Rule of Civil Procedure 65 and Local Rules 7(d) and 65.1, Plaintiff Pursuing America's Greatness ("Plaintiff" or "PAG") hereby replies to Defendant's opposition to Plaintiff's motion for a preliminary injunction seeking invalidation and enjoining enforcement of 52 U.S.C. § 30102(e)(4) and 11 C.F.R. § 102.14(a) (the "PAC Naming Prohibition") as applied to PAG's use of a certain website Uniform Resource Locator ("URL") and social media accounts that are not used for fundraising or solicitation purposes.

I. Defendant Misconstrues the D.C. Circuit's Holding In *Common Cause v. FEC*

a. *Common Cause* Upheld The FEC's Narrower Interpretation of the Statute

Defendant seeks to characterize the nearly 30 year old holding in *Common Cause v. FEC,* 842 F.2d 436 (D.C. Cir. 1988), as foreclosing PAG's challenge to the FEC's current speech ban that did not exist when *Common Cause* was decided in 1988. D.E. 13, Def.'s Oppn. to Pl.'s Mot. For Prelim. Inj. at 4-6. The D.C. Circuit wrote, in dicta, that "Common Cause's alternative construction" of the relevant statute – which of course had not been the subject of APA rulemaking – was "not a totally implausible interpretation of the statute's language." *Common Cause*, 842 F.2d at 440-41. The D.C. Circuit found "the likelihood remote that Congress set out stealthily to alter so dramatically the regulation of campaign advertisements and solicitations in the way Common Cause asserts," but nevertheless determined that the statute was "ambiguous" for Chevron purposes. *Id.* at 444. The D.C. Circuit then deferred to the FEC's judgment and upheld the FEC's interpretation of the statute.

The D.C. Circuit's *Chevron* analysis focused on whether *the FEC's interpretation* was reasonable, not whether Common Cause's alternative interpretation was reasonable. The D.C. Circuit did not subject Common Cause's proffered alternative interpretation to *Chevron* analysis, or hold that Common Cause's interpretation was reasonable and valid under the Administrative Procedures Act.

The FEC relied on the *Common Cause* dictum, and its tepid endorsement of what was deemed "not a totally implausible interpretation," when it revised its regulation in 1992 to effectively adopt Common Cause's proposal. *See Final Rule Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees,* 57 Fed. Reg. 31,424 (July 15, 1992). Even if one concedes for the sake of argument that *Common Cause* supports the FEC's 1992 rulemaking, no argument can be made that *Common Cause* somehow justifies transforming the 1992 rule into a content based speech ban that authorizes the use of a candidate's name where opposition is demonstrated, but not where support is shown.

The FEC contends that the D.C. Circuit's decision in *Common Cause* somehow blesses the FEC's current interpretation and application of the PAC Naming Prohibition to the Internet and social media when no fundraising occurs. Def.'s Oppn. to Pl.'s Mot. For Prelim. Inj. at 19-20. This cannot be, as the D.C. Circuit in 1988 did not consider the FEC's 1992 rule directly, or the 1994 rule that transformed the statutory provision into a content-based speech regulation, or the application of the statute or any version of the FEC's regulation to the Internet (which the FEC concluded in a 2006 rulemaking warranted a different regulatory approach). *See* Pl.'s Mot. For Prelim. Inj. at 13-14. In the course of upholding the FEC's pre-1992 interpretation of

the statute, the D.C. Circuit merely indicated that Common Cause's preferred reading of the statute was "not a totally implausible interpretation."

The FEC's reliance on *Common Cause* is also misplaced because the Court noted that Common Cause's interpretation stemmed from a generalized statement of legislative purpose to reduce confusion among the electorate. This purpose statement, and Common Causes' consequent interpretation, neglected the text of the statute and the complexities inherent in legislation regulating the First Amendment. *See Common Cause*, 842 F.3d at 445 ("To afford § 432(e) (4) so broad a scope as Common Cause and the district court's interpretation would, on the basis of a general statement of intent to reduce confusion among the electorate, would unduly elevate the rhetoric of purpose above the specifics of text, ignoring in the process the enormous subtleties and complexities inherent in the 'FECA's first-amendment-sensitive regime.'").

The FEC overstates the import of *Common Cause*. The D.C. Circuit's holding was limited, and its decision in 1988 in no way signals approval of the current content based speech regulation that is challenged here.

II. The PAC Naming Prohibition Is Not An Ordinary Disclosure Provision

The FEC attempts to characterize the PAC Naming Prohibition as "an integral part of FECA's disclosure regime," so basic and elementary that the FEC compares it to "players on opposing sports teams wear[ing] uniforms with contrasting colors." (D.E. 13, Def.'s Oppn. to Pl.'s Mot. For Prelim.Inj. at 24-25). They do so because it is the only remotely plausible path to a potentially reasonable justification for this direct ban on speech. However, if this were in fact part of a simple disclosure regime, PAG could speak freely and simply include an appropriate disclaimer on its communications or

make an appropriate filing with the FEC. Disclaimer requirements, of course, "do not prevent anyone from speaking." *Citizens United v. FEC*, 558 U.S. 310, 366 (2010).

PAG, of course, cannot simply include a disclaimer because the PAC Naming Prohibition is not a disclosure provision. Rather, the PAC Naming Prohibition bars PAG from speaking in the manner it chooses, on the basis of the content of PAG's speech. *See* Pl.'s Mot. For Prelim. Inj. at 22-23, 28-31. This serious limitation on PAG's constitutional rights is in no way comparable to permitting speech but nevertheless requiring a disclaimer on a communication or filing a disclosure report with the FEC. *See AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) (noting that the FEC had a duty to avoid unnecessarily infringing First Amendment rights); *Common Cause*, 842 F.2d at 448 ("[The FEC] must allow the maximum of first amendment freedom of expression in political campaigns commensurate with Congress' regulatory aims.").

PAG has, at all times since it acquired control of the website and Facebook page, maintained legally required disclaimers on its communications that state (1) that PAG paid for the communication, and (2) that the communication is not authorized by any candidate or candidate's committee. These disclaimers also provide PAG's web address so that recipients of the communication may learn more about PAG. The FEC maintains that this rather comprehensive source disclaimer is insufficient, and that PAG must be further restricted from even using the name "Mike Huckabee" in the title of its Facebook page ("I Like Mike Huckabee"), in a website address (www.ilikemikehuckabee), or in an associated Twitter handle – so long as PAG supports Mike Huckabee. The FEC suggests that "I Like Mike Huckabee" as a

"subheading" would be acceptable under the rule, but in the context of URLs and social media is both nonsensical and factually impossible. *See* Def.s' Oppn. to Pl.'s Mot. For Prelim. Inj. at 26-27. Twitter, for example, does not permit "subheadings" in its 140 character messages. The URL PAG holds at www.facebook.com/ilikemikehuckabee is about as close to a "subheading" as is feasible on Facebook's system, but appears otherwise prohibited under the FEC's speech ban. Additionally, it appears from the FEC's position that a URL located on PAG's server at www.pagpac.com/ilikemikehuckabee is similarly impermissible - or a "redirect" from ilikemikehuckabee.com to this web address would also not be a permissible "subheading" exempt from the ban. The FEC's focus and reasoning is not on what is typically thought of as "disclosure." The FEC's focus is on enforcing its speech ban because PAG's speech satisfies certain content criteria. The notion that a government agency would suggest that a phrase used in a subheading is permissible, but not in the title of a document, is a classic (and absurd) example of government regulation of the content of speech.

The FEC's reliance on *Citizens United v. FEC, McCutcheon v. FEC, Buckley v. Valeo, and SpeechNow.org v. FEC* with respect to the value of disclosure is misplaced. *See* Def.'s Oppn. to Pl.s' Mot. For Prelim. Inj. at 25. The mandated disclosure discussed in these cases consisted of *donor* disclosure and disclaimers. None of the decisions cited by the FEC as being generally supportive of disclosure made any mention of the PAC Naming Prohibition, and none of these provisions are a ban on speech in any way comparable to what the FEC attempts to defend here.

III. Defendant Misinterprets Plaintiff's Objection to the Name Identification Ban

The FEC challenges PAG's standing, arguing that even if this court were to invalidate 11 C.F.R. §102.14(b)(3), PAG's injury would not be redressed. (D.E. 13, Def.'s Oppn. to Pl.'s Mot. For Prelim. Inj. at 32). The FEC misstates PAG's argument. To clarify, PAG is challenging the PAC Naming Prohibition at 11 C.F.R. §102.14(a), and PAG seeks the invalidation of subsection (a) as it applies to PAG. PAG's injury would be redressed if this court invalidates the application of 11 C.F.R. § 102.14(a) to PAG. PAG's position is that subsection (b)(3)'s exemption for names that show opposition to candidates acts together with subsection (a), as a unified whole, to create a content-based speech regulation that violates PAG's constitutional rights.

The FEC asserts that subsection (b)(3) is severable. Def.'s Oppn. to Pl.'s Mot. For Prelm. Inj. at 32-33 n.7. 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 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."). *See* Pl.s' Mot. For Prelim. Inj. at 7.

Second, the regulation cannot function without the stricken provision. The current version of the regulation operates as a coherent whole because the exemption at subsection (b)(3) serves to better tailor the regulation to the government's claimed interests. Because of this and 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.

IV. The FEC's Claimed Government Interests Are Not Present In This Matter

The FEC contends that the governmental interests served by the PAC Naming Prohibition include limiting fraud, abuse, and confusion. Plaintiff's prior submission argues in great detail that the FEC's 1992 and 1994 rulemakings focus almost exclusively on the issue of fraudulent *fundraising* practices, and both iterations of the PAC Naming Prohibition are justified in those terms. PAG does not contend that preventing financial fraud and abuse is not a valid government interest. However, PAG does not seek to use its Facebook page, website, or associated Twitter account to engage in any fundraising. *See* Verified Compl. ¶ 12. Accordingly, an interest in preventing fraudulent fundraising cannot justify the FEC's prohibition on PAG's described activities.

As the FEC notes, the 1992 and 1994 rulemakings also assert that avoiding "confusion" was one of the government's interests that justified expanding the scope of the PAC naming regulation. Neither rulemaking, however, provided any concrete

example of confusion outside the fundraising context, and the underlying enforcement matter that resulting in the *Common Cause* litigation involved a fundraising matter. The FEC simply asserts its interest in combatting non-fundraising-related "confusion," and claims that this interest is related to its mandate to "protect[] the integrity of the electoral process." Def.s' Oppn. to Pl.'s Mot. For Prelim. Inj. at 21. The FEC never explains what these terms mean, how they apply in a non-fundraising context, or how content-based speech regulation could possibly "protect the integrity of the electoral process." Instead, the FEC simply refers to the "commonsense anti-confusion rationale." *Id*. at 23.

Prohibitions on PAG's speech must be justified by more than this. Recently, 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*, 132 S. Ct. 2537, 2544 (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 2545. 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 2546. 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 2544-45.

The Supreme Judicial Court of Massachusetts recently invalidated a state statute that "criminalize[d] certain false statements about political candidates or questions submitted to voters." *Commonwealth of Massachusetts v. Lucas*, 472 Mass. 387, 388 (2015). The court explained:

> The Commonwealth contends that fraudulent speech may nonetheless be unprotected absent a showing of concrete harm where the speech threatens "the integrity of Government processes." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2546, 183 L. Ed. 2d 574 (2012). However, the Commonwealth has not established that the range of speech proscribed by § 42 poses an actual and substantial threat to the electoral process. See *281 Care Comm.* v. *Arneson*, 766 F.3d 774, 790 (8th Cir. 2014), cert. denied, 135 S. Ct. 1550, 191 L. Ed. 2d 637 (2015) ("reliance upon 'common sense' to establish that the use of false statements impacts voters' understanding, influences votes and ultimately changes elections, is not enough on these facts to establish a direct causal link between [the statute] and an interest in preserving fair and honest elections").

Lucas, 472 Mass. at 394 n.8.

As in *Lucas*, the FEC has never established, except by claiming it to be a matter of "common sense," that speech such as PAG's poses any actual threat to the integrity of the electoral process. In another recent matter, a federal court recognized that although false statements in campaigns may have serious adverse consequences to the public at large, the interest in preventing false speech is only a legitimate interest, not a compelling interest. *Susan B. Anthony List v. Ohio Elections Comm'n*, 45 F. Supp. 3d 765, (S.D. Ohio 2014) citing *McIntyre v. Ohio Elections Comm'n*, 514 US 334, 349-351 (1995). The court struck down Ohio's law prohibiting false statements about electoral candidates. If restrictions on false speech must be so carefully scrutinized and justified, then surely the FEC's speech prohibition must be justified by more than mere resort to claims of unspecified "confusion."

In the end, what the FEC is attempting to do violates the Supreme Court's admonitions in *Citizens United*. The FEC's interpretation of its rules would prohibit PAG from publishing a book entitled "I Like Mike Huckabee", although the FEC seems to graciously concede that perhaps PAG could use "I Like Mike Huckabee" as a subheading to its title. Def.'s Oppn. to Pl.'s Mot. For Prelim. Inj. at 26-27. This violates the Supreme Court's admonition that the FEC cannot save the constitutionality of a statute by "[c]arving out a limited exemption through an amorphous regulatory interpretation." *Citizens United v FEC*, 558 U.S. 310, 324 (2010); *see also id.* at 334 (discussing the uncertainty caused by the FEC's litigating position that perhaps it may permit the challenger's activity on narrower grounds but does not adopt the position in its litigation). It is—to say the least—confusing where the government says that to prevent fraud you cannot incorporate a candidate's name into the name of a website, although you may do so in a subheading.

The FEC claims that the messages disseminated by PAG, and committees like PAG, implicate the government's anti-confusion interest even where those messages merely present information and do not request money. PAG has not be able to find any instances in which FEC previously asserted an interest in generally preventing confusion among voters (or the general public) with regard to its campaign finance regulations.[1] Even if there were an instance where the FEC has sought to advance this interest as it pertains to campaign finance, the FEC's only evidence of possible voter

[1] The U.S. Supreme Court did note that disclaimers prevent the very confusion the FEC claims as its justification for prohibiting certain speech. *See Citizens United v. FEC*, 558 U.S. 310, 368 (2010) ("At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party."). The precise kinds of disclaimers mentioned here are present in all of PAG's communications on these websites.

confusion are some comments posted on the Plaintiff's Facebook page, many of which were posted *prior* to the Plaintiff taking control of the Facebook page. Additionally, the FEC's review of Facebook page comments made by a few hundred Facebook users fails to put the number or content of these comments in any context.

The FEC has no role in monitoring or evaluating the truthfulness or clarity of the messages disseminated by political committees. *See, e.g., Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 790-791 (1988) (the government may not substitute its judgment for that of speakers and listeners); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1987) (criticizing State's claimed interest in protecting the Republican Party on the ground that it viewed a particular expression as unwise or irrational); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 791-792, n. 31 (1978) (criticizing the government's paternalistic interest to protect the political process by restricting speech); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977) (criticizing the government's paternalistic interest in maintaining the quality of neighborhoods by restricting speech).

The FEC may require disclaimers be placed on specified communications, and FECA includes specific provisions directed to fraudulent fundraising (52 U.S.C. § 30124). The FEC's role and responsibility is to regulate campaign finance; the scope of the FEC's authority does not extend to evaluating and approving messages disseminated by such committees on the grounds that these messages might perhaps confuse someone. The FEC's paternalistic claim that "*permitting* PAG to imply that its speech is Mr. Huckabee's by using the candidate's name in the title to PAG's message *would disserve the public*" amply demonstrates that the FEC has veered far off course from its role as a campaign finance regulator. It is not the FEC's role to determine

what speech should be "permitted" nor is it the FEC's role to determine what speech serves or disserves the public.

V. Defendant Misconstrues *Reed v. Town of Gilbert*

The FEC contends that the PAC Naming Prohibition is content-neutral because it is "justified without reference to the content of the regulated speech," and that as a result, the Supreme Court's recent decision in *Reed v. Town of Gilbert* has no bearing on the present matter. *See* Def.'s Oppn. to Pl.'s Mot. For Prelim. Inj. at 36. The FEC cites *Republican National Committee v. FEC*, 76 F.3d 400 (D.C. Cir. 1996) and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Both of these decisions involved regulations that were content-neutral on their face, and the courts' inquiries were directed to whether they should be treated as content-based on account of the motivations behind their adoptions. The PAC Naming Prohibition, on the other hand, is very plainly content-based on its face.

The *Reed* Court explained that "[g]overnment regulation of speech is content based if a law applies to particular speech *because of the topic discussed or the idea or message expressed*. . . . This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' *draws distinctions based on the message a speaker conveys*." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (emphasis added). The PAC Naming Prohibition, on its face, unquestionably meets this standard. *See* Pl.'s Mot. For Prelim. Inj. at 28-31. It is not a *Ward*-style regulation that is content-neutral on its face but adopted for content-based reasons.

Under *Reed*, the court must first "consider whether a regulation of speech 'on its

face' draws distinctions based on the message a speaker conveys." A regulation that draws such distinctions "on its face" cannot be treated as content-neutral, regardless of its justifications. The Fourth Circuit Court of Appeals recently recognized that the *Reed* "formulation conflicts with, and therefore abrogates … previous descriptions of content neutrality." *Cahaly v. Larosa*, Nos. 14-1651 & 14-1680, 2015 U.S. App. LEXIS 13736, *9 (4th Cir. Aug. 6, 2015). To the extent that prior cases *may have* treated regulations that, on their face, distinguish between content as content-neutral because of their underlying justifications, that approach is on longer the law. *See id*. ("Our earlier cases held that, when conducting the content-neutrality inquiry, '[t]he government's purpose is the controlling consideration.' *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013) (quoting *Ward*, 491 U.S. at 791). But *Reed* has made clear that, at the first step, the government's justification or purpose in enacting the law is irrelevant.").

The FEC's contention that *Reed* does not apply here is incorrect; it is the FEC's approach that no longer applies.

VI. The FEC's Regulation Acts As A Prior Restraint

The FEC contends that its regulation does not act as a prior restraint. Def.'s Oppn. to Pl.'s Mot. For Prelim. Inj. at 29-31. The FEC is wrong.

The FEC's PAC Name Prohibition does act as a prior restraint. The FEC itself describes its own regulation as a *ban* on an unauthorized political committee using the name of a candidate in its PAC name, its URL, special projects, etc. *See* 1994 Final Rule, 59 Fed. Reg. at 17,268; *see also* Advisory Opinion 2015-04 (Collective Actions PAC) at 3 (D.E. 1-2) ("The Commission therefore determined that a "total ban" on the use of candidate names in committee names was more "responsive to the problem," as well as

easier to monitor and enforce."). It explicitly forbids speech prior to that speech occurring, and if someone does speak that person is subject to prison for knowing and willful violations the FECA. Recognizing the FEC's regulation— and the FEC's application of the regulation to Collective Action PAC— as a prior restraint maintains the "[t]ime-honored distinction between barring speech in the future and penalizing past speech." *Alexander v. United States*, 509 U.S. 544, 553 (1993). As *Alexander* demonstrates, the RICO order at issue there did not forbid speech or require prior approval before speaking. *Id*. at 551. As in *Alexander*, the FEC's regulation is in fact closer to those obscenity cases where the government restrained certain materials as obscene without a judge determining that the materials were obscene. *Id*. at 551. The FEC is restraining PAG's speech prohibiting, under any circumstances, it from having the phrase "I like Mike Huckabee" in PAG's URL. That is a classic example of a prior restraint of speech. *See* Pl.'s Mot. For Prelim. Inj. at 23-28.

Respectfully Submitted,

/s/ Jason Torchinsky
Jason Torchinsky (D.C. Bar No. 976033)
J. Michael Bayes (D.C. Bar No. 501845)
Shawn Sheehy
HOLTZMAN VOGEL JOSEFIAK PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Phone: (540) 341-8808
Fax: (540) 341-8809

Counsel for Plaintiff Pursuing America's Greatness

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