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

STOP HILLARY PAC and DAN BACKER,	)	No. 1:15-CV-1208-GBL-IDD
Plaintiffs,	)	
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

REBUTTAL MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This Court should grant Plaintiffs' Motion for a Preliminary Injunction, because they are likely to succeed on the merits of their claim, and satisfy the non-merits requirements for injunctive relief. The FEC acknowledges that 52 U.S.C. § 30102(e)(4) was intended to protect against fraud and confusion, by ensuring the public is not misled into believing a PAC is actually a candidate's official authorized committee. This rationale might be sufficient to prohibit unauthorized committees from adopting names that embrace candidates, such as "I Like Mike Huckabee," *Pursuing America's Greatness*, No. 15-1217, 2015 U.S. Dist. LEXIS 128250 (D.D.C. Sept. 24, 2015). However, the FEC has completely failed to adduce any record evidence to suggest that the public might be misled into believing a committee with a name that clearly and unambiguously opposes a candidate, such as Stop Hillary PAC, is a candidate's official authorized committee.

Plaintiff Dan Backer's declaration in support of this Motion attests:

> I am not aware of any person who erroneously believed that Stop Hillary PAC was an authorized committee of candidate Hillary Rodham Clinton. So far as I am aware, not a single contribution, phone call, e-mail, Facebook communication,

> comment, Tweet, or other communication that Stop Hillary PAC received to date was actually intended for Clinton or the Clinton campaign.

Declaration of Dan Backer in Support of Plaintiffs' Motion for Preliminary Injunction, Dock. #3-4, ¶ 20 (Oct. 6, 2015) (hereafter, "Backer Decl."). The FEC has not provided a shred of evidence in rebuttal to suggest even a single person, anywhere in the country, believed Stop Hillary PAC might be authorized by Clinton, supports Clinton, or is Clinton's official campaign committee. In this case, the FEC did not bring a knife to a gunfight; instead, it showed up empty-handed.

A political group's name is its very heart and soul. It presents itself to the world through its name; its name is a ubiquitous, direct declaration of its values, goals, and mission. It is a constitutionally protected form of expression, and the banner under which its members exercise their constitutional right to associate. *See Common Cause v. FEC*, 655 F. Supp. 619, 621-22 (D.D.C. 1986) ("[P]olitical machinery is powered by names and what those names symbolize and identify."), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988). If this Court were compelled to change its name from the "U.S. District Court for the Eastern District of Virginia" to the "Adjudicatory Article III Body South of D.C.," something important would be lost. This principle applies with even greater force to an avowedly political entity such as Stop Hillary PAC. People who would gladly marshal under that banner may not bother taking the time to learn about the PAC if it had a vaguer, less effective name. The name "Stop Hillary PAC" powerfully, succinctly, and accurately conveys the committee's very reason for existence. Backer Decl. ¶¶ 6, 12, 16. Compelling committees to avoid such names needlessly abridges their First Amendment rights.

The FEC has not presented a constitutionally valid and factually supported reason why § 30102(e)(4) should sweep so broadly as to prohibit committees from adopting names that clearly and unambiguously oppose candidates. Plaintiffs therefore are likely to succeed in demonstrating

§ 30102(e)(4) is either unconstitutionally overbroad, or unconstitutional as applied to committees, such as Stop Hillary PAC, with names that clearly and unambiguously oppose a candidate.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM.

A. Section 30102(e)(4) is Not Merely a Disclosure Requirement, But a Substantial Burden on Constitutionally Protected Speech and Association

The FEC begins by attempting to minimize the burden imposed by § 30102(e)(4)'s Name Prohibition, characterizing it as a mere "disclosure" rule subject only to intermediate or exacting scrutiny. Defendant FEC's Opp. to Plaintiffs' Motion for a Preliminary Injunction, Dock. #25, at 9, 19 (Nov. 3, 2014) (hereafter, "FEC Opp.") (citing *Common Cause v. FEC*, 842 F.2d 436, 442 (D.C. Cir. 1988); *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1367-68 (D.C. Cir. 1988)). Insofar as § 30102(e)(4) prohibits unauthorized committees from adopting names that refer to candidates—even if the committee's intended name clearly and unambiguously opposes the candidate—it is far more than a disclosure requirement. *See Doe v. Reed*, 561 U.S. 186, 196 (2010) (holding that, to be deemed a "disclosure requirement" a statute cannot be a "prohibition on speech").

Section 30102(e)(4) does not simply require political committees to reveal information about themselves. Rather, it limits the range of names they may adopt. Thus, § 30102(e)(4) is a substantive restriction on constitutionally protected speech and association subject to strict scrutiny. *See City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) ("[T]he identity of the speaker is an important component of many attempts to persuade . . . ."); *Common Cause v. FEC*, 655 F. Supp. 619, 621-22 (D.D.C. 1986) ("[P]olitical machinery is powered by names and what those names symbolize and identify."), *rev'd on other grounds* 842 F.2d 436 (D.C. Cir. 1988).

B. Section 30102(e)(4) is a Content-Based Restriction on Expression

Citing a D.C. Circuit case from two decades ago, the FEC also contends § 30102(e)(4) triggers only intermediate scrutiny because it is a content-neutral requirement. FEC Opp. at 19-23. The facts of *Republican National Committee v. FEC*, 76 F.3d 700 (D.C. Cir. 1996), are easily distinguishable from this case. The plaintiffs there challenged legal provisions that defined what constitutes "best efforts" in the context of attempting to identify donors who gave more than $200 in a single year. *Id*. at 403. This case, in contrast, makes it illegal for unauthorized political committees to adopt names that include candidates' names, even if their names are clearly and unambiguously opposing those candidates.

As the Supreme Court recently reiterated in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (quotation marks omitted), a law is content-based if it "cannot be justified without reference to the content of the regulated speech. The FEC emphasizes, "Even plaintiffs do not suggest that their challenge to [§ 30102(e)(4)'s Name Prohibition] is based upon the FEC's supposed disagreement with any particular committee names." FEC Opp. at 21. *Reed* confirms, however, that the fact that the law was enacted with a "benign motive," a "content-neutral justification," or a "lack of 'animus toward the ideas contained' in the regulated speech" does not render the statute content-neutral or preclude strict scrutiny from applying. *Reed*, 135 S. Ct. at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 429 (1993)). Here, a committee's compliance with § 30102(e)(4) cannot be determined without looking at the content or substance of the name it adopted. Thus, under the Supreme Courts more recent holding in *Reed*, § 30102(e)(4)'s Name Prohibition is a content-based restriction subject to strict scrutiny.

C. Regardless of Whether It is Subject to Intermediate/Exacting or Strict Scrutiny, the FEC Has Provided *No* Evidence to Show That the Government Has a Valid Reason to Apply § 30102(e)(4) to Committees With Names That Clearly and Unambiguously Opposed Candidates

Plaintiffs are likely to succeed on the merits of their claims is because the FEC has not, and cannot, provide any evidence to show that applying § 30102(e)(4) to committees with names that clearly and unambiguously oppose federal candidates will promote the Government's interest in preventing fraud and confusion. *See* FEC Opp. at 23-25. The FEC argues that it is necessary to prevent committees from adopting names that clearly and unambiguously oppose candidates, because otherwise people might not know whether the committee was authorized by that candidate. FEC Opp. at 1, 3, 7, 9, 11, 13, 19. This argument practically rebuts itself.

The FEC contends that, by prohibiting unauthorized committees from adopting names that refer to candidates, § 30102(e)(4) allows the public to "learn 'by a glance' whether a particular committee" has been authorized by a candidate. *Id*. at 9, 23 (quoting *Common Cause*, 842 F.2d at 442). While this rationale may be sufficient to establish the law's constitutionality in many cases, it does not explain why a committee should be barred from adopting a name that clearly and unambiguously opposes a candidate. The public can "learn 'by a glance'" at the name "Stop Hillary PAC" that the committee opposes her, and therefore is unlikely to be Clinton's official campaign committee or other authorized committee. There is no reason to believe that names which clearly and unambiguously oppose candidates, such as "Stop Hillary PAC," may mislead or confuse the public in any way.

The Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (holding that, in First Amendment cases, the Government "must do more than simply posit the existence of the disease sought to be cured.") (internal citation and quotation marks omitted). A burden on First Amendment rights cannot rest on "a hypothetical possibility and nothing more." *FEC v. Nat'l Conservative Political*

Action Comm. ("*NCPAC*"), 470 U.S. 480, 498 (1985) (invalidating limit on independent expenditures by PACs where the Government failed to introduce any evidence suggesting that "an exchange of political favors for uncoordinated expenditures" was likely to occur). "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon*, 528 U.S. at 391. The Court has excused the Government from presenting actual evidence to meet this burden only where "there is little reason to doubt" that the targeted act furthers a valid governmental interest. *NCPAC*, 470 U.S. at 500; *Nixon*, 528 U.S. at 395.

In this case, it is facially implausible to believe that a person reasonably might be misled into thinking a committee with a name like "Stop Hillary PAC," which clearly and unambiguously opposes a candidate, might be that candidate's authorized committee. As discussed above, Plaintiffs provided evidence confirming the lack of any such public confusion, attesting that Stop Hillary PAC has never received any communications or contributions intended for Hillary Clinton, and no one has ever expressed any confusion about whether the PAC supported her. Backer Decl. ¶ 20. The FEC's response is silence.

The FEC has provided no evidence to suggest that its purported concern over public confusion ***in the context of committees with names that clearly and unambiguously oppose a candidate*** is anything other than chimerical. All of the examples the FEC cites involve committees with names that supported or embraced candidates, such as "Ready for Bernie Sanders 2016," "Bet on Bernie 2016," "I Like Mike Huckabee," and a PAC that Backer represents, formerly known as "Stand With Rand." FEC Opp. at 13-14. The FEC's "conjecture," *Nixon*, 528 U.S. at 392, and the "hypothetical possibilit[y]" *NCPAC*, 470 U.S. at 498, that someone, somewhere might actually

think a committee whose name clearly and unambiguously opposes a candidate might nevertheless have been authorized by that candidate is insufficient to establish § 30102(e)(4)'s validity.[1]

The FEC cannot even contend that it is too difficult to determine whether a committee name "clearly and unambiguously opposes" a candidate. FEC regulations already require the FEC to make ***that very determination*** with regard to the titles of political committees' special projects and other communications. 11 C.F.R. § 102.14(b)(3). The FEC allows an unauthorized committee to include the name of a candidate "in the title of a special project name or other communication if the title clearly and unambiguously shows opposition to the named candidate." FEC Opp. at 5 (citing *NewtWatch PAC*, FEC Adv. Op. 1995-09, 1995 WL 247474, at *5). The FEC easily can apply the same standard to the names of political committees themselves.

Ultimately, the FEC's argument boils down to a preference for a "bright line" rule that is easy to administer and apply. FEC Opp. at 1, 16, 25. The FEC, however, may not impose burdens on 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."). The "bright line" for which the FEC vociferously advocates in this case is insufficiently tailored, prohibiting committee names that clearly and unambiguously oppose candidates despite the complete lack of any evidence that they pose any risk of corruption. Thus, Plaintiffs are likely to prevail in demonstrating that § 30102(e)(4) is either unconstitutionally overbroad, on the grounds that "a substantial number of its applications are unconstitutional, judged in relation to the statute's

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[1] The FEC emphasizes that Plaintiffs are free to use the name of Hillary Clinton, or any other federal candidate, in "special projects" and other "communications." FEC Opp. at 4, 12 & n.3, 24-25 (quotation marks omitted). This does not constitute a valid reason, however, for preventing committees from also adopting a name that clearly and unambiguously opposes a candidate.

plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quotation marks omitted), or unconstitutional as applied to committees with names that clearly and unambiguously oppose a candidate.[2]

D. The D.C. District Court's Ruling in *Pursuing America's Greatness* Addressed Completely Different and Unrelated Objections to § 30102(e)(4).

The FEC dramatically overstates the relevance of the rulings of the U.S. District Court for the District of Columbia in *America's Greatness*, No. 15-1217, 2015 U.S. Dist. LEXIS 128250 (D.D.C. Sept. 24, 2015) (cited in FEC Opp. at 5). The FEC contends the plaintiffs in *Pursuing American's Greatness* raised a "similar constitutional challenge" to this case. FEC Opp. at 5. In reality, those plaintiffs wished to use the title "ILikeMikeHuckabee" in its special projects and communications—a title that clearly conveys ***support*** of the candidate. *Id*. at *2.

The plaintiffs in *Pursuing America's Greatness* argued 11 C.F.R. § 102.14(b)(3), which permits committees to adopt special project titles that oppose federal candidates, violates the

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[2] Plaintiffs also are likely to succeed on the merits of their void-for-vagueness argument, as well. *See* Memo. of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Dock. #3-1, at 19-23 (Oct. 6, 2015). The FEC contends that a "reasonable officer of a political committee" would know that "the name of a candidate" includes both a candidate's legal name (e.g., Bernard Sanders or William Clinton) or a commonly used variant (*e.g.*, Bernie Sanders or Bill Clinton). FEC Opp. at 17-18. Nothing in either federal law or the FEC's regulations sets forth this critical definition, however. A person could just as reasonably conclude that the "name" of a candidate is that candidate's actual, legal name, or alternatively is the name the candidate includes on the Statement of Candidacy she files with the FEC.

Moreover, this definition gives the FEC apparently unbridled discretion as to whether a nickname is sufficiently "commonly used" to trigger liability. Finally, the FEC remains cagey about whether the law prohibits: (i) adopting a name the committee officers themselves subjectively intend to refer to a candidate, or (ii) adopting a name someone, somewhere might erroneously believe refers to a candidate. To take a concrete and realistic example, it is unclear whether Plaintiff Dan Backer would be able to form "Dan PAC," on the grounds that he was subjectively intending to refer to himself, or instead would be prohibited from adopting that name on the grounds that there are numerous federal candidates named "Dan." Particularly since the Statement of Organization (FEC Form 1) does not offer an opportunity to explain the subjective intent behind a committee name, *see* http://www.fec.gov/pdf/forms/fecfrm1.pdf, the statute's vagueness can have a substantial chilling effect.

Administrative Procedures Act and First Amendment. *Id*. at *18. The district court rejected both arguments, agreeing that a title referencing a candidate's name in a positive manner reasonably could mislead the public and increase "opportunities for confusion, fraud, and abuse." *Id*. at *25, *28-29 (quotation marks omitted). The court also held § 30102(e)(4) is subject to intermediate or "exacting scrutiny," because it "burden[s] the ability to speak" while leaving open alternate channels of communication. *Id*. at *34-35 (quotation marks omitted). It again concluded that § 30102(e)(4)'s Name Prohibition is "substantially related" to the government's "legitimate" interest in "limiting the possibility of fraud, confusion, and abuse." *Id*. at *47.

Critically, *Pursuing America's Greatness* did not even consider the possibility of a political committee adopting a name that clearly and unambiguously opposes a candidate. It did not address whether § 30102(e)(4)'s categorical prohibition was unconstitutionally overbroad, because it prohibited such opposition-based names, despite the absence of any potential for confusion. And it certainly did not address whether § 30102(e)(4) was valid as applied to committees with names that clearly and unambiguously oppose a candidate. In short, while *Pursuing America's* greatness deals, in part, with § 30102(e)(4), it neither addressed nor resolved the constitutional questions at issue here.

II. THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION

A. A Preliminary Injunction Would Maintain the *Status Quo*

Fundamentally, this Court should grant Plaintiffs' Motion for a Preliminary Injunction because it would simply preserve the *status quo*. *Cf*. FEC Opp. at 8. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013) ("'The traditional office of a preliminary injunction

is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits.'") (quoting In re *Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003)).

The Preliminary Injunction Plaintiffs seek will do nothing more than maintain the *status quo* that has persisted for the past two-and-a-half years. Plaintiffs adopted the name "Stop Hillary PAC" on May 16, 2013, in full compliance with § 30102(e)(4). Verified Compl. ¶ 12. Clinton was not a candidate for federal office, vehemently denied any intention of becoming a candidate for federal office, and did not officially declare her candidacy until approximately two years later. Pl. Brief at 8 & n.3; Verified Compl. ¶ 14. Thus, for about two years, Plaintiffs legally used and retained the name "Stop Hillary PAC." The FEC seeks to disturb this *status quo* under § 30102(e)(4), on the grounds that Clinton officially declared her candidacy in April 2015. Plaintiffs are entitled to maintain the *status quo* that has persisted for nearly two years while their constitutional challenge to § 30102(e)(4) is pending.

B. Plaintiffs Satisfy the Non-Merits Requirements for a Preliminary Injunction

Even if this Court accepts the FEC's position that, in some sense, Backer was courting trouble by adopting the name "Stop Hillary PAC," that does not affect the constitutionality of § 30102(e)(4), either on its face or as applied to committees with names that clearly and unambiguously oppose a candidate. And if this Court agrees that § 30102(e)(4) is likely unconstitutional, either facially or as applied, then enforcing it against Backer constitutes irreparable injury as a matter of law, even if we ignore all the costs and burdens he would incur as a result of changing the committee's name.[3] *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality

[3] The FEC contends that requiring Stop Hillary PAC to change its name "would *not* require plaintiffs to take many of the supposed actions Backer claims would be necessary to bring the committee into compliance." FEC Opp. at 26. If Stop Hillary PAC is no longer permitted to operate under that name, however, then it necessarily must change, remove, or destroy all tangible

op.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *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). Similarly, it would constitute substantial hardship, and be against the public interest, to enforce a likely unconstitutional law against Backer. *See, e.g.*, *Republican Party v. N.C. State Bd. of Elecs.*, No. 94-1057, 1994 U.S. App. LEXIS 14961, at *8 (4th Cir. June 17, 1994) (affirming district court ruling that balance of hardships "tipped decidedly in favor" of victims of likely constitutional violation); *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). The FEC's dismissal of the "superficial notion that enforcing constitutional rights is always in the public interest," FEC Opp. at 29, deserves no further response.

The FEC argues that Plaintiffs could have filed this lawsuit sooner. *Id.* at 26, 29. So what? The 2016 presidential election was well over a year away at the time this lawsuit was filed, and still remains approximately a year away. The FEC does not contend it was prejudiced in any way by the fact that Plaintiffs filed this lawsuit in September 2015 rather than four months earlier in May 2015. Nor does it explain how the timing of this lawsuit is likely to lead to pubic confusion. *Cf.* FEC Opp. at 26-27. As mentioned earlier, the FEC has completely failed to adduce any evidence whatsoever that anyone in the country has any confusion about Stop Hillary PAC's goals, mission, or complete lack of affiliation with Clinton. To the extent the FEC is attempting to make a *sub silentio* laches argument, it fails spectacularly.

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and online uses of that name. *See* Backer Decl. ¶¶ 14-15 (explaining steps that would have to be taken if the committee is no longer permitted to use the name "Stop Hillary PAC").

C. The FEC's Arguments Concerning the Non-Merits Requirements for Injunctive Relief Confirm § 30102(e)(4)'s Unconstitutional Vagueness and Overbreadth

The FEC contends plaintiffs' "claimed injuries are self-inflicted," because they chose to adopt the name "Stop Hillary PAC." FEC Opp. at 7, . Backer registered Stop Hillary PAC with the FEC on May 16, 2013. Verified Compl. ¶ 12. At the time, Hillary Clinton was not a candidate for any office. Indeed, she repeatedly and vehemently disclaimed any interest in running for federal office. *See* Memo. of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Dock. #3-1, at 8 & n.3 (Oct. 6, 2015) (hereafter, "Pl. Brief") (collecting public declarations by Clinton that she would not seek office). And for approximately the next two years, Clinton ***was not*** a candidate. Verified Compl. ¶ 14. She did not become a candidate for President until April 13, 2015. *Id.*

Thus, in the FEC's view, § 30102(e)(4) does not simply prohibit people from adopting a committee name that includes the name of a candidate. Rather, § 30102(e)(4) effectively bars people from adopting a committee name that includes the name of any person who, at any point in the future, might possibly become a candidate. The FEC argues, in essence, that Backer should not have merely complied with § 30102(e)(4) by avoiding the names of candidates, but also should have been chilled from conduct that doesn't actually violate the statute; that is, he should not have included the name of a person who, at some point years in the future, eventually may become a candidate.

III. THIS COURT SHOULD ENJOIN THE FEC FROM ENFORCING § 30102(e)(4) AGAINST ANYONE DURING THE PENDENCY OF THIS LAWSUIT

The FEC concludes its brief with the curious exhortation that, if this Court agrees that Plaintiffs are entitled to preliminary relief, it should enjoin enforcement of § 30102(e)(4) solely

with regard to them, and no other committees, treasurers, attorneys, or other people in the country. FEC Opp. at 30 n.8. It cites the Fourth Circuit's ruling in *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), in support of this proposition, but completely fails to discuss the Fourth Circuit authorities relating to this issue.

First, in *Walston v. School Bd.*, 566 F.2d 1201 (4th Cir. 1977), which was brought by several individual plaintiffs but was not a class action suit, the plaintiffs challenged the defendant school district's use of the National Teachers Exam as the sole basis for employment. The Fourth Circuit affirmed the validity of an injunction completely barring the school district from employing the Exam, modifying it to specify that the district could not employ it "without proper validation studies or job analyses." *Id*. at 1204. Importantly, the injunction did not simply prohibit the district from applying the exam to the individual plaintiffs, but rather categorically barred the district from using it at all. *Id*. at 1203. Under the prior panel rule, this holding takes precedents over later, inconsistent rulings. *See McMellon v. United States*, 387 F.3d 329, 333-34 (4th Cir. 2004).

More recently, in *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 248-49 (4th Cir. 2014), *stay granted*, 135 S. Ct 6 (2014), *cert. denied* 135 S. Ct. 1735 (2015), upon determining that a North Carolina statute eliminating same-day voter registration was likely unconstitutional, the Fourth Circuit directed the district court to enter an injunction completely prohibiting the State from enforcing it against anyone. The court did not, as the FEC urges here, order the district court to permit only the League of Women Voters or the individual members whose rights it was asserting to engage in same-day voter registration. Like the instant case, *League of Women Voters* also was not a class action case.

Moreover, the FEC does not even begin to address the implications of a court order granting or enforcing special constitutional rights for Stop Hillary PAC and Dan Backer that are not shared

by any other similarly situated people or entities in the nation. Under the FEC's bizarre proposed remedy, a political committee formed by Backer, represented by Backer, or has retained Backer as a treasurer would be permitted to adopt a name that clearly and unambiguously opposes a candidate. Committees with other founders, counsel, or treasurers would remain subject to administrative investigations, civil penalties, and even criminal prosecution for engaging in the same conduct. Although such an order would give Backer an inestimable advantage in the market for his legal services, it runs afoul of basic equal protection principles.

Thus, under both the prior panel rule, and by reference to the Fourth Circuit's most recent approach to the scope of preliminary injunctions, a Defendant-Oriented Injunction barring the FEC from enforcing § 30102(e)(4) for the duration of these proceedings is the appropriate, equitable remedy. *League of Women Voters*, 769 F.3d at 248-49; *Walston*, 566 F.2d at 1203-04.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court preserve the *status quo* by issuing a preliminary injunction.

Dated this 17th day of November, 2015.

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CERTIFICATE OF SERVICE

I, Dan Backer, hereby certify that on this 17th day of November, 2015, I did cause a true and complete copy of the foregoing Rebuttal Memorandum In Support Of Plaintiffs' Motion For Preliminary Injunction to be filed via the court's CM/ECF system, which effected service upon:

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