UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP HILLARY PAC, *et al.*,	
Plaintiffs,	Civ. No. 1:15-1208 (GBL-IDD)
v.	
FEDERAL ELECTION COMMISSION,	OPPOSITION
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Plaintiffs' claims do not warrant the extraordinary remedy of a preliminary injunction. For decades, the Federal Election Campaign Act ("FECA" or "Act") and Federal Election Commission ("FEC") regulations have required a federal candidate's official committee to include in the committee name the name of the candidate who authorized it, and, correspondingly, prohibited independent committees not authorized by any candidate from using any candidate's name in their official, registered committee names. Plaintiffs are unlikely to succeed on the merits of their facial and as applied constitutional challenges to this commonsense name identification requirement, which is substantially related to the government's important interests in limiting confusion, fraud, and abuse in federal elections.

The bright-line requirement is straightforward and precise. It is an integral part of FECA's disclosure regime, enabling a contributor to learn at a glance whether a particular political committee is an authorized vehicle of a candidate. It is neither vague, overbroad, nor restrictive of the content of plaintiffs' or anyone else's speech, as demonstrated by the record in this preliminary proceeding. The real world examples cited in this memorandum also underscore how the FEC has interpreted the statutory requirement in a narrowly tailored way, advancing the government's important disclosure interests while minimizing burdens.

Plaintiffs have made no real effort to demonstrate any irreparable harm and instead offer tendentious overstatements of the efforts they would have to undertake to comply with a longstanding provision they "intentionally" defied. These self-inflicted injuries are not the type of irreparable harm that warrants the extraordinary relief of a preliminary injunction, particularly when compared to the public's interest in a presumptively constitutional statute that furthers the government's important and compelling interests in limiting election-related fraud, abuse, and confusion. Plaintiffs' motion should be denied.

BACKGROUND

I. RELEVANT STATUTORY AND REGULATORY PROVISIONS

A. The Federal Election Commission

The FEC is the independent federal agency with exclusive jurisdiction to administer, interpret, and civilly enforce FECA, 52 U.S.C. §§ 30101-30146.[1] The Commission is specifically empowered to "formulate policy" with respect to the Act, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," *id.* § 30107(a)(8); to issue advisory opinions construing FECA, *id.* §§ 30107(a)(7), 30108; and to civilly enforce the Act, *id.* § 30109. By statute, no more than three of the FEC's six Commissioners may be members of the same political party, and at least four votes are required for certain Commission actions, including, *inter alia*, rendering advisory opinions and promulgating regulations to implement FECA. *Id.* §§ 30106(a)(1), (c); *id.* §§ 30107(a)(7), (8).

B. FECA's Name Identification Requirement

FECA has for decades required political committees to disclose, within very broad boundaries, whether they speak on behalf of a particular candidate or group of candidates. Under the Act, each candidate for federal office (other than a nominee for Vice President) is required to "designate in writing a political committee . . . to serve as the principal campaign committee of such candidate" within "15 days after becoming a candidate." 52 U.S.C. § 30102(e)(1). Candidates may also designate other "authorized" committees. *Id.* An "authorized committee" is "the principal campaign committee or any other political committee authorized by a candidate . . . to receive contributions or make expenditures on behalf of such candidate." *Id.* § 30101(6).

[1] Effective September 1, 2014, the provisions of FECA formerly codified in Title 2 of the United States Code were recodified in Title 52.

The name of each such "authorized" political committee "shall include the name of the candidate who authorized" it. *Id.* § 30102(e)(4). In contrast, "any political committee which is not an authorized committee . . . shall not include the name of any candidate in its name." *Id.* Congress added FECA's name identification provision to the Act in 1980. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 102, 93 Stat. 1339, 1346 (1980). Its wording has remained unchanged for the past 35 years.

Congress enacted the provision due to a problem identified by the FEC from experience. The Commission alerted Congress that "in some cases, it is difficult to determine which candidate a principal campaign committee supports. In such cases the committee name does not contain the candidate's name as, for example, 'Good Government Committee' or 'Spirit of '76." *Federal Election Campaign Act Amendments, 1979: Hearing Before the Senate Comm. on Rules and Administration,* 96th Cong., 1st Sess. 23 (1979) (FEC's Legislative Recommendations) (Appendix to Statement of Robert Tiernan, Chairman of the FEC). "[T]o avoid confusion," the FEC recommended that "the Act should require the name of the principal campaign committee to include in its name the name of the candidate which designated the committee." *Id.*

Following passage of the 1979 Amendments to FECA, the FEC implemented the name identification requirement in a regulation largely echoing the statutory provision, but carving out exceptions for "delegate" and "draft" committees in order to permit such groups to use the names of candidates in their committee names. 11 C.F.R. § 102.14(a)-(b) (1980). In 1992, the Commission revised subsection 102.14(a) of the regulation to provide that "'name'" for purposes of the regulation "include[s] 'any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation.'" FEC, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized*

Committees, 57 Fed. Reg. 31,424, 31,425 (July 15, 1992). In 1994, the Commission added another exception to subsection 102.14(b), allowing unauthorized committees more flexibility to use 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, *Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees*, 59 Fed. Reg. 17,267, 17,269 (Apr. 12, 1994) ("1994 Rule"); 11 C.F.R. § 102.14(b)(3).

Accordingly, while unauthorized committees like Stop Hillary PAC "shall not include the name of any candidate in its name" 52 U.S.C. § 30102(e)(4), such committees are free to express their opposition to any candidate in the title of any special projects the committees operate if such titles unambiguously show opposition to the named candidate. And all "[u]nauthorized committees remain free to discuss candidates throughout the[ir] communication[s]; and to use candidates' names as frequently, and highlight them as prominently (in terms of size, typeface, location, and so forth) as they choose." 1994 Rule, 59 Fed. Reg. at 17,268-69.

Subsequent applications by the Commission of the name identification requirement illustrate the substantial flexibility unauthorized committees have to discuss candidates, including in their special projects and communications. In 1995, in response to an advisory opinion request made by a political committee named "NewtWatch PAC," the Commission explained that a "committee's online activities are projects that fall within the scope of section 102.14." FEC Advisory Op. 1995-09 (NewtWatch PAC), 1995 WL 247474, at *5 (Apr. 21, 1995) ("NewtWatch Advisory Op."). The Commission explained that although "NewtWatch" could not be used as part of the committee's registered name because the candidate's first name clearly conveyed the identity of then-House Speaker Newt Gingrich, "the Act and Commission regulations do not prohibit the Committee from using the name 'NewtWatch' as a project name."

Id. The committee had used NewtWatch in the name of the uniform resource locator ("URL") for its website. *Id.* at *1. Applying the new exception it had created in the 1994 revision of the regulation, 11 C.F.R. § 102.14(b)(3), the Commission determined that "[t]he use of the term 'watch,' when coupled with a candidate's name, conveys clear and unambiguous opposition to the candidate being watched." 1995 WL 247474, at *5. For this reason, NewtWatch was acceptable as a project name, including as the URL of the project's website. *Id.*

By contrast, in a recent advisory opinion, the FEC concluded that an unauthorized political committee was not permitted to use the name of 2016 presidential candidate Bernie Sanders in the name of its website and social media pages that did not clearly express opposition to Sanders. FEC Advisory Op. 2015-04 (Collective Actions PAC), 2015 WL 4480266, at *1 (July 16, 2015) ("CAP Advisory Op."). The FEC noted that, "[b]ecause the names of the Committee's websites and social media accounts that include Senator Sanders's name do not clearly express opposition to him, those sites and accounts are impermissible under 11 C.F.R. § 102.14." *Id.* at *3. The Commission reiterated, "however, that this restriction only applies to the titles of the Committee's projects. The Committee is free to promote Senator Sanders (or any other candidate) by name in the body of any website or other communication." *Id*

Just last month, a district court in the District of Columbia held that another unauthorized political committee was unlikely to succeed on the merits of a similar constitutional challenge to the FEC's name identification regulation, which the court recognized is an integral part of FECA's disclosure regime. *Pursuing America's Greatness v FEC*, __ F. Supp. 3d __, 2015 WL 5675428, at *11-12 (D.D.C. Sept. 24**,** 2015) ("*PAG*"). The court explained that the regulation "requires disclosure of the candidate authorization status of a political committee and its special projects to be made *in a particular place, just as do other disclosure and disclaimer regulations*

concerning publicly disseminated political committee communications." *Id.* at *12 (emphasis added).

II. PLAINTIFFS

Plaintiffs are Stop Hillary PAC, an unauthorized political committee with an Alexandria, Virginia address, and its treasurer/counsel/member/supporter Dan Backer. (Verified Compl. for Declaratory and Injunctive Relief (Docket No. 1) ("Compl.") ¶¶ 4-5; Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Prelim. Inj. ("Mem."), Backer Decl. ¶ 3 (Docket No. 3-4).)

Backer has been involved in the operation of approximately 40 political committees over the past five years, many of which are groups that raise money by "claiming to represent" certain candidates or claiming that they will "Stop" other candidates. *See* Kenneth P. Vogel, *The Rise of 'Scam PACs'*, Politico (Jan. 26, 2015, 5:35 AM), http://www.politico.com/story/2015/01/super-pac-scams-114581 ("*Scam PACs*"), attached as Exhibit A to the Declaration of Jayci A. Sadio, Nov. 3, 2015. Backer seeks to participate in the formation and operation of other "political committees that include the names of candidates in their names." (Compl. ¶ 27.)

Plaintiffs assert facial First Amendment challenges to the disclosure regime regulating the names identifying authorized and unauthorized political committees. Specifically, plaintiffs challenge the statutory requirement, 52 U.S.C. § 30102(e)(4), Compl. ¶¶ 28-41, and part of the FEC's regulation implementing section 30102(e)(4), 11 C.F.R. § 102.14(b) (Compl. ¶¶ 61-62).[2]

Backer registered Stop Hillary PAC with the FEC in May 2013. (Backer Decl. ¶ 4.) The committee's website states that its mission is to "ensure Hillary Clinton never becomes President of the United States." (*Id.* ¶ 6; Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Prelim. Inj. (Docket No. 3-1) ("Mem.") at 2.) In addition to its website, the committee also operates an email

[2] The complaint also asserts Fifth Amendment equal protection claims (Compl. ¶¶ 63-70), but plaintiffs' preliminary-injunction motion does not address such claims.

account, Facebook page, and Twitter handle that include the committee's "Stop Hillary" slogan. (Backer Decl. ¶ 8; Mem. at 2-3.) At the time Backer registered the committee with the FEC, he "was aware" of the Act's "prohibition on including candidate names in the names of PACs," and "believed that Hillary Rodham Clinton was certain to seek the 2016 Democratic Party nomination for the office of President." (Compl. ¶ 13.) Backer "intentionally … failed to comply" with FECA's prohibition on the use of candidate names and refuses to change the committee's name. (*Id.* ¶¶ 13, 17.)

In addition to their facial claims, plaintiffs also challenge the name identification requirements as applied to political committees like Stop Hillary PAC with names that unambiguously oppose a federal candidate (*id.* ¶¶ 50-53, 61-62), as well as such committees' treasurers (*id.* ¶¶ 54-57).

ARGUMENT

I. A PRELIMINARY INJUNCTION IS AN EXTRAORDINARY REMEDY THAT REQUIRES PLAINTIFFS TO MEET A HEAVY BURDEN

Plaintiffs' request for a preliminary injunction should be denied. The name identification requirement is an integral part of FECA's disclosure regime that is substantially related to important government interests in limiting confusion, fraud, and abuse, and has been refined and construed by the Commission in a manner that is narrowly tailored to address the government's compelling interests. Moreover, plaintiffs' claimed injuries are self-inflicted, do not demonstrate irreparable harm, and do not meet the other requirements for the drastic relief it seeks.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). A party "seeking a preliminary injunction *must* establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the

public interest." *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). In this Circuit, each of the four requirements for a preliminary injunction "must be satisfied as articulated." *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) ("*RTAO*"), *vacated by* 130 S. Ct. 2371 (2010), *reinstated in relevant part by* 607 F.3d 355 (4th Cir. 2010). And plaintiffs bear the burden of proving each factor. *See Direx Israel, Ltd. v. Breakthrough Med. Corp*., 952 F.2d 802, 812 (4th Cir. 1991).

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). Plaintiffs misapprehend the status quo (Mem. at 8) as their continued flagrant violation of the law. In fact, plaintiffs seek not to preserve the status quo but rather to "upend" it by eviscerating the longstanding rules governing political committees' use of candidate names. *Cf. Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (refusing to enjoin enforcement of congressional Act despite First Amendment claim because "[b]y seeking an injunction, applicants request that I issue an order *altering* the legal status quo"). Such injunctions are "'disfavored'" and require the movant to "'satisfy an even heavier burden of showing that the four factors listed above weigh heavily and compellingly in movant's favor.'" *Cornwell v. Sachs*, 99 F. Supp. 2d 695, 704 (E.D. Va. 2000) (quoting *Tiffany v. Forbes Custom Boats, Inc.*, 959 F.2d 232 (table), No. 91-3001 (4th Cir. Apr. 6, 1992)). "[C]onsiderations specific to election cases" weigh even further against the issuance of injunctions. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (vacating lower court's injunction against enforcement of election statute and noting potential for pre-election injunctions to cause confusion among voting public). Plaintiffs cannot prevail on their motion

absent a clear showing in their favor sufficient to justify bringing to a halt the enforcement of a two-decades-old federal election requirement as the primary election season fast approaches.

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

A. The Name Identification Requirement Is an Important Part of FECA's Disclosure Regime and Is Facially Constitutional

To prevail on their facial challenge, plaintiffs must show that the name identification requirement, in all of its applications, lacks a "legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) ("[A] facial challenge must fail where the statute has a plainly legitimate sweep." (internal quotation marks omitted)); *United States v. Chappell*, 691 F.3d 388, 392 (4th Cir. 2012) ("As the Supreme Court has repeated, facial invalidation of legislation is disfavored.").

1. The Name Identification Requirement Is a Disclosure Rule

The name identification requirement is an integral part of FECA's disclosure regime. As the D.C. Circuit has explained, section 30102(e)(4) "require[s] political bodies to *disclose* the identity of persons associated with them." *Common Cause v. FEC*, 842 F.2d 436, 442 (D.C. Cir. 1988) (emphasis added); *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1367-68 (D.C. Cir. 1988) (characterizing section 30102(e)(4) as part of the Act's "specific disclosure requirements" or "extensive disclosure requirements").

The requirement enables a contributor to learn "by a glance" whether a particular political committee "is an authorized or unauthorized vehicle of the candidate." *Common Cause*, 842 F.2d at 442. Recognizability at a glance is similar to the reason that players on opposing sports teams wear uniforms with contrasting colors. The name identification requirement "avoids the kind of confusing disclaimer previously possible, 'Paid for by Reagan for President. Not authorized by President Reagan,' and makes § [30120(a)'s] disclaimers more effective." *Id.*

at 442; *cf. Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (explaining that other disclaimer and disclosure provisions in FECA similarly serve to "'insure that the voters are fully informed' about the person or group who is speaking" about a candidate and "avoid confusion by making clear that the ads are not funded by a candidate" (quoting *Buckley v. Valeo*, 424 U.S. 1, 76 (1976) (per curiam)).

As another district court thus recently observed, the name identification requirement is "part and parcel of FECA's disclosure regime." *PAG*, 2015 WL 5675428, at *11. The requirement does not prohibit speech; it simply requires political committees to disclose their "candidate authorization status . . . in a particular place, just as do other disclosure and disclaimer regulations concerning publicly disseminated political committee communications."

2. The Name Identification Requirement Advances the Government's Important Interests in Limiting Confusion, Fraud, and Abuse

Like FECA's other disclosure rules, the name identification requirement is reviewed for "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66; *McConnell v. FEC*, 540 U.S. 93, 231-32 (2003), *overruled in part by Citizens United*, 558 U.S. 310); *PAG*, 2015 WL 5675428, at *11 (applying exacting scrutiny). The name identification requirement easily satisfies this intermediate level of constitutional review.

As explained in a number of binding precedents, FECA's disclosure provisions further important interests. In *McCutcheon v. FEC*, the Supreme Court's plurality opinion generally explained that "[d]isclosure requirements are in part justified based on a governmental interest in provid[ing] the electorate with information about the sources of election-related spending." 134 S. Ct. 1434, 1459 (2014) (internal quotation marks omitted). "With modern technology,

disclosure now offers a particularly effective means of arming the voting public with information." *Id.* at 1460. In *Citizens United*, eight Justices agreed that the challenged disclosure provisions were constitutional, observing that "the public has an interest in knowing who is speaking about a candidate shortly before an election," even when such speech lacks express candidate advocacy. 558 U.S. at 368-69; *see also Buckley*, 424 U.S. at 68 (holding that the Act's disclosure requirements for political committees "directly serve substantial governmental interests"). And in *Real Truth About Abortion, Inc. v. FEC ("RTAA")*, the Fourth Circuit catalogued the Supreme Court's "routine[]" recognition that disclosure requirements are "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist" and are constitutionally permissible for a wide variety of speech. 681 F.3d 544, 549, 553 (4th Cir. 2012) (collecting cases), *cert. denied*, 133 S. Ct. 841 (2013).

The statutory and regulatory components of the name identification requirement work in tandem to enable contributors and others to learn "by a glance" whether a particular political committee "is an authorized or unauthorized vehicle of the candidate." *Common Cause*, 842 F.2d at 442. Without both the positive requirement of including candidate names in authorized committee names, and the corresponding restriction for unauthorized committees, a candidate's authorized committee could be lost in a sea of other groups including the candidate's name. The rules mandate a floor level of disclosure about the relationship, or lack thereof, between the speaker and any candidate mentioned by the speaker in order to "limit 'the potential for confusion.'" CAP Advisory Op., 2015 WL 4480266, at *2. Plaintiffs challenge only whether the interest in avoiding confusion is served in the context of groups with names of unambiguous opposition (addressed *infra* pp. 23-25), and fail to even allege that the rules do not serve their intended purpose in the majority of applications. *See infra* p. 17.

Moreover, the name identification requirement leaves unauthorized committees entirely free to discuss candidates throughout their websites, solicitations, and other communications, and even to establish special projects whose titles include candidate names "if the title clearly and unambiguously shows opposition to the named candidate," 11 C.F.R. § 102.14(b)(3). The requirement thus "'do[es] not prevent anyone from speaking,'" *Citizens United*, 558 U.S. at 366 (quoting *McConnell*, 540 U.S. at 201), and plaintiffs easily could comply with it, as Backer has done on behalf of other committees that advocate for or against candidates, by omitting the name of a candidate from the committee's registered name, while continuing to use the "Stop Hillary" logo in its website, social media pages, and other communications.[3] Indeed, the Commission's

[3] For example, the Tea Party Leadership Fund PAC, for which Backer serves as treasurer and counsel, operates a website entitled "Remove John Boehner," at the URL, http://primaryboehner.com, as well as a website entitled "BOOT BOEHNER," at the URL, http://www.theteapartyleadershipfund.com/boot-boehner. (*See* Sadio Decl. Exhs. I & J.) The same committee has a Facebook application entitled "DRAFT SARAH PALIN," https://www.facebook.com/TheTeaPartyLeadershipFund/app_285790518222439 (Sadio Decl. Exh. K). The Constitutional Rights PAC, for which Backer serves as treasurer, has a website entitled "END JEB 2016," at the URL, http://endjeb2016.com/ (Sadio Decl. Exh. L). Conservative Action Fund, for which Backer also serves as treasurer, operates a website that unambiguously opposes the same candidate at http://www.conservativeactionfund.com/stopbush/1/ (Sadio Decl. Exh. M), and has sent numerous emails asking recipients to "Stand with Governor Mike Pence" or to draft Allen West or Condoleeza Rice. Matt Lewis, *The Conservative PACs Trolling for Your Money*, Wall Street J. (May 7, 2015, 7:18), http://www.wsj.com/articles/the-conservative-pacs-trolling-for-your-money-1431040712 ("*PACs Trolling for Your Money*") (Sadio Decl. Exh. C). In 2014, Conservative Action Fund raised more than $240,000. *Id.* In addition, several unauthorized committees that comply with the name identification requirement operate websites whose titles clearly and unambiguously oppose Hillary Clinton's candidacy. America Rising PAC operates a website that raises money "to ensure we never see another Clinton administration." *See* https://www.stophillary2016.org/donations/home/ (Sadio Decl. Exh. N). The Republican National Committee itself also operates an unambiguously anti-Clinton website at http://poorhillaryclinton.com/ (Sadio Decl. Exh. O). Moreover, the unauthorized ActBlue committee has a fundraising page where it asks viewers to "Contribute Now to Stop Paul Ryan, https://secure.actblue.com/contribute/page/stoppaulryan (Sadio Decl. Exh. P), and the Let's Fire

narrowly tailored interpretive regulation targets the more acute situations of potential confusion and fraud, while construing the statutory name requirement to allow groups and individuals like plaintiffs here to include candidate names in special project titles that are unambiguously in opposition to the named candidate. 11 C.F.R. § 102.14(b)(3).

Invalidating the requirement, as plaintiffs seek to do, would enable authorized committees to adopt names that do not identify the candidate on whose behalf the committee acts, while also permitting unauthorized committees to adopt misleading committee and special project names that suggest such committees *are* acting on behalf of a candidate. In other words, the relief plaintiffs seek would facilitate the very concerns that Congress and the FEC sought to address in establishing the name identification requirement in the first place.

Recent examples confirm that such concerns are justified. Earlier this year, plaintiff/counsel Backer changed the registered name of another unauthorized committee he counsels that had originally been named "Stand With Rand." Byron Tau, *PAC Backing Rand Paul Changes Its Name to Avoid Tangle With Election Rules*, Wall Street J. – Wash. Wire (Apr. 9, 2015, 11:23 AM), http://blogs.wsj.com/washwire/2015/04/09/pac-backing-rand-paul-changes-its-name-to-avoid-tangle-with-election-rules/ (Sadio Decl. Exh. D). In explaining the decision to change the committee's registered name to "SWR PAC," Backer reportedly admitted that "'there is a legitimate basis for confusion in the name, and the client doesn't want to interfere with Rand Paul's messaging, so they decided a change was appropriate.'" *Id.*

Also this year, the Center for Public Integrity reported "numerous instances" of donors "who believed they were giving to the Sanders campaign" when they actually contributed to an

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Terrible Radicals Undermining Middle-Class People PAC operates a website entitled "LET'S FIRE DONALD TRUMP," at http://letsfiretrump.com/, which it operates as a special project of the committee (Sadio Decl. Exh. Q).

unauthorized political committee that operates a website entitled "BET ON BERNIE!" at the URLs http://BetonBernie.com and http://pledgesanders2016.com. Colby Itkowitz, *Report: Actor Daniel Craig, A.K.A. James Bond, Donated to Bernie Sanders' Super PAC. Where Did His Money Go?*, Wash. Post (Sept. 10, 2015), https://www.washingtonpost.com/news/powerpost/wp/2015/09/10/report-actor-daniel-craig-a-k-a-james-bond-donated-to-bernie-sanders-super-pac-or-a-fraud/ (Sadio Decl. Exh. E). The committee exacerbated the confusion caused by its websites by initially naming itself "Ready for Bernie Sanders 2016," and "Bet on Bernie 2016," before modifying its registered name to Americans Socially United. Michael Beckel, *Did This Shady Pro-Bernie Sanders Super PAC Just Dupe James Bond?*, Ctr. for Public Integrity (Sept. 17, 2015, 6:50 PM), http://www.publicintegrity.org/2015/09/10/17947/did-shady-pro-bernie-sanders-super-pac-just-dupe-james-bond (Sadio Decl. Exh. F) ("Several Sanders supporters confirmed they donated to Americans Socially United thinking the money was going to Sanders' campaign.").

The potential for confusion is also clear from the preliminary record in the pending *PAG* case. The plaintiff there seeks to use candidate Mike Huckabee's name in the title and URLs of its website and social media pages, in violation of FEC regulations that prohibit unauthorized committees from using a candidate's name in the title of a special project, unless the title clearly demonstrates opposition to the candidate. *PAG*, 2015 WL 5675428, at *2. The district court observed that "hundreds of comments on the ["I Like Mike Huckabee" Facebook page] that appear to be directed to Governor Huckabee himself" illustrated "the potential for confusion" when an unauthorized committee can hold itself out as an agent of the candidate. *Id.* at *9.

Notably, even under the existing disclosure regime, significant concerns about groups purporting to speak and solicit money on behalf of and in opposition to named candidates —

including many of Backers' groups — are well documented. *See, e.g.*, Vogel, *Scam PACs* (reporting on growing concerns that such groups raise funds with candidate-centered pitches but spend little on the promised advocacy or candidate contributions)[4]; Eric Lipton and Jennifer Steinhauer, '*Fire Paul Ryan'? Rebel PACs Hit Republicans, and It Pays*, N.Y. Times (Oct. 23, 2015), http://www.nytimes.com/2015/10/24/us/politics/conservative-pacs-turn-attack-on-gop-leaders-into-fund-raising-tool.html (summarizing similar criticism and analyzing the spending of PACs Backer helps run) (Sadio Decl. Exh. B); Betsy Woodruff and David M. Drucker, *Why These Republicans Weren't Happy With a Plan to Draft Sarah Palin*, Wash. Examiner (June 9, 2014, 4:45 PM), http://www.washingtonexaminer.com/why-these-republicans-werent-happy-with-a-plan-to-draft-sarah-palin/article/2549494 (Sadio Decl. Exh. G) (suggesting that an unauthorized political committee's "draft Palin" campaign may reflect "a growing trend of shadowy political action committees that . . . often spend minimally on the campaigns and candidates they purport to champion, while succeeding in enriching the PAC and the organizers and consultants behind it"); Factual and Legal Analysis, In re Patriot Super PAC, et al., MUR 6643 (Mar. 7, 2014), http://eqs.fec.gov/eqsdocsMUR/14044352360.pdf (Sadio Decl. Exh. U) (describing a group's use of a candidate's "likeness to raise funds independently to support his candidacy" and spending of "very little of the money it raised to support" the candidate, and finding that the conduct did not constitute fraudulent misrepresentation); Lewis, *PACs Trolling for Your Money* (discussing rise of "scam PACs" that "spend[] far more on the professional political operatives who manage them than on the candidates who well-meaning donors give money to support").

[4] *See id.* (finding that fifteen of Backer's groups had spent "less than 12 percent of their total fundraising haul" on ads and contributions in 2014).

Plaintiffs thus plainly cannot meet the exceedingly high burden of showing that the name identification requirement, in all of its applications, lacks a "legitimate sweep." *Wash. State Grange*, 552 U.S. 442 at 449. The name identification requirement is a bright-line rule that advances the government's important disclosure interests in a minimally burdensome manner, as Backer's extensive experience complying with the requirement confirms, *see supra* n.3. The relief plaintiffs seek would make it more difficult for contributors to distinguish between authorized and unauthorized political committees, while making it easier for unauthorized political committees to use candidates' names in manners that mislead supporters of such candidate and misdirect contributions intended for the candidates. The examples of confusion under existing rules documented above demonstrate the confusion that would dramatically increase if the requested relief is granted. Both the statutory and regulatory components of the name identification requirement have a plainly legitimate sweep and the provisions thus easily survive plaintiffs' facial challenges.

B. The Name Identification Requirement Is Not Overbroad

Plaintiffs cannot meet their heavy burden to demonstrate that the name identification requirement is facially overbroad. A law cannot be found facially invalid on overbreadth grounds unless "its overbreadth is 'substantial . . . judged in relation to the statute's plainly legitimate sweep.'" *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 751 (4th Cir. 2010) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)); *Legend Night Club v. Miller*, 637 F.3d 294, 297 (4th Cir. 2011) ("[T]he Supreme Court has counseled lower courts to declare statutes facially overbroad 'sparingly and only as a last resort.'") (quoting *Broadrick*, 413 U.S. at 613). As explained *supra* pp. 12-13 & n.3, the name identification requirement is a minimally burdensome, bright-line requirement that facilitates quick and easy distinctions between an authorized committee that acts on behalf of a candidate and an unauthorized committee that does

not. It thus serves the government's important and compelling interests in limiting fraud, abuse, and confusion, while instances of fraud, abuse, and confusion would greatly increase in the absence of the requirement. *See supra* pp. 13-15.

Importantly, even if plaintiffs are correct that there is less potential for fraud, abuse, and confusion in the context of certain unauthorized committees with names that unambiguously indicate opposition to a named candidate, *cf.* 1994 Rule, 59 Fed. Reg. at 17,269, plaintiffs apparently do not dispute that the name identification requirement advances the government's important interests in the many other contexts in which the requirement applies. The other contexts include all *authorized* political committees and all unauthorized political committees whose names do not unambiguously indicate opposition to a federal candidate. Because the name identification requirement's legitimate sweep is substantial and undisputed, plaintiffs' facial overbreadth claim is plainly unavailing.

C. FECA's Name Identification Requirement Is Not Unconstitutionally Vague

Plaintiffs' vagueness arguments fair no better. A statute is unconstitutionally vague only if it fails to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and permit "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Courts evaluating vagueness claims "must ask whether the statutory prohibitions are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1079 (4th Cir. 2006). The name identification requirement clearly meets this standard. The phrase "name of any candidate" is sufficiently precise to give a person of ordinary intelligence fair notice of what is proscribed. A reasonable officer of a political committee exercising common sense should 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).

That there may exist closer questions hardly demonstrates that the name identification requirement is impermissibly vague. "A statute need not spell out every possible factual scenario with celestial precision to avoid being struck down on vagueness grounds." *United States v. Whorley*, 550 F.3d 326, 334 (4th Cir. 2008) (internal quotation marks omitted); *see Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.") (internal quotation marks omitted); *United States v. Harriss*, 347 U.S. 612, 618 (1954) ("[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise.").

Plaintiffs have evidently scoured the roster of current and potential candidates to pose myriad hypothetical applications of the name identification requirement. But hypotheticals are irrelevant. "[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010). There is no dispute that Stop Hillary PAC refers to candidate Hillary Clinton, and no suggestion that a reasonable voter would not understand that the committee refers to her and not, for example, actresses Hillary Duff or Hillary Swank.[5] And far from being uncertain, Backer "intentionally" failed to comply (Compl.

[5] It was equally clear to any person of ordinary intelligence that the name of Backer's former "Stand with Rand PAC," which operated a website displaying photos, quotations, and a silhouette of Senator Rand Paul, contained the name of a federal candidate and not the name of "Ayn Rand," as Backer initially suggested, before later acknowledging a danger of confusion with Senator Paul's messaging and agreeing to revise the committee's name. *Compare* Aaron

¶ 14) with the unambiguous requirement by choosing to include in the committee's name "a reference to 'Hillary,' which was intended as a reference" to Hillary Rodham Clinton, whom Backer "believed . . . was certain to" be a candidate in the 2016 presidential election (*id.* ¶ 13). Since the name identification requirement is not vague as applied to plaintiffs, they "cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And [they] certainly cannot do so based on the speech of others." *Humanitarian Law Project*, 561 U.S. at 20 (distinguishing overbreadth and vagueness doctrines and clarifying that "a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression. Otherwise the doctrines would be substantially redundant." (internal citations omitted)).

D. The Name Identification Requirement Is Not a Content-Based Restriction

Plaintiffs' contention (Mem. at 13-14) that the name identification requirement operates as a content-based restriction on speech is erroneous, and their demand for strict scrutiny is misguided. The requirement that political committees must disclose the status of their authorization by candidates in their registered names is not a ban on the content of their communications. Like other disclosure requirements, the name identification requirement limits opportunities for confusion, fraud, and abuse by making it easier for anyone to immediately determine if a committee is an authorized committee or not. The name identification requirement merely requires disclosure of whether an organization speaks independently or on a candidate's behalf — if a candidate's name is present in the committee's registered name the

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Blake, *After FEC Inquiry, 'Stand with Rand' PAC Says It Backs Ayn Rand, Not Rand Paul*, Wash. Post (Sept. 24, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/09/24/after-fec-inquiry-stand-with-rand-pac-says-it-backs-ayn-rand-not-rand-paul/ (Sadio Decl. Exh. H), *with* Tau, *PAC Backing Rand Paul Changes Its Name to Avoid Tangle With Election Rules*, *supra* p. 13.

committee must be the candidate's authorized committee. The requirement does not prohibit any speech; it limits confusion "about the person or group who is speaking" and helps make clear that the groups' communications "are not funded by a candidate," *Citizens United*, 558 U.S. at 368 — important governmental interests that eight Justices of the Supreme Court have repeatedly embraced. *See id.*; *McConnell*, 540 U.S. at 196-97. The requirement does not control content any more than do the rules requiring small disclaimers on communications.

In *Republican National Committee v. FEC* ("*RNC*"), the D.C. Circuit rejected an analogous claim that another FEC disclosure regulation was a content-based speech prohibition. 76 F.3d 400 (D.C. Cir. 1996). The regulation at issue in *RNC* implemented FECA's requirement that political committees use their "best efforts" to provide information about donors who give more than $200 in a single year. *Id.* at 403. The rule required committees claiming "best efforts" to have made a separate follow-up request to contributors that had failed to disclose all the needed information. The follow-up request could "not contain anything other than the request for the missing information, [a] mandatory statement [regarding the request for information], and an expression of gratitude." *Id.* at 404; 11 C.F.R. § 104.7(b)(2). The plaintiffs challenged this "restriction on additional speech" as content based. 76 F.3d at 409.

The D.C. Circuit rejected this contention. It explained that in order "[t]o determine whether the regulation is content-based (in which case we would apply strict scrutiny) or content-neutral (in which case we would apply intermediate scrutiny), we ask whether 'the government has adopted a regulation of speech because of disagreement with the message it conveys,' or whether '[The] regulation . . . serves purposes unrelated to the content of expression.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Applying that standard, the Court of Appeals concluded that the "regulation is content-neutral" and merely

"ensure[s] that a written request for the information is not overlooked." *Id.* at 410 (internal quotation marks omitted). It then held that the regulation satisfied intermediate scrutiny. *Id.*

The analysis in *RNC* is on all fours with this case. Like the name identification requirement, the "best efforts" regulation at issue in *RNC* is part of FECA's disclosure regime. The D.C. Circuit thus said that the "simple answer" to the plaintiffs' challenge was "*Buckley*'s holding that the Act's disclosure requirements are not inconsistent with the First Amendment." *RNC*, 76 F.3d at 409. Plaintiffs here argue that the name identification requirement's purpose is directed to "the content of the expression," (Mem. at 14), but precisely the same could be said of follow-up letters requesting information that do or do not show the group's "thank[s]." 11 C.F.R. § 104.7(b)(2). Yet the Court of Appeals rejected the same argument when it concluded that section 104.7(b)(2) is simply a content-neutral means of "ensur[ing] that a written request for the information is not overlooked." *RNC*, 76 F.3d at 410 (internal quotation marks omitted).

Here, as in *RNC*, the name identification requirement is "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (internal quotation marks omitted). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*; *cf. Wagner v. FEC*, 793 F.3d 1, 28 (D.C. Cir. 2015) (en banc) (finding no hint of "any purpose to disfavor" some individuals affected by a contribution prohibition "as against the categories proffered by the plaintiffs"). Even plaintiffs do not suggest that their challenge to the name identification requirement is based upon the FEC's supposed disagreement with any particular committee names. There is no dispute that Congress enacted section 30102(e)(4) to limit confusion by making it possible to immediately identify whether a committee is authorized or not. *See Common Cause*, 842 F.2d at 447. Importantly, the provisions challenged here leave

unauthorized political committees entirely free to express their views about any particular candidate *in any communication*.

Plaintiffs' content-based claims are premised almost exclusively on *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). (*See* Mem. at 13-14.) In fact, *Reed* does not apply here at all. *Reed* concerned an Arizona town's imposition of varying size, location, and duration restrictions on the manner in which individuals could display outdoor signs, including distinct requirements for directional and other categories of signs. *Id.* at 2224-25. The Court unanimously agreed that the challenged restrictions were unconstitutional and three Justices thought that the restrictions even failed the "laugh test." *Id.* at 2239 (Kagan, J., concurring). The rules restricted the amount, location, and duration of certain speech based on the nature of the message the sign communicated. "Ideological messages [we]re given more favorable treatment than messages concerning a political candidate, which [we]re themselves given more favorable treatment than messages announcing an assembly of like-minded individuals." *Id.* at 2230. But that "paradigmatic example of content-based discrimination," *id.* at 2230, is wholly absent from the name identification requirement, which permits all unauthorized political committees unfettered freedom to "discuss candidates throughout" the content of their "communication; and to use candidates' names as frequently, and highlight them as prominently (in terms of size, typeface, location, and so forth) as they choose." 1994 Rule, 59 Fed. Reg. at 17,268-69; *see also RNC*, 76 F.3d at 410 (regulation left committees "free to express their views . . . in other communications"). Unlike the law at issue in *Reed*, the name identification requirement challenged here does not restrict the content of any group's speech.

In addition, *Reed* is inapposite because the sign law at issue in that case did not promote *any* disclosure interest, let alone constitute an integral part of FECA's comprehensive disclosure

program that has been deemed constitutional since *Buckley* and overwhelmingly supported by eight current Supreme Court Justices and the Fourth Circuit Court of Appeals in 2012. *See supra* pp. 10-11. *Reed* should not be read to silently displace this longstanding precedent.

Regardless, even if this Court accepts plaintiffs' argument that their constitutional challenge requires more stringent, "strict" scrutiny, the name identification requirement is narrowly tailored to serve a compelling government interest and it thus satisfies that test as well. The government's interests in limiting confusion, fraud, and abuse and preserving the integrity of American elections are important interests. *See supra* pp. 11-12. They are also compelling. Indeed, the Supreme Court has already "concluded that a State has a compelling interest in protecting voters from confusion and undue influence." *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983); *accord McCutcheon*, 134 S. Ct. at 1445-46 (explaining that although government's anti-corruption interest needed to be only "sufficiently important" to satisfy the closely drawn scrutiny that applies to contribution limits, the Court had itself already stated that that "interest may properly be labeled 'compelling'").

E. The Name Identification Requirement Is Constitutional As Applied

As applied here, the name identification requirement is substantially related to the government's important interest in limiting the fraud, abuse, and confusion that would result if committees like Stop Hillary PAC could include a candidate's name in its registered name. Even if the potential for confusing unauthorized committees with authorized ones may be diminished where a committee name conveys unambiguous opposition to a named candidate, a proliferation of unauthorized committee names that include candidate names would undermine Congress's objective of facilitating "immediate identification of a candidate's authorized committee" by a simple "glance" at the committee's name. *Common Cause*, 842 F.2d at 442, 447.

The name identification requirement is also constitutional as applied because of its extremely limited scope that poses no more than a de minimis burden on plaintiffs. The requirement is narrowly tailored to pass even strict constitutional scrutiny. As detailed *supra* pp. 3-5, the Commission has narrowly construed the statutory requirement to allow unauthorized committees like Stop Hillary PAC the freedom to use candidate names in the titles of special projects — including websites, social media pages, and other communications — "if the title clearly and unambiguously shows opposition to the named candidate." 11 C.F.R. § 102.14(b)(3); *see* NewtWatch Advisory Op., 1995 WL 247474, at *5. Unauthorized committees are also entirely free to promote or oppose candidates to whatever extent they desire in the "body of any website or other communication." CAP Advisory Op., 2015 WL 4480266, at *3; *see PAG*, 2015 WL 5675428, at *11 (same).

Plaintiff/counsel Backer's own declaration underscores just how miniscule of a burden is at issue here. Even setting aside that the burden was "intentionally" self-imposed (Compl. ¶ 14), it is simply not true that complying with the narrow name identification requirement would cause the committee "to squander the goodwill and name recognition" of its "Stop Hillary" logo (Backer Decl. ¶ 14). Plaintiffs could choose any committee name that does not include candidate Hillary Clinton's name while still expressing their desire to "Stop Hillary" in the title of any special project or anywhere in the body of any of its communications, as other unauthorized committees have done. *See supra* pp. 12-13 & n.3. Indeed, with the exception of the committee's registered name, plaintiffs have the unrestrained ability to use their "Stop Hillary" logo not only in the body of the committee's websites, social media pages, and other communications but also in the titles and URLs of any such "special projects." It is thus not true that the requirement challenged here would require the committee to obtain new website

domains or modify "the dozens of websites that currently link to its various web pages," nor is it true that the committee would be required to obtain a new Twitter handle, Facebook page, or revise the names of any other "special projects" that the committee may operate. (*Contra* Backer Decl. ¶ 14.)

The limited changes plaintiffs would have to make for the committee's registered name to comply with the challenged requirement could easily have been avoided if Backer had not chosen to "intentionally" violate the law (Compl. ¶ 14), and instead had acted consistent with his extensive experience with other committees, *see supra* pp. 12-13 & n.3. Although plaintiffs may not be able to "get what [they] want," they can easily "get what [they] need" — the freedom to oppose Clinton (and discuss any other candidate) at will without eviscerating a reasonable, longstanding, bright-line disclosure requirement that limits the potential for confusion, fraud, and abuse and helps preserve the integrity of American elections. *Cf. Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 11, 14 (D.C. Cir. 2014) (quoting The Rolling Stones, *You Can't Always Get What You Want, on* Let It Bleed (Decca Records 1969), and rejecting constitutional challenge brought by Backer in part due to the plaintiffs' voluntary choice to pursue a more "burdensome" course of action), *cert. denied*, 135 S. Ct. 949 (2015).

III. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM

Plaintiffs fail to demonstrate that they will suffer irreparable harm without an injunction. *Winter*, 555 U.S. at 22. "[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation and internal quotation marks omitted). "The plaintiff must make a clear showing of irreparable harm . . ., and the required irreparable harm must be neither remote nor speculative, but actual and imminent."

Scotts Co. v. United Indus. Corp., 315 F.3d 264, 283 (4th Cir. 2002) (internal quotation marks omitted).

Plaintiffs offer no evidence of irreparable harm that they have suffered or will suffer as a result of their intentional violation. Indeed, as explained *supra* pp. 24-25, the narrow name identification requirement would *not* require plaintiffs to take many of the supposed actions Backer claims would be necessary to bring the committee into compliance. Moreover, as also explained *supra* pp. 7, 25, the limited burdens plaintiffs would face were "intentionally" self-imposed (Compl. ¶ 13) and easily could have been avoided. Indeed, the limited record the Commission has developed at this preliminary stage demonstrates plaintiff/counsel Backer's extensive experience promoting committees' candidate-centered messages while complying with the minimal limitations of the name identification requirement. *See supra* n.3.[6]

Furthermore, in light of Backer's admission that he knew he was flouting federal law since at least April 2015, when Clinton announced her candidacy (Compl. ¶ 14), plaintiffs plainly could have brought their challenge to the decades-old name identification requirement sooner. Courts have found that irreparable injury is not present in the event of self-created urgency. *See Tenacre Found. v. INS*, 78 F.3d 693, 695 n.2 (D.C. Cir. 1996) (finding that seven-month delay before filing suit "undermines any assertions that [plaintiff] will suffer irreparable harm if the Court does not grant preliminary injunctive

[6] To the extent plaintiffs are serious in suggesting that their harm was unanticipated because they named the committee before Clinton announced her candidacy (*e.g.* Mem. at 7-8), they have entirely undermined such a suggestion by asserting (1) the committee name was intended to reference "Hillary Rodham Clinton," whom Backer "believed . . . was certain to seek" election as President of the United States in 2016 (Compl. ¶ 13); (2) the exclusive purpose of the committee has always been "to ensure Hillary Clinton never becomes President of the United States" (Mem. at 2); and (3) "Backer intentionally" violated the name identification requirement (Compl. ¶ 14).

relief"); *cf. Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) ("[Plaintiff's] cries of urgency are sharply undercut by its own rather leisurely approach to the question of preliminary injunctive relief.").

Plaintiffs' authorities do not help them. Both *Odebrecht Construction, Inc. v. Secretary, Florida Department of Transportation*, 715 F.3d 1268 (11th Cir. 2013) and *Chamber of Commerce v. Edmondson*, 594 F.3d 742 (10th Cir. 2010) involved challenges to newly enacted state statutes and did not involve intentional, self-inflicted harm as a result of a purposeful violation of the law.

Plaintiffs' purported reliance on *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality) is also misplaced. In *Elrod*, the Supreme Court affirmed the order of the Court of Appeals instructing the district court to enter appropriate injunctive relief. The Court's statement that loss of First Amendment rights for even minimal periods of time constituted irreparable harm was premised on its finding that the government employees had shown that they were likely to succeed on the merits of their First Amendment claims. 427 U.S. at 374 ("[S]ince respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief."). *See also Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (explaining that defendant was "is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation" where the record suggested the rule was likely unconstitutional).

Here, by contrast, plaintiffs have *not* established their likely success on the merits. *See supra* pp. 9-25. They simply assume that which they have not established — that the name identification requirement likely violates their constitutional rights. *See Ross v. Meese*, 818 F.2d

1132, 1135 (4th Cir. 1987) ("[T]he denial of a constitutional right, *if denial is established*, constitutes irreparable harm for purposes of equitable jurisdiction.") (emphasis added).

Plaintiffs' mere allegations of harm under the First Amendment are insufficient, especially where the challenged statute and regulation poses no more than de minimis burdens. *See RTAO*, 575 F.3d at 351 (finding *Elrod* inapplicable and no threat of irreparable harm where plaintiff is "free to disseminate its message and make [any] expenditures as it wished" and subject only to "constitutionally permitted restrictions"); *Smith v. Frye*, 488 F.3d 263, 271 (4th Cir. 2007) (allegation does not "necessarily, by itself, state a First Amendment claim under *Elrod*"). Plaintiffs' overwrought allegations of "FEC threats" are also insufficient to show irreparable harm, especially given their failure to even suggest that they have been singled out or that the Commission's routine inquiries and notifications are capricious, irregular, or certain to result in concrete injury.[7] In fact, "plaintiffs will not 'suffer irreparable harm in the absence of preliminary relief'; they will simply be required to adhere to the regulatory regime that has governed campaign finance for decades." *Rufer v. FEC*, 64 F. Supp. 3d 195, 206 (D.D.C. 2014).

IV. THE REQUESTED RELIEF WOULD HARM THE PUBLIC INTEREST

The current version of the name identification requirement has been law for twenty-one years. Enjoining enforcement of this long-standing requirement would substantially harm the

[7] The lack of any irreparable harm here is further reflected in the Commission's past handling of other alleged violations of the name identification requirement. In Matter Under Review 6213, the Commission dismissed an administrative complaint alleging a violation of the name identification requirement and issued a cautionary warning to the respondent, the Decidedly Unhappy Mainstream Patriots Rejecting Evil-mongering Incompetent Democrats Political Action Committee, "to take steps to ensure that its conduct is in compliance with the Act and the Commission's Regulations, by amending its Form 1 to remove the parenthetical '(DUMPREID PAC)' from its official name, and by including the Committee's full name in the 'paid for by' section of its website disclaimer and in any future public communications." *See* MUR 6213 (Decidedly Unhappy Mainstream Patriots Rejecting Evil-mongering Incompetent Democrats PAC), http://eqs.fec.gov/eqsdocsMUR/10044271813.pdf, at 2 (Sadio Decl. Exh. U).

public's and government's important and compelling interests in limiting election-related fraud, abuse, and confusion. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). A "presumption of constitutionality [] attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) ("The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction.").

Plaintiffs seek to alter the "federal campaign finance framework only months prior to the next federal election based on an as yet untested legal theory. Permitting that to happen would be imprudent, to say the least, and certainly not in the public interest." *Rufer*, 64 F. Supp. 3d at 206; *Holmes v. FEC*, 71 F. Supp. 3d 178, 188 (D.D.C. 2014) ("Plaintiffs' attempt to locate a problem of constitutional proportions in the [challenged provision] would upset settled expectations immediately before the vote itself."). Indeed, enjoining the name identification requirement would likely lead to more of the confusion and abuse that has already resulted from the violations of the requirement described above, *see* supra pp. 13-15.

At bottom, plaintiffs' argument that the public interest favors a preliminary injunction in their favor is the superficial notion that enforcing constitutional rights is always in the public interest. But their argument assumes that which they seek to prove — that they have a

constitutional right to include a candidate's name in their committee's name. Because plaintiffs are not likely to succeed on the merits of their claims, it can hardly be said that a preliminary injunction would be in the public interest compared with the "presumption of constitutionality [that] attaches to every Act of Congress." *Walters*, 468 U.S. at 1324 (Rehnquist, J., in chambers). The balance of harms and the public interest weigh heavily in favor of preserving the status quo and denying plaintiff's request for the extraordinary injunctive relief they seek.[8]

CONCLUSION

For the foregoing reasons, the Court should deny the preliminary-injunction motion.

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[8] Even if this Court agrees that plaintiffs are entitled to preliminary relief, they are not entitled to the nationwide injunction they appear to request. In *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), overruled on other grounds by *RTAA*, 681 F.3d 544 (4th Cir. 2012), the Fourth Circuit remanded the case for modification of a nationwide injunction the district court had entered against the FEC, explaining that "the district court abused its discretion by issuing a nationwide injunction." It further explained that a nationwide injunction "is broader than necessary to afford full relief to [the plaintiffs] . . . [and] . . . encroaches on the ability of other circuits to consider the constitutionality of [the challenged regulation]." *Id.*