UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

STOP HILLARY PAC and DAN BACKER, *Plaintiffs*, v. FEDERAL ELECTION COMMISSION, *Defendant*.	)	No. 1:15-cv-01208-GBL-IDD

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Stop Hillary PAC and Dan Backer respectfully move this Court for a preliminary injunction to maintain the *status quo* during the pendency of this constitutional challenge. They ask that this Court issue an interim order permitting Stop Hillary PAC to retain the name it has used for nearly two-and-a-half years for the duration of the lawsuit, as well as prohibiting the FEC from enforcing 52 U.S.C. § 30102(e)(4), and from commencing, recommending, pursuing, or ordering any adverse administrative, civil, criminal, or other action against Stop Hillary PAC or Backer based on Stop Hillary PAC's name during that time.

FACTUAL BACKGROUND

A. The Importance of Stop Hillary PAC's Name

Trying to have Stop Hillary PAC without "Hillary" is like trying to have *Hamlet* without "Hamlet," *Kill Bill* without "Bill,"[1] or *Freddy v. Jason* without either "Freddy" or "Jason."[2] The messages conveyed by these titles would be both different and diminished if they had to be changed to "Ruminations of a Danish Prince," "Kill Someone," and "Battle of Fictional Psychopaths," respectively.

Stop Hillary PAC is a non-connected hybrid political committee (colloquially, a "PAC") that its Treasurer, Dan Backer, and others formed on May 16, 2013, by filing a Statement of Organization with Defendant Federal Election Commission ("FEC"). *See* Declaration of Dan Backer in Support of Plaintiffs' Motion for Preliminary Injunction (hereafter, Backer Decl.); *see also* Verified Compl., Ex. 1. The Statement of Organization listed "Stop Hillary PAC" as the PAC's name, and Dan Backer as its Treasurer and custodian of records. Backer Decl., Ex. 1. At

[1] http://www.imdb.com/title/tt0266697/?ref_=nv_sr_1/.
[2] http://www.imdb.com/title/tt0329101/. One would be left only with "V", an entirely different movie about a race of reptilian aliens masquerading as humans. http://www.imdb.com/title/tt0085106/?ref_=fn_al_tt_3.

the time Backer formed Stop Hillary PAC, Hillary Rodham Clinton was not a candidate for federal office (nor, apparently, was anyone else bearing the first or last name "Hillary").

Stop Hillary PAC's website describes the organization's mission: "Stop Hillary PAC was created ***for one reason:*** to ensure Hillary Clinton never becomes President of the United States." Backer Decl., Exh. 2 (emphasis added). It further explains, in flamboyantly hyberbolic terms, "The American way of life is under attack and Hillary Clinton is the liberal standard-bearer of the next generation of liberal creep on our Constitutional rights. We are committed to saving America from this destructive far-left, liberal cancer that's trying to transform America." *Id*. Thus, Stop Hillary PAC's name reveals the organization's purpose and goal clearly, succinctly, accurately, and effectively. *Cf.* Backer Decl. ¶ 16.

The committee's name has been an important component of its identity, as well as its constitutionally protected political speech and association. Backer Decl. ¶ 16. All e-mails from the committee originate from addresses with the domain "@StopHillaryPAC.org," *id*. ¶ 8(a); the committee's website is http://www.stophillarypac.org, *id*. ¶ 8(b); the URL for its Facebook page is https://www.facebook.com/StopHillaryPAC, *id*. ¶ 8(c); and its Twitter handle is "@StopHillaryPAC," *id*. ¶ 8(d). The committee uses its name pervasively as a means of expression, a way of attracting public support, and an organizing principle. *Id*. ¶ 16.

Stop Hillary PAC has operated continuously for the past two years and four months, since its founding, in pursuit of its mission. *Id*. ¶ 5. During that time, the committee has spent well over $1 million engaging in public communications through various media under its name, generating name recognition and goodwill. *Id*. ¶ 8. Each month, the committee sends millions of e-mails bearing its name, from "@StopHillaryPAC.org" e-mail addresses, and has sent well over 100 million e-mails. *Id*. ¶ 8(a). Its website, http://StopHillaryPAC.org, is the 1,920th most-visited

website in the United States, visited by an average of over 1 million people each month. *Id*. ¶ 8(b). Over five dozen other websites presently link to StopHillaryPAC.org, helping drive traffic there and familiarize people with the committee. *Id*.

The committee's Facebook page has received approximately 200,000 "likes," and the committee's posts appear in the Facebook newsfeeds of over 1.1 million people each week. *Id*. ¶ 8(c). Over the past week alone, 38,000 people have shared Stop Hillary PAC's Facebook posts, and over 14,000 people have commented on them. *Id*. The committee also has made 1,264 Tweets from its @StopHillaryPAC handle, and posted five YouTube videos critical of Clinton under its name, which have received over 100,000 direct views. *Id*. ¶ 8(d)-(e).

As a result of this public outreach, hundreds of thousands of people have chosen to express support for, or associate together with, Stop Hillary PAC. Since its creation, Stop Hillary PAC has raised more than $2 million from over 100,000 contributors. *Id*. ¶ 7(a). Between 750,000 and 1 million people have affirmatively expressed support for, or otherwise associated with, Stop Hillary PAC in one or more ways, such as making a contribution, signing a petition, or joining the committee's mailing list. *Id*. ¶ 7(b). Among the committee's most widely supported efforts, this past May, it submitted a petition signed by 469,954 Americans to Rep. Trey Gowdy supporting the Benghazi Select Committee's investigation into Clinton's culpability before, during, and after the attack on the American diplomatic mission in Benghazi. *Id*. ¶ 9.

Stop Hillary PAC also has received tremendous coverage in both the popular and political press. *Id*. ¶ 10; *see also id*. Exh. 3 (sample articles). It has been discussed in outlets such as CNN, CBS News, the *National Journal*, the *Daily Caller*, *The Hill*, *Huffington Post*, *Forbes*, *Washington Times*, and *The Week*. *Id*. ¶ 10; *see also id*. Exh. 3. It has further garnered public attention by associating with high-profile conservative politicians such as Congressman Steve Stockman (R-

Tex.), Maricopa County Sheriff Joe Arpaio, and its former honorary chairman, Colorado state senator Ted Harvey. *Id*. ¶ 13. Additionally, the committee filed a complaint with the FEC, and later sued the FEC, over Clinton's alleged improper support of the Ready for Hillary SuperPAC's efforts to draft her as a candidate, and the FEC's yearlong delay in determining whether to investigate it. *See Stop Hillary PAC v. FEC*, No. 1:14-02080-KBJ (D.D.C. 2014); *see also* Backer Decl. ¶ 11. In short, the committee's name has proven to be a rallying point for hundreds of thousands of people opposed to Clinton's candidacy; has received substantial public exposure; and precisely conveys the committee's sole purpose.

B. <u>The FEC's Threats Over Stop Hillary PAC's Name</u>

At the time Plaintiff Dan Backer formed Stop Hillary PAC, in May 2013, neither Hillary Clinton, nor apparently anyone else bearing the first or last name of Hillary, was a candidate for federal office. Backer Decl. ¶ 17. Clinton did not officially declare her candidacy until nearly two years later in April 2015. *Id*. ¶ 18. Backer became aware of her "official" candidacy at that time, and also was familiar with 52 U.S.C § 30102(e)(4)'s prohibition on the inclusion of candidates' names in the names of unauthorized PACs. *Id*. ¶ 19. He nevertheless refrained on First Amendment grounds from changing Stop Hillary PAC's name to remove its reference to Hillary, since it created no risk of public confusion. *Id*.

On April 27, 2015, the FEC sent a "Request for Additional Information" ("RFAI") to "DAN BACKER, TREASURER[,] STOP HILLARY PAC." Verified Complaint, ¶ 15. The RFAI stated, "Your committee's name includes the name of a candidate; however, your committee does not appear to be authorized by a candidate." *Id*. The RFAI ordered that, if Stop Hillary PAC was not a candidate-authorized committee, Backer would have to amend its Statement of Organization to change its name "so that it does not include the candidate's name and/or provide further

clarification regarding the nature of your committee." *Id*. The RFAI did not specify whether Hillary Clinton would have to authorize the committee, or simply any candidate bearing the first or last name of "Hillary." *Id*. As Treasurer, Backer colorfully responded to the RFAI by declining its invitation to change the committee's name. *Id*. ¶ 16.

Following further communications between Backer and the FEC, *see id*. ¶ 17, on September 8, 2015, the FEC sent a letter to Stop Hillary PAC and Dan Backer, declaring that they "may have violated" FECA, and that the matter has been referred to the FEC's Office of General Counsel for "possible enforcement action," *id*. ¶ 18. The letter charged that Stop Hillary PAC and Backer failed to remove the name of a federal candidate, Hillary Rodham Clinton, from the name of Stop Hillary PAC, in violation of 52 U.S.C. § 30102(e)(4). *Id*. ¶ 19. It stated the FEC was giving Stop Hillary PAC and Backer the opportunity to "demonstrate in writing that no action should be taken." *Id*. If they failed to file a response, the FEC "may take further action," including an audit. *Id*. The letter also threatened that the FEC could "refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution." *Id*.

C. <u>Changing Stop Hillary PAC's Name Would Impose Substantial Costs and Burdens</u>

Compelling Stop Hillary PAC to change its name would impose substantial financial, logistical, and practical burdens on Stop Hillary PAC. Most basically, an alternate name that does not mention "Hillary" as the person to be stopped would express the committee's purpose and goals far less accurately and precisely. *Cf*. Backer Decl. ¶¶ 12, 16. The quality of the expression conveyed by the committee's name would be substantially degraded. Moreover, people would be forced to associate, if at all, under a name that did not directly, forcefully, and precisely convey their mission and goals. An alternate, vaguer name also would necessarily interfere with the committee's ability to attract supporters and raise funds. It would be more difficult for people

wishing to devote themselves to opposing Clinton's candidacy to determine whether a renamed entity is exclusively focused on that goal.

If the committee were forced to change its legal name, beyond filing a new Statement of Organization with the FEC, *id*. ¶ 14(a), it would have to similarly update its name with the Internal Revenue Service ("IRS"), with regard to its employer identification number ("EIN"); with banks, for its bank accounts; with the U.S. Postal Service, to continue receiving mail; and on all vendor contracts, *id*. ¶¶ 14(b)-(e). The committee also would have to obtain an entirely new online and social media presence, including a new web domain, Twitter handle, and Facebook page, which did not use the name "Stop Hillary PAC." *Id*. ¶¶ 14(f)-(i). These new accounts would not have the established history and following of Stop Hillary PAC's current accounts, and likely would receive far lower placement from web search engines. *Id*. ¶ 15.

Stop Hillary PAC also would have to obtain new checks, stationary, pre-printed direct-mail inbound and outbound envelopes, reply cards, thank-you cards, "best efforts" compliance materials, and bumper stickers, bearing its new name, at substantial expense. *Id*. ¶ 15(k)-(o). Additionally, it would be legally obligated to update its name in its statutorily mandated disclaimer on every single web page, video, picture, and advertisement. *Id*. ¶ 15(p). On Facebook alone, Stop Hillary PAC's name is emblazoned more than a hundred pictures that would have to be digitally updated with its new name. *Id*. 15(r). Stop Hillary PAC should not be forced to undergo this tremendous burden, if at all, until this lawsuit is complete and its constitutional claims have been fully adjudicated.

ARGUMENT

PLAINTIFFS ARE ENTITLED TO A PROHIBITORY PRELIMINARY INJUNCTION TO ALLOW STOP HILLARY PAC TO MAINTAIN ITS NAME THROUGHOUT THE PENDENCY OF THIS LAWSUIT

This Court should grant Plaintiffs' Motion for a Preliminary Injunction. Plaintiff Stop Hillary PAC has operated under its name since its founding nearly two-and-a-half years ago. Backer Decl. ¶ 5. Its name clearly, succinctly, accurately, and powerfully conveys its important mission. *Id*. ¶¶ 6, 12, 16. The committee has sent out millions of communications under that name, been the subject of numerous news articles, run over a million dollars of political advertisements under that name, and otherwise generated valuable goodwill and name recognition. *Id*. ¶¶ 8, 10. Hundreds of thousands of people have decided to associate together under the name "Stop Hillary PAC," by making contributions to the PAC, assisting in its projects, or joining its mailing list. *Id*. ¶ 7. Requiring Stop Hillary PAC to change its name would cause it to incur substantial cost and inconvenience; require it to acquire an entirely new online presence; squander the goodwill associated with its present name; and compel it to operate under a less specific, less effective name that does not reflect it mission and purpose. *Id*. ¶ 14.

In May 2013, when Stop Hillary PAC was formed and registered under its name, neither Hillary Clinton, nor (apparently) anyone else bearing the first or last name of "Hillary," was a federal candidate. *Id*. ¶¶ 4, 17. Consequently, both at the time of its formation, and throughout the first two years of its existence, the committee's name was indisputably consistent with federal law, *see* 52 U.S.C. § 30102(e)(4). In the months leading up to Stop Hillary PAC's formation—indeed since the 2010 congressional elections—Hillary Clinton repeatedly insisted that she was ***not*** going to become a candidate for President of the United States.[3] These denials proved untrue.

[3] *See* Tracy Connor, "Hillary Clinton Explains Why She Might Not Run," NBC NEWS (June 10, 2014) ("Hillary Clinton says there are a few reasons she might not run for president — and one of

Thus, Stop Hillary PAC adopted its name at a time when Clinton was not a candidate, and affirmatively discounted any intent of becoming a candidate. Nevertheless, after over two years of engaging in core First Amendment activities under this name, Plaintiff Stop Hillary PAC and its counsel, treasurer, supporter, and contributor Plaintiff Dan Backer are being threatened with burdensome administrative proceedings, regulatory financial audits, substantial civil fines, and even criminal prosecution for violating 52 U.S.C. § 30102(e)(4), all because Clinton changed her mind and decided to become a candidate. Verified Compl. §§ 21-22.

Section 30102(e)(4) states, in relevant part, "In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name." 52 U.S.C. § 30102(e)(4) (hereafter, "Name Prohibition"). The FEC has threatened administrative proceedings, audits, civil fines, and even criminal prosecution to compel Backer to change Stop Hillary PAC's name. Plaintiffs respectfully ask that this Court grant them a preliminary injunction to maintain the *status quo*, while their facial and as-applied constitutional

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them hasn't even been born yet."), *available at* http://www.nbcnews.com/storyline/hillary-clinton-interview/hillary-clinton-explains-why-she-might-not-run-n127576; Taegan Goddard, "Did Hillary Clinton Ever Stop Running for President?," THE WEEK (Feb. 21, 2014), *available at* http://theweek.com/articles/450436/did-hillary-clinton-ever-stop-running-president ("Hillary Clinton long denied that she would be running for president again after her loss to Barack Obama in 2008."); Melissa Jeltsen, "Hillary Clinton: 'I Really Don't Believe' I'll Run for President Again (VIDEO)," HUFFINGTON POST (Dec. 12, 2012), *available at* http://www.huffingtonpost.com/2012/12/12/hillary-clinton-2016_n_2286173.html; Lindsey Boerma, "Hillary Clinton for President in 2016?," CBS NEWS (Dec. 9, 2012), *available at* http://www.cbsnews.com/news/hillary-clinton-for-president-in-2016/ ("Mrs. Clinton has denied harboring any desire to weather another election."); Elise Labott, "Hillary Clinton: Repeats 'No' for 2016, Can't Stand 'Whining' About Life Choices," CNN (Oct. 18, 2012), *available at* http://politicalticker.blogs.cnn.com/2012/10/18/hillary-clinton-repeats-no-2016-cant-stand-whinin-about-life-choices/; Michael Muskal, "Hillary Clinton Again Says She Won't Run for President in 2016," L.A. TIMES (Oct. 17, 2011), *available at* http://articles.latimes.com/2011/oct/17/news/la-pn-hillary-clinton-future-20111017; *see also* "Hillary Clinton May Not Run for President After All, Says Senator Who Conferred With Her," THE WEEK (Sept. 20, 2014), *available at* http://theweek.com/speedreads/445928/hillary-clinton-may-not-run-president-after-all-says-senator-who-conferred.

challenges to § 30102(e)(4) are pending, so that Stop Hillary PAC need not change or otherwise stop using its name.

The sole purpose of § 30102(e)(4)'s Name Prohibition is to ensure that the public is not misled into believing that a non-connected PAC is actually a candidate's official authorized committee. *See infra* Subsection I.A.2. Neither the FEC nor the Clinton campaign has identified even a single individual anywhere in the nation who even momentarily suspected that Stop Hillary PAC might be Clinton's official authorized campaign committee, or that Stop Hillary PAC was trying to facilitate Clinton's effort to become President. The Government lacks a constitutionally valid basis for seeking to curtail the fundamental First Amendment rights of speech and association of Stop Hillary PAC, its supporters and contributors, or Backer. Section 30102(e)(4) is an embarrassingly hamfisted, blunderbuss, and overbroad attempt at preventing the purely imaginary chimera of confusion posed by groups such as Stop Hillary PAC.

To obtain a preliminary injunction, a plaintiff must show that:

(1) they are likely to succeed on the merits;
(2) they will likely suffer irreparable harm absent an injunction;
(3) the balance of hardships weighs in their favor; and
(4) the injunction is in the public interest.

League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 236 (4th Cir. 2014) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); *see also United States v. South Carolina*, 720 F.3d 518, 533 (4th Cir. 2013) (quoting *Real Truth About Obama v. FEC*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010), *reinstated in relevant part*, 607 F.3d 355 (4th Cir. 2010)). Each of these factors is satisfied here.

A. Plaintiffs are Likely to Succeed on the Merits of Their Claims

Plaintiffs are likely to succeed on the merits of their facial and as-applied challenges to 52 U.S.C. § 30102(e)(4)'s vague and overbroad Name Prohibition. Subsection 1 explains that this provision abridges Plaintiffs' First Amendment rights of speech and association and therefore is subject to strict—or, at the very least, "exacting"—scrutiny. Subsection 2 demonstrates that, as applied to committees whose names expressly and unambiguously oppose federal candidates, § 30102(e)(4) does not further any important government interests.

Subsection 3 establishes that, both facially and as applied, § 30102(e)(4) is an unconstitutionally overbroad means of attempting to further the government's asserted goal of preventing public confusion. Finally, Subsection 4 shows that the provision violates the First Amendment because it is impermissibly vague. Importantly, because § 30102(e)(4) infringes First Amendment rights, Plaintiffs must be deemed likely to succeed on the merits of their challenge unless the Government can affirmatively demonstrate § 30102(e)(4)'s constitutionality, both facially and as-applied. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

1. Section 30102(e)(4)'s Name Prohibition Abridges the Fundamental First Amendment Rights of Speech and Association for Political Committees, as Well as Their Treasurers, Contributors, and Other Supporters.

Section 30102(e)(4) substantially burdens fundamental First Amendment rights to freedom of speech, *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)), as well as political and expressive association, *see id*. at 15 (quoting *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975)). Federal law generally requires individuals wishing to band together to collectively participate in the political process by contributing to candidates or making independent expenditures on commercials, mailers, or other communications about candidates to form a political committee. 52 U.S.C. § 30101(4). The committee must have a treasurer, *id*. § 30102(a), who is responsible for filing all required reports with the FEC, *id*. § 30104(a). Such

reports, which are publicly available on the FEC's website, *id*. § 30104(d)(2), must contain the committee's name and identify every person who has contributed $200 or more to the committee. *Id*. § 30104(b)(3)(A).

The First Amendment squarely protects the right of a committee itself, through its founders and officers, to determine what its name will be. A committee's name is a matter of pure political expression. *See* Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 391 (2011) ("Names, whether personal or commercial, have historically been a way of communicating information to others . . . ."). "[P]olitical machinery is powered by names and what those names symbolize and identify." *Common Cause v. FEC*, 655 F. Supp. 619, 621-22 (D.D.C. 1986), *rev'd* 842 F.2d 436 (D.C. Cir. 1988). Especially in politics, the name of an organization or committee goes to the very essence of defining what that organization is and how it chooses to present itself to the public. A committee uses its name to convey its mission and values, to attract and inspire supporters. *Cf*. Backer Decl. ¶¶ 12, 16. To understand the expressive importance of a name, one has only to look at the vitriolic public debates over whether the *#BlackLivesMatter* movement should be *#AllLivesMatter*. The message conveyed by Defendant Federal Election Commission's name would be quite different if Congress changed it to Meaningless Paperwork Bureaucracy. By adopting a name that reflects its mission, goals, or values, a committee can engage in succinct, powerful communication each time the committee is mentioned or discussed, even if a listener, viewer, or reader does not have time, opportunity, or inclination to completely digest a complete advertisement or other communication from the committee.

The right to select a name also lies squarely at the heart of the First Amendment right to political association. *See Citizens Against Rent Cont./Coal. for Fair Hous. v.*

, 454 U.S. 290, 294 (1981) ("[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."). Federal law requires that most political association relating to federal elections occur through political committees. 52 U.S.C. § 30102(a), and each political committee is required to adopt a name. "Names are an obvious badge of identity," Mark Bartholomew, *Trademark Morality*, 55 WM. & MARY L. REV. 85, 123 (2013), and "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994). Requiring a committee to change its name, or prohibiting it from adopting a certain name in the first place, inexorably affects the core of that committee's very identity. A name defines what that committee is; it is the banner around which people exercise their fundamental First Amendment right to associate together to achieve their shared political goals. Moreover, a political committee is statutorily required to include its name in disclaimers on virtually all advertisements and communications to the public, 52 U.S.C. § 30120(a), as well as its publicly available disclosure reports, *id*. § 30104(b)(3)(A). Thus, name restrictions compel people to publicly associate, if at all, with entities bearing names that do not fully and accurately describe their goals, convey their values, or express their true beliefs.

Section 30102(e)(4)'s Name Prohibition abridges the First Amendment right to freedom of speech and association of political committees; their founders, officers, and treasurers; and their supporters, contributors, and members. It directly limits political expression and association by prohibiting non-connected committees from adopting names that include federal candidates, even when the use of such names is essential to accurately, succinctly, and powerfully express the committee's mission, goals, and values.

The fact that § 30102(e)(4) bars committees only from adopting certain names does not remove the constitutional infirmity. In *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977), the Court invalidated an ordinance prohibiting homeowners only from posting "For Sale" signs on their front lawns, even though they could post any other signs they wished there, and could advertise the sale of their homes through various other means. Likewise, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court struck down a law that prohibited beer manufacturers from printing alcohol content on beer labels, even though they could include other desired information on the labels, and communicate the alcoholic content of their beverages in other ways. *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (invalidating law prohibiting mailing of unsolicited contraceptive advertisements, even though it did not prohibit the mailing of other unsolicited advertisements, and contraceptive manufacturers could advertise in other ways). Thus, § 30102(e)(4) is subject to strict scrutiny, and must be invalidated unless it serves a "compelling" government interest and is "the least restrictive means" of achieving that interest. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014); *Buckley*, 424 U.S. at 44-45.

* * *

Another reason § 30102(e)(4) triggers strict scrutiny, in addition to its substantial burden on First Amendment rights of association and expression, is because it is a content-based restriction on First Amendment activities. The Government "has no power to restrict expression because of its . . . content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). A law is content-based if it "applies to particular speech because of . . . the idea or message expressed" or it "cannot be justified 'without reference to the content of the regulated speech.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). For example, a law that prohibits the posting of signs relating to events is content-

based because it applies only to signs that mention an event. *See id*. at 2231. A law prohibiting political committees from adopting names that include candidates' names candidates is similarly content-based. Moreover, as discussed below, the law's asserted purpose is to ensure that the content of the expression—the inclusion of a candidate's name—does not confuse the public. Thus, § 30102(e)(4) is content-based. The fact that the Government may have enacted § 30102(e)(4) with a "benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech" does not preclude strict scrutiny from applying. *Reed*, 135 S. Ct. at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 429 (1993)).

* * *

In *Pursuing America's Greatness v. FEC*, No. 1:15-CV-1217-TSC (D.D.C. Sept. 24, 2015), the only constitutional issue raised was whether the First Amendment permitted the FEC to carve out various exceptions to § 30102(e)(4) in its implementing regulation, 11 C.F.R. § 102.14(b). The U.S. District Court for the District of Columbia held that § 30102(e)(4) is "part and parcel of FECA's disclosure regime." *Pursuing America's Greatness* at 23; *see also Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1367-68 (D.C. Cir. 1988) (stating that § 30102(e)(4) is one way in which FECA "require[s] political bodies to disclose the identity of persons associated with them"). In that court's view, it is subject only to intermediate scrutiny.

Pursuing America's Greatness and the D.C. Circuit precedents upon which it is based misapprehend the nature of disclosure requirements. A disclosure requirement is a law requiring an entity to reveal certain information. *See, e.g.*, *Buckley*, 424 U.S. at 61-64; *see, e.g.*, *Doe v. Reed*, 561 U.S. 186 (2010) (holding that a law making signatures on a petition publicly available is "not a prohibition on speech," but rather "a disclosure requirement"). A law that goes beyond merely requiring a person to provide certain information, and instead restricts or prohibits his ability to

engage in certain political expression, cannot be considered a mere "disclosure requirement." *See Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (holding that a law cannot be treated as only a disclosure requirement if it "prevent[s] anyone from speaking"); *cf. Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985) (outlining the "material differences between disclosure requirements and outright prohibitions on speech").

Section 30102(e)(4)'s Name Prohibition seeks to prevent public confusion by making it easier to determine whether a committee is non-connected, but that provision goes beyond merely requiring a committee to disclose its "non-connected" status. Section 30102(e)(4) directly limits a committee's ability to express itself and associate with supporters through its name by outright prohibiting the committee from adopting certain names. *See supra* pp. 11-14. Thus, § 30102(e)(4) is more than a mere disclosure requirement, substantially burdens First Amendment rights, and is subject to strict scrutiny. Nevertheless, even if this Court agrees with the reasoning of *Pursuing America's Greatness*, § 30102(e)(4) remains subject to exacting scrutiny, meaning that it must be invalidated unless the Government can establish that it is "closely drawn" to achieving an "important" government interest. *McCutcheon*, 134 S. Ct. at 1444 (2014); *accord Buckley*, 424 U.S. at 25.

2. Section 30102(e)(4) is Unconstitutional As Applied to the Creation and Maintenance of PACs With Names That Clearly and Unambiguously Oppose Candidates Because It Does Not Further a Valid Government Interest.

Plaintiffs are likely to succeed on the merits of their challenge to § 30102(e)(4) as applied to the creation and maintenance of non-connected political committees bearing names that clearly and unambiguously oppose candidates, because the statute does not further a valid governmental interest. Section 30102(e)(4) restricts political committees from choosing names based on their content: whether they include the name of a candidate. The Supreme Court has "sustained content-

based restrictions" on First Amendment activities "only in the most extraordinary circumstances." *Bolger*, 463 U.S. at 65.

Here, the legislative intent behind § 30102(e)(4)'s Name Prohibition was to "avoid confusion," to make it easier for the public to determine whether a particular committee has been authorized by a candidate. Senate Rules and Admin. Comm., Hearing on Amending the FECA of 1971, as Amended, 96th Cong., 1st Sess., 23 (July 13, 1979); *see also Common Cause v. FEC*, 842 F.2d 436, 447 n.31 (D.C. Cir. 1988) (recognizing that § 30102(e)(4) was enacted to "prevent confusion arising from misleading committee names"). The FEC likewise has explained that its implementing regulations were intended to "minimize or eliminate the possibility" for "confusion or abuse" that can purportedly occur when non-authorized committees adopt candidates' names. FEC, "Special Fundraising Projects and Other Use of Candidates Names By Unauthorized Committees," 57 FED. REG. 31,424, 31,424 (July 15, 1992); *accord* FEC, "Special Fundraising Projects and Other Use of Candidates Names By Unauthorized Committees," 59 FED. REG. 17,267, 17,268 (Apr. 12, 1994). The FEC feared that people might believe they are receiving communications from, or making contributions to, a candidate's committee when in fact they are dealing with an unauthorized PAC. *Id*.

No valid governmental interest is furthered by prohibiting political committees from adopting names that clearly and unambiguously oppose candidates. Neither FEC, the Clinton campaign, the media, nor anyone else has identified a single person who even momentarily believed that Stop Hillary PAC ***might*** have been Clinton's authorized candidate committee, or that a contribution to Stop Hillary PAC otherwise would have been used to support Clinton's candidacy. In the words of the FEC itself, "the potential for fraud and abuse is significantly reduced in the case" of a name which "opposes the candidate." 59 FED. REG. at 17,269 (quotation

marks omitted). Thus, applying § 30102(e)(4) to political committees with names that clearly and unambiguously oppose a federal candidate does not further the government's asserted interest in combating fraud or preventing confusion.

The FEC also contends that "[a] total ban" on unauthorized committees' use of candidate names is "easier to monitor and enforce" than less restrictive measures. 57 FED. REG. at 31,425. By definition, however, it would not be burdensome for the FEC to determine whether a committee name "clearly and unambiguously" opposes a federal candidate. The FEC already reviews the name of each political committee name to determine whether it violates § 30102(e)(4), assessing whether words such as "Young," for example, refer to a candidate or instead are used in a different sense. And 11 C.F.R. § 102.14(b)(3) already requires the FEC to determine whether the names of unauthorized committees' "special projects" clearly and unambiguously express opposition to a candidate. Thus, the FEC is well equipped to make that same determination concerning the names of political committees themselves. Moreover, in any event, the Government may not burden First Amendment rights to promote "administrative convenience." *United States v. Nat'l Treas. Emp. Union*, 513 U.S. 454, 473 (1995); *see Riley v. Nat'l Fed for the Blind*, 487 U.S. 781, 795 (1988) ("[T]he First Amendment does not permit the State to sacrifice speech for efficiency.").

Finally, the FEC has argued that it must restrict unauthorized committees' ability to use candidates' names because some candidates have "disagree[d] with the views expressed" by such committees and "object[ed] to the use of [their] names." 57 FED. REG. at 31,425; *accord* 59 FED. REG. at 17,268. But the Government may not bar a committee from adopting a candidate's name simply because the candidate may object. The "fundamental First Amendment right to advocate the defeat of election of a candidate necessarily carries with it a right to use a candidate's name. . . . By permitting a candidate to regulate the use of his name in a political campaign, such remedies

would stifle the 'uninhibited, robust, and wide-open' debate on public issues that the First Amendment was designed to promote." *Friends of Phil Gramm v. Am. for Phil Gramm in '84*, 587 F. Supp. 769, 774 (E.D. Va. 1984) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964)). Thus, the Government lacks a constitutionally valid interest in prohibiting unauthorized committees from adopting names that clearly and unambiguously oppose candidates.

3. Section 30102(e)(4) is Unconstitutional, Both Facially and As Applied to the Creation and Maintenance of PACs Bearing Names That Clearly and Unambiguously Oppose Candidates, Because It Is Poorly Tailored to Achieving the Government's Goals.

Section 30102(e)(4) also is unconstitutional, both facially and as applied to committees such as Stop Hillary PAC, because it is substantially overbroad and not tailored to achieving the Government's goals. A law violates the First Amendment due to overbreadth when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quotation marks omitted); *accord United States v. Stevens*, 559 U.S. 460, 473 (2010). Likewise, under strict scrutiny, a law is unconstitutional if more narrowly tailored or less restrictive means exist of pursuing the Government's goals. *McCutcheon*, 134 S. Ct. at 1444; *Buckley*, 424 U.S. at 44-45. To survive "exacting" or "closely drawn" scrutiny, in contrast, a law must "employ[] means closely drawn to avoid unnecessary abridgement" of First Amendment rights. *Buckley*, 424 U.S. at 25. Section 30102(e)(4) cannot survive any of these tests.

Section 30102(e)(4) flatly prohibits any non-authorized committees from adopting a name that includes the name of a candidate, in order to prevent the public from being misled into believing that a non-connected committee is actually an authorized candidate committee. *Common Cause*, 842 F.2d at 447 n.31; 57 FED. REG. at 31,424; 59 FED. REG. at 17,268. This blanket prohibition sweeps unnecessarily broadly, covering not only committees that a person reasonably

could mistake for a candidate's authorized committee, but also ones such as Stop Hillary PAC that clearly and unambiguously oppose the named candidate. The FEC itself has recognized that names do not carry the same "potential for fraud and abuse." 59 FED. REG. at 17,269 (quotation marks omitted). Stop Hillary PAC clearly and unambiguously conveys the committee's opposition to Clinton's candidacy, and the FEC cannot adduce a single person who believed it might have been Clinton's official authorized candidate committee. Thus, § 30102(e)(4) is overbroad, poorly drawn, and unnecessarily invasive of First Amendment rights.

4. Section 30102(e)(4)'s Name Prohibition Violates the First and Fifth Amendments Because It is Unconstitutionally Vague.

Even if this Court concludes that § 30102(e)(4) can survive heightened or strict scrutiny, it still should hold the law facially unconstitutional under the First Amendment and Fifth Amendment's Due Process Clause because it is impermissibly vague. The provision's vagueness chills political committees in exercising their constitutional right to select a name and confers upon the FEC impermissibly broad interpretative and enforcement discretion. *See Reno v. ACLU*, 521 U.S. 844, 870-871 (1997) ("The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect"). A statute is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox TV Stats., Inc.*, 132 S. Ct. 2307, 2317 (2012) (quotation marks omitted); *accord United States v. Williams*, 553 U.S. 285, 304 (2008).

The Supreme Court has struck down statutory terms as impermissibly vague when they regulated expressive activities yet were undefined by statute, regulation, or prior judicial construction. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 360-62 (1983) (invalidating law requiring people to present "credible and reliable" identification to police upon request, due to

vagueness); *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620-21 (1976) (invalidating law requiring anyone wishing to engage in door-to-door solicitation for a "recognized charitable cause" to first register with the police, due to vagueness); *Smith v. Goguen*, 415 U.S. 566, 581-82 (1974) (invalidating law that barred "contemptuous treatment" of the Flag, due to vagueness); *see also Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987) (holding phrase "'airport related,'" as used in interpretation of airport policy, unconstitutionally vague); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 393-94 (1926) (holding phrases "current rate of wages" and "locality" unconstitutionally vague).

In the context of § 30102(e)(4), the term "name" is as vague as other terms that the Supreme Court has held unconstitutional. Neither FECA nor FEC regulations defines what portions of a candidate's name are necessary to trigger § 30102(e)(4)'s Name Prohibition. Is it a candidate's full name? Is just a candidate's first, middle, or last name sufficient? Must a committee avoid adopting a name that includes a candidate's legal name, the candidate's nickname, the name the candidate listed on their FEC Statement of Candidacy, or some combination thereof? Does it matter whether the committee subjectively intends for a word in its name to refer to a certain candidate? Or instead whether any word in the committee's name simply happens to be the same as any portion of any name of any candidate? Or is the issue instead whether someone, somewhere, might understand the committee's name to be referring to a particular candidate? And in making that determination, is this hypothetical person limited to considering only the committee name itself in isolation, or instead must he consider the name in the context of various advertisements or communications by the committee (and, if so, how many advertisements or communications, and which ones?).

A few examples illustrate § 30102(e)(4)'s vagueness. Clinton's statement of candidacy lists "Hillary Rodham Clinton" as "Name of Candidate." *See* Hillary Rodham Clinton, Statement of Candidacy, FEC Form 2 (Apr. 13, 2015), *attached as* Backer Decl. Exh. 4. Stop Hillary PAC's name, in contrast, refers only to "Hillary." Thus, at most, Stop Hillary PAC has adopted only part of the name of a candidate, yet the FEC has threatened Plaintiffs with administrative, civil, and criminal prosecution. Verified Compl. ¶¶ 21-22. If the PAC were named "Stop the Clinton Family PAC" or "Stop the Clinton Legacy PAC" instead, it would contain a reference to Hillary's last name, but that also happens to be the last name of former President William J. Clinton, who is not presently a federal candidate and to whom § 30102(e)(4)'s Name Prohibition therefore does not apply. It is unclear whether a committee would face administrative, civil, and criminal penalties for adopting such a name.

In contrast, Bush's statement of candidacy lists "Jeb Bush" as the "Name of Candidate." *See* Jeb Bush, Statement of Candidacy, FEC Form 2 (June 15, 2015), *attached as* Backer Decl. Exh. 5. Bush's legal name, however, is John Ellis Bush. Don Gonyea, *5 Things You Should Know About Jeb Bush*, NPR (June 14, 2015), *available at* http://www.npr.org/sections/itsallpolitics/2015/06/14/414093887/5-things-you-should-know-about-jeb-bush. A person cannot reasonably know whether § 30102(e)(4) prohibits "Vote Jeb PAC," since it contains the candidate's name as it appears on the FEC Form 2, or instead names such as "We Love John Ellis Bush PAC" or "John Ellis for President PAC," since they contain the candidate's real name. And if "Jeb PAC" is invalid because it refers to the candidate's name, would "JEB PAC," as a reference to the candidate's initials, be more permissible?[4]

[4] There presently exists an unauthorized PAC containing the name "Jeb": VAMOS FOR JEB 2016, with the website http://www.vamosforjeb2016.com. According to its publicly available FEC file, it has not yet received an RFAI from the FEC or otherwise been the target of adverse administrative, civil, or criminal action.

Sanders lists "Bernard Sanders" on his Statement of Candidacy as the "Name of Candidate." *See* Bernard Sanders, Statement of Candidacy, FEC Form 2 (Apr. 30, 2015), *attached as* Backer Decl. Exh. 6. Although that is apparently also his legal name, the FEC has opined that non-connected political committees may not use the name "Bernie," because that is a nickname commonly used to refer to Sanders. *See* FEC, Adv. Op. 2015-04, at 3 (July 16, 2015). Thus, a person can apparently violate § 30102(e)(4) when naming a committee, even while avoiding a candidate's legal name and the name the candidate registered with the FEC. There is no guidance, however, as to the range of purported nicknames to which § 30102(e)(4) extends (*i.e.*, would it have precluded "Gipper PAC" when Reagan was a candidate?).

Chafee lists "Lincoln Davenport Chafee" on his Statement of Candidacy as the "Name of Candidate." *See* Lincoln Chafee, Statement of Candidacy, FEC Form 2 (June 16, 2015), *attached as* Backer Decl. Exh. 7. A reasonable person would have no way of knowing whether this would preclude him from forming a "Lincoln PAC" or a "Lincoln Values PAC," to support candidates who support the ideals of former President Abraham Lincoln. Along those lines, it is unclear whether someone else named Lincoln—such as former Representative Lincoln Diaz-Balart—would be precluded from forming a "Lincoln PAC," either. Overall, the law offers no guidance as to whether a non-connected PAC's ability to include the term "Lincoln" in its name hinges solely on the subjective, and potentially unexpressed, intent of its founders as to the particular "Lincoln" to which the committee's name would refer.

Section 30102(e)(4) also raises vexing issues when one or more words in a candidate's name bears another meaning. For example, there are presently two House candidates with the surname "Young." There also exist several unauthorized political committees bearing that name, including "Young Conservatives of America" and "Stonewall Young Democrats." Based on these

committees' names, it is impossible to determine whether their references to "Young" relate to a particular candidate (akin to "Reagan Conservatives of America" or "Stonewall Clinton Democrats"), or instead the youth of the PAC's supporters. Section 30102(e)(4) reasonably may deter committees from fully exercising their First Amendment rights by adopting such names precisely to avoid unnecessary FEC entanglements. And it appears solely up to the FEC, on a case-by-case basis, to determine which of these committee names will trigger administrative proceedings, civil fines, audits, and the threat of criminal prosecution. This Court should invalidate § 30102(e)(4) due to unconstitutional vagueness.

B. Stop Hillary PAC and Backer Will Suffer Irreparable Injury Without an Injunction

Second, Plaintiffs will suffer irreparable injury if this Court declines to grant an injunction. Most basically, 52 U.S.C. § 30102(e)(4)'s Name Prohibition burdens their First Amendment rights, *see supra* Section A, and "[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) (plurality op.); *accord Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011); *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003).

Moreover, any harm that Plaintiffs suffer as a result of their name change would be irreparable because sovereign immunity prevents them from suing the FEC for compensatory damages in the event this Court later strikes down § 30102(e)(4). *Odenbrecht Constr. v. Sec'y, Fla. DOT*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable."); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

In addition, the harm Stop Hillary PAC would suffer from having to change its name cannot be easily quantified. To be sure, it would immediately incur substantial economic costs because it will have to acquire a new online presence (*i.e.*, new webpage, e-mail domain, Facebook page, and Twitter handle without the offending name); remove its current name from all disclaimers, online photos, videos, advertisements, and other materials; and purchase new checks, business cards, stationary, direct-mail envelopes, reply cards, thank-you cards, "best efforts" compliance materials, and bumper stickers with its new name. Backer Decl. ¶ 14.

Beyond those quantifiable costs, however, Stop Hillary PAC necessarily will suffer a loss of the goodwill and name recognition it has built up over the past two years of its existence. This Court has recognized that "'the potential loss of goodwill . . . support[s] a finding of irreparable harm.'" *JTH Tax, Inc. v. Frashier*, 624 F.3d 635, 639 (4th Cir. 2010) (alterations in original) (quoting *Multi-Channel TV Cable Co. v. Charlottesville Qual. Cable Op. Co.*, 22 F.3d 546, 552 (4th Cir. 1994)); *see, e.g., Sig. Flight Sup. Corp. v. Landow Aviation Ltd. P'ship*, 442 F. App'x 776, 784-85 (4th Cir. 2011) (affirming district court's grant of injunction based on finding of irreparable injury due to "'possibility'" that a company would lose its goodwill).

Stop Hillary PAC has generated a substantial amount of goodwill and name recognition under its current name. It has spent over $1 million pursuing its goals under the name "Stop Hillary PAC," developing its brand. Backer Decl. ¶ 8. It has sent out well over 100 million -mails from the "@StopHillaryPAC.org" domain to engage supporters and spread its message, *id*. ¶ 8(a); currently receives an average of 1 million visitors monthly to its website, http://www.StopHillaryPAC.org, which is the 1,920th most-visited site in the nation, *id*. ¶ 8(b); and has received roughly 200,000 "likes" on its Facebook page, https://www.facebook.com/StopHillaryPAC, *id*. ¶ 8(c). The Committee's Facebook posts appear,

under its name, in the Facebook Newsfeeds of over 1.1 million individuals each week. *Id.* ¶ 8(c). Its Twitter account, "@StopHillaryPAC," has approximately 6,900 followers and has made over 1,200 tweets. *Id.* ¶ 8(d). The committee has received extensive coverage under its current name in the popular and political presses. *Id.* ¶ 10; *see id.* Exh. 3.

Although Plaintiff still may refer to Clinton "in the body of any website or communication," and use Clinton's name in the "'title of a special project name or other communication'" that "'unambiguously shows opposition'" to her, FEC, Adv. Op. 2015-14, at 3-4 (July 16, 2015) (quoting 11 C.F.R. § 102.14(b)(3)), it cannot retain "Stop Hillary PAC" as its name. Thus, Plaintiff must stop referring to itself as "Stop Hillary PAC," particularly in statutorily required disclaimers in its solicitations and other communications, *see, e.g.*, 52 U.S.C. § 30120(a). Over three-quarters of a million people have chosen to associate together under the banner "Stop Hillary PAC" in a variety of ways, such as by making financial contributions, supporting its projects, or joining its mailing list. Backer Decl. ¶ 7(a)-(c). The committee would suffer the irreparable loss of this goodwill if it were forced to change its name.

Compelling Stop Hillary PAC to operate under a different name also would inflict unquantifiable harm by interfering with its mission and ability to attract supporters and raise funds. The name "Stop Hillary PAC" clearly, succinctly, accurately, and powerfully conveys the committee's precise and exclusive purpose, *id.* ¶¶ 6, 12, 16—a purpose that already has attracted over three-quarters of a million people, *id.* ¶ 7. Compelling the committee to operate under a different, vaguer name that does not directly communicate its mission would hinder its ability to attract potential supporters or contributors, who would be unable to discern its purpose simply through a glance at its name. *Id.* ¶ 16. Even if the committee were to completely eschew decorum and civility by changing its name to something like the inflammatory "Stop the Manipulative Liar

Who Has Undermined Our National Security PAC," the public would have no idea which "manipulative liar" in Washington, D.C. who has "undermined our national security" the PAC was opposing without further research or reading.

"[A] finding of irreparable harm is most appropriate where the plaintiff's damages are difficult to calculate." *HCI Techs., Inc. v. Avaya, Inc.*, 446 F. Supp. 2d 518, 521 (E.D. Va. 2006) (citing *Multi-Channel TV Cable Co.*, 22 F.3d 546); *see also Sci Apps. Int'l Corp. v. CACI-Athena, Inc.*, No. 1:08-CV-443 (JCC), 2008 U.S. Dist. LEXIS 37849, at *8 (E.D. Va. May 8, 2008) (holding that irreparable harm is likely to exist where it is "impossible to ascertain[] with any accuracy the extent of the loss") (quotation marks omitted). Here, it would be extremely difficult to attempt to estimate the financial and other loss Stop Hillary PAC would suffer from having to operate under a less informative and attractive name. Indeed, even if the amount by which its contributions declined could be reliably ascertained, monetary damages would be insufficient to compensate for fundamentally non-economic harms such as the reduction in additional new members, other supporters, and people joining its mailing lists that would likely result from an alternate name. *Cf. Project Vote/Voting for Am., Inc. v. Long*, 813 F. Supp. 2d 738, 744 (E.D. Va. 2011) ("[M]onetary damages are insufficient to compensate for denial of a statutory right to access completed voter registration applications."). Thus, allowing the FEC to compel Stop Hillary PAC to change its name would inflict irreparable injury upon Plaintiffs.

C. <u>The Balance of Hardships Weighs in Favor of Stop Hillary PAC and Backer</u>

Third, an injunction is warranted because the balance of hardships clearly tilts in favor of Plaintiffs. If this Court declines to issue an injunction, Stop Hillary PAC's constitutional rights will be abridged because it will no longer be able to clearly, succinctly, powerfully, and accurately express its sole, precise mission through its name, *cf.* Backer Decl. ¶¶ 6, 16. Similarly, its hundreds

of thousands of supporters and contributors, *see id*. ¶ 8, will no longer be permitted to associate under that banner. The abridgement of constitutional rights constitutes a substantial hardship generally warranting injunctive relief. *See, e.g.*, *Republican Party v. N.C. State Bd. of Elecs.*, No. 94-1057, 1994 U.S. App. LEXIS 14961, at *8 (June 17, 1994) (affirming district court ruling that balance of hardships "tipped decidedly in favor" of victims of constitutional violation); *Vollette v. Watson*, 978 F. Supp. 2d 572, 597 (E.D. Va. 2013) (holding that "the balance of hardships plainly weighs in favor of Injunction Plaintiffs," because they "continue to suffer from the effects of the unconstitutional retaliation").

Substantively, Plaintiffs will suffer substantial hardship in the absence of an injunction because the FEC—through the threat of burdensome administrative proceedings, substantial civil penalties, and even criminal prosecution, *see* Verified Compl. ¶¶ 21-22—will force Plaintiffs to discontinue using the name under which they have operated for more than two years and adopt a different, vaguer, less accurate, and less effective name, Backer Decl. ¶ 14; *see Yellow Cab Co. v. Rocha*, No. 3:00-CV-13, 2000 U.S. Dist. LEXIS 11597, at *15 (W.D. Va. July 5, 2000) ("Not being able to use their current trade names will harm [Plaintiffs] . . because the current trade names . . . are the ones they have been using in building their" operation and brand.).

Adopting a different name will cause Stop Hillary PAC to lose the goodwill and name recognition that it spent over $1 million legally cultivating throughout the first two years of its existence. Backer Decl. ¶ 8; *see Global Tel*Link, Corp. v. Jail Cell Servs., LLC*, No. 1:14-CV-1557 (TSE/JFA), 2015 U.S. Dist. LEXIS 55591, at *21 (E.D. Va. Mar. 20, 2015) (recognizing loss of goodwill associated with an entity's name as a hardship warranting injunctive relief); *see also W. Insulation, L.P. v. Moore*, No. 3:05-CV-602, 2008 U.S. Dist. LEXIS 4390, at *11-12 (E.D. Va.

Jan. 22, 2008) (holding that the balance of hardships favored grant of injunctive relief to prevent plaintiffs' "goodwill from eroding further").

The committee also will be forced to incur substantial inconvenience and spend a substantial amount of money changing its name on all communications, stationary, disclaimers, and social media. Backer Decl. ¶ 14; *Fogerty v. Poor Boy Prods.*, No. 96-56546, 1997 U.S. App. LEXIS 24695, at *9-10 (9th Cir. Sept. 12, 1997) (holding that a litigant would suffer substantial hardship from being forced to change its name because the change "will require substantial expense and may undermine" its future operations); *cf. Pan Am World Airways, Inc. v. Flight 001, Inc.*, No. 06 Civ. 14442 (CSH), 2007 U.S. Dist. LEXIS 51012, at *58 (S.D.N.Y. July 13, 2007) (denying preliminary injunction that would have required the defendant to change its name, because it would have suffered hardship from changing "store signage, bags, product hand tags, gift wrap, gift cards, and website" and would "lose the goodwill it has developed").

The FEC, in contrast, will not suffer any hardship from a preliminary injunction. As an initial matter, a government entity does not suffer hardship by being enjoined from enforcing a law where it would likely be unconstitutional. *See Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011) (holding that a state "is in no way harmed by issuance of an injunction that prevents [it] from enforcing unconstitutional restrictions"); *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (holding that a school "is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which, on this record, is likely to be found unconstitutional"). To the contrary, an injunction would benefit the FEC, because it would have one less law to spend its limited resources enforcing, and it could better focus its enforcement efforts on pursuing more serous conduct, such as the solicitation or receipt

of foreign contributions, or *quid pro quo* corruption. *See Citizens United*, 558 U.S. at 359. Thus, the balance of hardships tilts sharply in favor of Plaintiffs.

D. An Injunction Would Be in the Public Interest

Finally, an injunction would promote the public interest. Enforcing constitutional rights, of course, is always in the public interest. *Newsom*, 354 F.3d at 261 (overturning district court's refusal to grant preliminary injunction in First Amendment case, in part because "upholding constitutional rights serves the public interest"); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (affirming grant of preliminary injunction against enforcement of public nudity statute on First Amendment grounds, because "upholding constitutional rights surely serves the public interest"), *modified in part on other grounds*, 470 F.3d 1074 (4th Cir. 2006). This is especially true of First Amendment rights. *See Lytle v. Brewer*, 73 F. Supp. 2d 615, 629 (E.D. Va. 1999) ("[W]henever there is a possibility that constitutionally protected rights will be infringed by the chilling of free speech, the public interest weighs in favor of protecting the constitutional rights of the people.").

Constitutional considerations aside, the public also has a strong interest in avoiding confusion by knowing the identity, mission, goals, and purpose of political committees they may wish to support, subsidize, or otherwise associate with. *Common Cause v. FEC*, 842 F.2d 436, 447 n.31 (D.C. Cir. 1988) (explaining that "Congress' general intent" behind § 30102(e)(4) was "to prevent confusion arising from misleading committee names"). Allowing Stop Hillary PAC to retain its name furthers this goal because that name clearly, succinctly, powerfully, and accurately conveys the committee's sole purpose, Backer Decl. ¶¶ 6, 16, without in any way suggesting that it might be authorized by, or otherwise affiliated with, Clinton or her campaign.

While the FEC may contend that the public generally has an interest in the enforcement of federal laws, Fourth Circuit precedent shows that mere recital of a generalized interest in law enforcement is insufficient to satisfy this prong. *Murrow Furn. Gall, Inc. v. Thomasville Furn. Indus.*, 889 F.2d 524, 529 (4th Cir. 1989); *cf. Pashby v. Delia*, 709 F.3d 307, 329 (4th Cir. 2013) (criticizing district court's assumption that the public interest "'always lies with upholding the law'" and enforcing a law). In this case, the FEC has not, and cannot, present any evidence that anyone might be misled into contributing to, or supporting, Stop Hillary PAC under the mistaken assumption that it is Clinton's official authorized campaign committee. Nothing would further the public interest more than allowing this committee to continue, unimpeded, its important work of ensuring that Hillary Clinton does not become President.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court issue a preliminary injunction barring the FEC from enforcing 52 U.S.C. § 30102(e)(4), either facially, or as applied to non-connected political committees (and their treasurers, counsel, and officers) bearing names that clearly and unambiguously oppose one or more candidates, including but not limited to Stop Hillary PAC and any other such non-connected political committees Backer may choose to form.

Dated this 6th day of October, 2015.

Respectfully submitted,

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