Case No. 15-5264

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PURSUING AMERICA'S GREATNESS,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court for the
District of Columbia, Civil Action No. 15-cv-1217 (TSC)
Tanya S. Chutkan, United States District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND JAMES MADISON CENTER FOR FREE SPEECH IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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STATEMENT REGARDING CONSENT TO FILE

All parties have consented to the filing of Pacific Legal Foundation's and James Madison Center for Free Speech's brief amicus curiae. To the best of the knowledge of counsel for Amici Curiae, there are no other interested parties planning to file amicus briefs in this case in support of Appellant Pursuing America's Greatness.

Pursuant to Fed. R. App. P. 29(c), Amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or its counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, and District of Columbia Circuit Rule 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Amicus Curiae James Madison Center for Free Speech is an internal fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation.

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GLOSSARY OF ABBREVIATIONS

"FEC" . . . . . Federal Election Commission

"PAC" . . . . . Political Action Committee

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

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded over 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated to support First Amendment free speech rights and to advance the idea that speech protections of the First Amendment should be consistently applied, regardless of the speaker's identity. *See*, *e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 686 (6th Cir. 2014), *cert. denied sub nom. Liberty Coins, LLC v. Porter*, 135 S. Ct. 950 (2015). PLF has also participated as amicus curiae in important cases involving the First Amendment's protections of corporate speech. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Wine & Spirits Retailers, Inc. v. Rhode Island and Providence Plantations*, 552 U.S. 889 (2007); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); and *FEC v. Beaumont*, 539 U.S. 146 (2003).

The James Madison Center for Free Speech (Madison Center) is recognized by the Internal Revenue Service as a nonprofit organization under 26 U.S.C. § 501(c)(3). The Madison Center and its counsel have been involved in numerous election-law cases, including the challenges to the Bipartisan Campaign Act of 2002 in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006), and

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007). The mission of the Madison Center is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." *New York Times v. Sullivan*, 376 U.S. 254, 275 (1964). The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This summer, the FEC issued an advisory opinion interpreting Section 30102(e)(4) of the Federal Election Campaign Act of 1971. *See* FEC Advisory Opinion 2015–04. The opinion states that unauthorized political committees cannot use the name of the candidate they support in the domain name or title of a social media page. The FEC claims that it has a compelling interest in protecting voters from confusing a candidate's official page (or the page of its authorized political committee) with an unauthorized political committee page that has the candidate's name in the title or web address. *Pursuing Am.'s Greatness v. FEC*, 15-CV-1217 (TSC), 2015 WL 5675428, at *11 (D.D.C. 2015). But under the FEC's new interpretation, unauthorized political committees cannot use even accurate,

nonconfusing Internet addresses or names like "Anarchists for Bernie" or "Feminists who like Hillary" on Facebook, Twitter, or other social media outlets. *See* FEC Advisory Opinion 2015–04.

Though the government certainly has an interest in preventing fraud, the Naming Prohibition goes too far. It is a speaker-based and content-based restriction on speech, requiring the FEC to look at the message expressed and the speaker expressing it to determine whether a political committee is violating the law. *See Reed*, 135 S. Ct. at 2226. To justify content-based censorship, the government bears the burden of showing that its restriction is narrowly tailored to advance a compelling interest. *See id.* The government fails that heavy burden. Indeed, even if the restriction were content-neutral, it would fail the lesser hurdle of intermediate scrutiny.

Content-neutral restrictions are unconstitutional when they restrict substantially more speech than necessary or fail to leave open adequate alternative channels of expression. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The FEC regulation fails on both counts. Website addresses and social media page names serve as important markers that allow individuals to know, without visiting the site, what kind of content to expect. Like a sign hanging outside of a brick-and-mortar business, the title or domain name of a website will determine who chooses to visit the site. Especially in light of the increasing importance of the Internet and social media to

educating the public about political ideas, there are no adequate alternatives for political committees to market their political beliefs to voters.

Likewise, the speech restriction bans substantially more speech than necessary. The restriction does not merely ban confusing or fraudulent names, it bans a much larger category of non-confusing, accurate names. *See* FEC Advisory Opinion 2015–04. The government failed to offer any evidence that titles like "I like Mike Huckabee" are confusing Facebook or website users. But even if it had, the FEC has many substantially less restrictive alternatives that could achieve the same end. For example, the FEC could instead ban political committees from choosing confusing names that actually look like they belong to the candidate, like "Campaign for Carly," or it could require them to choose names that imply a third-party interest in the candidate, like "Anarchists for Bernie" or "Feminists who like Hillary." Or it could require political committees to include a disclaimer on the home page of the website or social media page that says that it is not the official campaign site for the candidate involved.

Because the FEC will be unable to prove a need for its restriction, and because the restriction fails to leave open adequate alternative channels, this Court should grant the injunction against the FEC.

ARGUMENT

I

THE FEC'S NAMING PROHIBITION IS AN UNCONSTITUTIONAL CONTENT-BASED RESTRICTION ON SPEECH

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I. Under that protection, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. On its face, the Naming Prohibition bans speech based on its content and thus is subject to strict scrutiny. While government certainly has a compelling interest in preventing political committees from acquiring donations through fraudulent or deceptive practices, the FEC's prohibition is not narrowly tailored to meet a compelling interest. To the contrary, the prohibition bans far more speech than necessary, when common-sense alternatives are available.

Determining whether a law censors speech based on its content is straightforward. A speech restriction is content-based if it applies to a particular communication "because of the topic discussed or the idea or message expressed."

Reed, 135 S. Ct. at 2227. In other words, "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred," then it is content-based. *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (quoting *Fed. Commc'ns Comm'n v. League of Women Voters of Cal.*, 463 U.S. 364, 383 (1984)).

In *Sorrell v. IMS Health Inc.*, the Supreme Court overturned a Vermont law that banned pharmacies, health insurers, and similar entities from disclosing information about doctors' prescribing practices to pharmaceutical marketers. 131 S. Ct. at 2659-60. Pharmacies could disclose the information to purchasers who would use the information for educational or academic purposes. *Id*. at 2663. But the statute prohibited pharmaceutical manufacturers from using the information for marketing. *Id*. Explaining that "marketing" is "speech with a particular content," the Court found that the statute disfavored speech based on its content. *Id*. The Court also held that the statute "disfavor[ed] specific speakers, namely pharmaceutical manufacturers." *Id*. Thus, "[b]oth on its face and in its practical operation" the law "impose[d] a burden based on the content of speech and the identity of the speaker." *Id*. at 2665.

In contrast, in *McCullen*, the Court held that a law establishing a buffer zone around an abortion clinic—though unconstitutional—was not content-based. 134 S. Ct. 2518. The Massachusetts statute at issue made it a crime to "knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway" of abortion

clinics. *Id.* at 2525. Clinic employees and visitors were exempt. The statute did not require enforcement authorities to examine the content of the message conveyed by individuals in order to determine whether the individual violated the law. *Id.* at 2531. An individual would violate the law not based on what they said within in the 35 feet, but solely based on their standing within the 35 feet. *Id.* ("[P]etitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word."). Accordingly, the law was content-neutral. Notably, the Court clarified that the law would be content-based "if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.' " *Id.* Had the buffer statute banned standing near an abortion clinic only when the speech "caused offense or made listeners uncomfortable" then the ban would have been content-based. *McCullen*, 134 S. Ct. at 2531-32.

Here, the FEC's Naming Prohibition specifically bans PACs from using Internet addresses or social media page names that contain the name of a candidate they support. *See* FEC Advisory Opinion 2015–04. On its face, the Naming Prohibition bans speech based on its content. In order for the FEC to determine whether a PAC violates the rule, it must actually read the names of the PAC's websites and social media pages and determine whether they contain the name of a candidate they support. *See McCullen*, 134 S. Ct. at 2531. If so, the PAC violates the FEC rule. Even if the law only banned Internet and social media names that caused

confusion in the minds of readers, the FEC naming rule would still be a content-based restriction, just as a buffer zone law that only banned speech that made listeners uncomfortable would be content-based. *See id*. at 2531.

As a content-based ban, the Naming Prohibition is presumptively invalid. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). "In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Sorrell*, 131 S. Ct. at 2667; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) ("With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one."). The restriction is unconstitutional unless it can pass strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest," *Citizens United*, 558 U.S. at 340 (internal quotes omitted). Thus the FEC must demonstrate that its Naming Prohibition "furthers a compelling governmental interest and is narrowly tailored to that end." *Reed*, 135 S. Ct. at 2231.

The FEC argues that its prohibition furthers its interest in preventing confusion and mistaking the message of a PAC for a message from a candidate. *Pursuing Am.'s Greatness*, 15-CV-1217 (TSC), 2015 WL 5675428, at *11. But the FEC has not shown why prohibiting all uses of candidate names in internet addresses or social

media page names is necessary or serves this end. *See* Opposition at 21-29, 38-39; *Citizens United*, 558 U.S. at 362 (restriction overturned when government failed to provide sufficient evidence to prove the restriction was narrowly tailored to meet a compelling interest). As explained below, the FEC's prohibition does not meet even the lesser tailoring demands of intermediate scrutiny and should be overturned as unconstitutional.

II

EVEN IF THE FEC OPINION IS CONTENT-NEUTRAL, IT STILL VIOLATES PAG'S FREEDOM OF SPEECH

Even if the FEC Prohibition is content-neutral restriction on the time, place, or manner of protected speech, it is unconstitutional. Content-neutral restrictions on the time, place, or manner of speech "must be narrowly tailored to serve a significant governmental interest" and must "leave open ample alternative channels" for speech. *McCullen*, 134 S. Ct. at 2529 (quoting *Ward*, 491 U.S. at 791). Here, the FEC prohibition fails both tests by regulating too much speech and failing to leave open adequate alternative channels.

A. The FEC's Opinion Burdens Substantially More Speech than Necessary To Achieve Its Interests

A content-neutral speech restriction must be overturned as unconstitutional if it is not "narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2534 (quoting *Ward*, 291 U.S. at 796). A speech restriction cannot censor

or burden "substantially more speech" than necessary to further the government's interest. *Id*. That means that government may not "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 799). Though less demanding than the protection for a content-based restriction, this narrow tailoring requirement still requires the government to "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen*, 134 S. Ct. at 2540.

In *McCullen*, the Supreme Court held that a law creating a 35-foot buffer around abortion clinics violated the First Amendment, because it burdened substantially more speech than necessary to achieve the government's interests in "preserving access" to the clinics and "maintaining public safety" on the streets and sidewalks around them. 134 S. Ct. at 2541. The statute made it difficult for Ms. McCullen and others to "initiate the close, personal conversations that they view[ed] as essential to 'sidewalk counseling.'" *Id*. at 2535. The buffer restriction also made it "more difficult" to share literature with clinic patients. *Id*. at 2536. Under the narrowly tailoring requirement, the government bore the burden of showing that less restrictive laws—like banning intimidation or blocking entrances to clinics—would fail to achieve the same end. *Id*. at 2539. The government failed to meet its burden of showing that it "seriously undertook to address the problem with less intrusive

tools." *Id*. The Court outright rejected the government's justification that the buffer law made it easier to achieve its end. "[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.' " *Id*. at 2534 (quoting *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) (brackets in original).

Likewise, the FEC's Naming Prohibition censors substantially more speech than necessary. For example, while a Facebook Page name like "Huckabee for President" or "Mike Huckabee 2016" could *theoretically* confuse some inexperienced Facebook users, the Naming Prohibition bans an infinite variety of nonconfusing, accurate names that PACs may wish to someday employ like "Mike Huckabee Fans," "Socialists for Bernie Sanders," "Youth for Rand Paul," or "An Unauthorized Committee to Elect Hillary."[1] Each name implies a third party's interest in the candidate. As in *McCullen*, there are many substantially less restrictive ways to accomplish the same end of avoiding fraud or confusing Facebook users. Most obviously, a ban on genuinely misleading names like "Huckabee's Campaign" and *arguably* confusing names like "Mike Huckabee 2016" could accomplish the same end. If existing requirements proved inadequate (and there is no evidence of such

[1] The first three of these examples are real Facebook Fan Pages. The fourth illustrates that the Naming Prohibition would ban even a title that includes a disclaimer.

inadequacy), the FEC could, for example, require social media profile or cover photos to contain disclaimers in readable font that the page is not approved by the candidate.

The government in this case has not proven a need for *any* social media or Internet address naming restrictions at all. Social media pages like Facebook and Twitter already protect users from confusing official pages of public figures with the pages of imitators or similarly named individuals or organizations. On Facebook, political committees use what is known as a "Fan" Page to promote candidates. Unlike Facebook users' personal profiles, "Fan Pages can be viewed by anyone who visits them" and "are created with a specific focus—such as a corporate brand, place, organization, or public figure—allowing fans of that subject to express support for or interest in the topic." *Mattocks v. Black Entm't Television LLC*, 43 F. Supp. 3d 1311, 1314-15 (S.D. Fla. 2014). Supporters of public figures or products often start Fan Pages to spread information or share appreciation with other fans. *See, e.g.*, *id*. (Fan started Page to share her love for a television show with other fans). Importantly, "Facebook treats officially sponsored Fan Pages differently than unofficial Fan Pages," which are operated by fans of products or public figures. *Id*. at 1315. For example, official pages of public figures are denoted with a conspicuous blue checkmark next to their name. *See Verified Page or profile*, Facebook Help

Center.[2] Likewise, Twitter uses a verification process "whereby a Twitter account receives a blue check icon to indicate" that Twitter has confirmed the identity of the public figure. *See The Twitter glossary*, Twitter Help Center.[3] Moreover, if a public figure discovers an existing account on either Twitter or Facebook that appears to masquerade as the figure, both social media outlets have means by which the public figure can request to shut down those pages and transfer the followers to his or her official Facebook Fan Page or Twitter page. *See How do I report a fake account that's pretending to be me?*, Facebook Help Center;[4] *Impersonation policy*, Twitter Help Center.[5] That said, public figures often welcome unofficial fan pages because they offer free publicity and outreach. *See*, *e.g.*, Amprewave Media, *Create a Social Media Strategy*.[6]

In spite of Facebook's verification feature, the trial court found persuasive the government's exhibit of Facebook comments on the *I like Mike Huckabee* page that "appear to be directed to Governor Huckabee himself." The government relied on that exhibit for evidence that Facebook users are having difficulty discerning PAC pages

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[2] https://www.facebook.com/help/196050490547892

[3] https://support.twitter.com/articles/166337

[4] https://www.facebook.com/help/174210519303259

[5] https://support.twitter.com/articles/18366

[6] http://www.amprewave.com/guides/social-media-strategy/

from those of candidates and their campaigns. But even a passing understanding of how individuals actually interact on Facebook undermines that argument. For example, Harry Potter's official Facebook page, which has over 73 million fans, is dedicated to promoting fictional books and movies.[7] Yet, fans regularly direct comments to the fictional characters in the series. (*E.g.*, numerous fans commented on a photo of a young Harry Potter posted on December 11, saying things like "Merry Christmas, Mr. Potter" and "I miss you, Harry." Another fan wrote "I love your movies. Seriously, I wish that I [could] meet you someday, but that is not possible.")[8] That doesn't mean they think Harry Potter or Hermione or other characters are real people and they are viewing those characters' personal Facebook pages. Rather, these kinds of interactions are known in psychology as "parasocial interactions." Parasocial interactions are one-side interactions with celebrities, fictional characters, or public figures like political candidates. Sara E. Branch, et al., *Committed to Oprah, Homer, or House: Using the Investment Model to Understand Parasocial Relationships*, 2 Psychology of Popular Media 96, 100 (2013).[9] Anyone who yells advice to a quarterback in a televised football game or mutters a warning to a fictional character

[7] https://www.facebook.com/harrypottermovie/

[8] https://www.facebook.com/harrypottermovie/photos/a.461447939312.243308.156794164312/10153781162539313/?type=3&theater

[9] http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1066&context=psychpubs

in a book is engaging in a parasocial interaction. *See id*. Just as people speak to real and fictional people on television sets, knowing they cannot be heard, users of social media often address comments to public figures and fictional characters on social media and fan pages, never expecting a response. *See id*. at 20; Jonathan Cohen, *Mediated Relationships and Social Life: Current Research, Fandom, Parasocial Relationships, and Identification, Media and Social Life* 144 (2014) (ed. Mary Beth Oliver and Arthur A. Raney).[10] Accordingly, the FEC's "evidence" of Facebook comments on the *I like Mike Huckabee* page shows only that the Petitioner's Facebook page successfully fosters support for Huckabee by eliciting emotional reactions about Mike Huckabee by sharing information about him. The FEC has no evidence of confusion to support its Naming Prohibition.

B. The Restriction Fails To Leave Open Adequate Alternative Channels for Communication

For a time, place, and manner restriction to be upheld, the government must show that remaining channels provide a "practical substitute" and permit speakers to reach their audience "nearly as well" as the foreclosed one. *City of Ladue*, 512 U.S. at 57. The Naming Prohibition fails to leave open adequate alternative channels, because domain names (i.e., website addresses) and social media page names are uniquely important and have no substitute. *See id*.

[10] https://books.google.com/books?id=9EssAwAAQBAJ&printsec=frontcover#v=onepage&q&f=false

A social media page name or website domain name is similar to a doorway or a business sign posted at the door. *See*, *e.g.*, *What's in a Twitter Name? Everything that You Can Fit into It*, I Teach Blogging (descriptive Twitter handles inform users what kind of information to expect at that account).[11] Many people will not bother to enter the doorway in the first place if a business's sign does not suggest it will have the kind of content they are seeking. If a tattoo parlor were not allowed to display its purpose outside of the walls of its business, or use words like "tattoo parlor" to advertise its services, then potential customers would never glance past the doorway. Likewise, social media names and website addresses affect whether individuals will visit webpages and access the content therein. *See*, *e.g.*, Bradley Glonka, *8 Facts About Choosing the Right Domain Name*, Huffington Post, Apr. 2, 2015 (choosing keywords that communicate your brand can improve ranking on search engines and can be worth significant monetary investments);[12] *Improving PPC Search Engine Campaign Results Using Generic Domain Names*, Memorable Domains (study comparing whether users click on website advertisements concluded that users were more likely to click on the domain name closest to the product they searched for);[13]

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[11] http://iteachblogging.com/whats-twitter-name-everything-can-fit/

[12] http://www.huffingtonpost.com/bradley-glonka/8-facts-about-choosing-th_b_6976450.html

[13] http://www.memorabledomains.co.uk/ppcanalysis.pdf

Gina Carr, *How to Name Your Facebook Page—5 Keys to Getting Found*.[14] Using keywords that interested individuals type into search engines (like Google or Bing) also significantly improves the website's position in a list of search results. *Supra* Glonka; Google's *200 Ranking Factors: The Complete List*, BackLinko, Dec. 21, 2015.[15]

The searchability of page names also affects the success of social media pages. On Facebook, for example, users can search for political candidates and fan pages in support of particular candidates by using the candidate's name in Facebook's own search bar. *See Search FYI: Find What the World is Saying With Facebook Search*, Facebook Newsroom, October 22, 2015 (Facebook promotional video shows how people use the search function to find out more about topics of interest).[16] Someone interested in Mike Huckabee could type his name in the search bar and quickly find two pertinent pages—his verified page (indicated with the blue checkmark) and the now unused page, *I Like Mike Huckabee*, belonging to Pursuing America's Greatness. Likewise, a Facebook user could find a variety of fan pages by searching "Mike Huckabee for President," "Mike Huckabee 2016" or using other relevant keywords.

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[14] http://ginacarr.com/2012/09/find-us-on-facebook-how-to-name-your-facebook-page-so-you-can-be-found/

[15] http://backlinko.com/google-ranking-factors

[16] https://newsroom.fb.com/news/2015/10/search-fyi-find-what-the-world-is-saying-with-facebook-search/

In fact a good page title can be just as important as good content. *See* Himabindu Lakkaraju, et al., *What's in a Name? Understanding the Interplay Between Titles, Content, and Communities in Social Media*, AAAI Conference on Weblogs and Social Media at 311 (2013)[17] (title has significant impact on popularity of social media posts). Practically speaking, it would never occur to individuals who are not already familiar with the PAC in this case to search out a generic name like "Pursuing America's Greatness" to find content about Mike Huckabee. Accordingly, foreclosing political committees from using a candidate's name in a Facebook page title extinguishes one of the major ways that interested users can find PACs' social media speech.

In *City of Ladue*, the Supreme Court overturned a city's ban on residential signs, because there were no "adequate substitutes." 512 U.S. at 56. Though the ordinance allowed individuals to post signs on vehicles, or to use hand-held signs, or to employ other mediums like handbills, flyers, or newspaper advertisements, the Court held those mediums were inadequate substitutes for a sign in a yard or on a home window. *Id*. "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." *Id*. Residential signs implicitly "provide

[17] http://www.aaai.org/ocs/index.php/ICWSM/ICWSM13/paper/viewFile/6085Himabindu/6370

information about the identity of the 'speaker.'" *Id.* They are an "unusually cheap and convenient form of communication" that "may have no practical substitute." *Id.* at 57. Moreover, residential signs allow individuals to easily reach their neighbors with their message. *Id.*

Just as prohibiting yard signs fails to leave open adequate channels, so too does prohibiting use of a candidate's name in a website address or social media page title fail to leave adequate substitutes for political committees who wish to use the Internet to advocate specific candidates. The Internet and especially social media are likewise " 'unusually cheap and convenient form[s] of communication' that 'may have no practical substitute.'" *See City of Ladue*, 512 U.S. at 57. Voters increasingly rely on the Internet, especially social media, to seek information about candidates. Between January 1 and October 7 of this year, "68 million people in the U.S. had more than a billion 'interactions' about the presidential campaign." James Niccolai, *Is Facebook the New Political Townhall?*, PC World, Nov. 5, 2015.[18] Sixty-one percent of American Millenials (19 to 34-year-olds) get their political news from Facebook more than any other source. Amy Mitchell, et al., *Millennials and Political News, Social Media—the Local TV for the Next Generation?*, Pew Research Center, June 1, 2015.[19]

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[18] http://www.pcworld.com/article/3001842/software-social/is-facebook-the-new-political-town-hall.html

[19] http://www.journalism.org/2015/06/01/millennials-political-news/

The FEC's rule severely interferes with political committees' ability to access and educate social media and Internet users in a cheap and efficient manner. Internet addresses and social media page names serve a unique purpose, for which there is no practical substitute. Accordingly, the FEC rule fails to leave open adequate alternative channels.

The lower court failed to grasp the importance of page names and website addresses, likening the restriction to the buffer zone around polling places in *Burson v. Freeman*, 504 U.S. 191 (1992), or limitations on the length of a parade in *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. D.C.*, (*KKK*), 919 F.2d 148, 151 (D.C. Cir. 1990). *Pursuing Am.'s Greatness*, 2015 WL 5675428, at *13. But neither comparison is apt. Most obviously, the Naming Prohibition does not require someone to move their "I like Huckabee" sign beyond the boundaries of a relatively small buffer, where they will likely encounter the same traffic. Because the Naming Prohibition forecloses political committees' ability to target and attract certain audiences to hear their message, it is more analogous to a miles-wide buffer zone around a polling place, which the Court in *Burson* implied would be unconstitutional. *See Burson*, 504 U.S. at 208, 210 ("The real question then is how large a restricted zone is permissible or sufficiently tailored. . . . [A]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden . . . ."). Likewise, the Naming Prohibition does not

require someone to use a shorter, but still reasonably conspicuous parade route through the heart of Washington, D.C. Instead, the Naming Prohibition is more analogous to banning demonstrators from scrawling a candidate's name on a sign at a parade, but allowing the same demonstrators to use the name inside a leaflet. Many individuals interested in that candidate would reject a leaflet from a group whose mission is unclear from its signs.

Moreover, in *KKK*, the D.C. Circuit later overturned the government's limitation over the parade route as an unconstitutional content-based prohibition. *See Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. D.C.*, 972 F.2d 365, 375 (D.C. Cir. 1992). And in *Burson*, the Supreme Court permitted the buffer zone, only because the government's evidence proved a long history of voter intimidation in spite of various attempts to prohibit it. "Voter intimidation and election fraud . . . are difficult to detect" and the alternative of increasing police presence to prevent the intimidation would be counterproductive, because "law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process." *Burson*, 504 U.S. at 207-208. The buffer still allowed candidates to send their message to individuals headed to the polls, but the government could protect voters with an approximately 15-second buffer to walk to and from the polls alone.

CONCLUSION

The FEC's Naming Prohibition is a content-based restriction that regulates substantially more speech than necessary to achieve its goals, and fails to leave open adequate alternative channels. This court should grant the injunction.

DATED: December 23, 2015.

Respectfully submitted,

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I hereby certify that on December 23, 2015, I electronically filed the foregoing BRIEF AMICUS CURIAE with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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