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August 8, 2016

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VIA E-MAIL

Jeff S. Jordan, Esq.
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Office of the General Counsel
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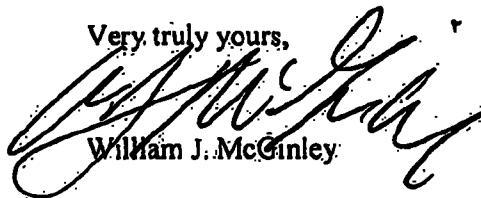
Re: MUR 6786
National Republican Congressional Committee and
Keith Davis, as Treasurer

Dear Mr. Jordan:

Please find attached a supplemental response of our clients, the National Republican Congressional Committee and Keith Davis, as Treasurer, to the above-referenced complaint.

Please do not hesitate to contact us with any questions.

Very truly yours,



William J. McGinley

Attachments

BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of)
The National Republican Congressional Committee) MUR 6786
And Keith Davis, as Treasurer)

SUPPLEMENTAL RESPONSE OF NRCC AND KEITH DAVIS, AS TREASURER, TO THE COMPLAINT

On behalf of our client, NRCC (formerly known as the National Republican Congressional Committee), and Keith Davis, as Treasurer (collectively, the "Respondents"), we submit this supplemental response to the Complaint, which has been pending for more than two years before the Commission. In light of a recent decision by the U.S. Court of Appeals for the D.C. Circuit finding that the naming requirement regulation at the heart of this Complaint "fails strict scrutiny and violates the First Amendment", the Commission must promptly dismiss this Complaint, close the file, and take no further action. *Pursuing America's Greatness v. FEC*, No. 15-5264, 2016 WL 4087943 at *16 (D.C. Cir. Aug. 2, 2016).

Introduction

Filed by the Atlantic County Democratic Committee, the Complaint alleged that NRCC's website attacking Democrat candidate Bill Hughes, Jr. violated the FEC's naming restrictions at 11 C.F.R. §102.14 which govern unauthorized candidate committees and their projects, including websites. This is also the very regulation at issue in *Pursuing America's Greatness v. Federal Election Commission*, a case in which the DC Circuit considered a separate, as-applied challenge brought by another unauthorized political committee, *Pursuing America's Greatness* ("PAG").¹ Since the

¹ As the court notes, PAG characterized its argument before the District Court as an as-applied challenge. 2016 WL 4087943 at *12, note 5. However, the court did not limit its review of section 102.14 in such a manner. Instead, the court looked "at the face of section 102.14 in determining whether it is content based . . . [because] the substantive rule

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Commission was a party to that case, it is well aware that the D.C. Circuit thoroughly examined the constitutionality of this regulation and concluded that it is a “content-based ban on speech that likely violates the First Amendment.” *Id.* at *2. As a result, the court granted PAG a preliminary injunction enjoining the Commission from enforcing the naming restrictions against PAG for websites and Facebook pages it sought to publish containing candidate names in their titles.

Addressing the constitutional merits of 11 CFR §102.14, the D.C. Circuit soundly rejected the Commission’s argument that 11 CFR §102.14 is a disclosure requirement and instead found that the regulation is a content-based restriction on political expression which violates the committee’s core First Amendment rights. “By prohibiting the use of a candidate’s name in the titles of PAG’s websites and social media pages, the FEC banned more speech than covered by FECA’s provisions requiring disclosure. [...] As a result, we conclude that section 102.14(a) is a restriction on PAG’s political speech, not a disclosure requirement.” *Id.* at *11.

Furthermore, the court made clear that its decision addressed the entirety of 102.14, stating “the FEC is incorrect that PAG’s challenge targets only a portion of section 102.14. Instead, PAG has clearly asked us to enjoin the FEC from enforcing the entirety of section 102.14 against it.” *Id.* at *5. The court proceeded to do so, finding that the entirety of 102.14 is “content-based discrimination pure and simple.” *Id.* at *13.

Argument

The D.C. Circuit’s clear ruling that the entirety of 11 CFR §102.14 is an unconstitutional speech ban leaves the Commission no quarter to enforce this regulation against other unauthorized committees. As a matter of constitutional law, the D.C. Circuit concluded that the restrictions in 11

of law is the same for both as-applied and facial First Amendment challenges.” *Id.* (internal citations and quotations omitted).

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CFR §102.14 must not be enforced against an unauthorized committee because they are a constitutionally defective infringement on core political speech. "Because the FEC has not shown that its speech ban is the least restrictive means of achieving the government's interest, there is a substantial likelihood that section 102.14 fails strict scrutiny and violates the First Amendment." *Id.* at *16. It is important to emphasize that the court did not reach this conclusion on the basis of administrative law or procedural principles. Instead, its ruling was based squarely on a thorough examination of the entirety of the regulation at issue here applying only the principles of constitutional law. For this reason alone, the Commission has no choice but to find no reason to believe that the NRCC violated the law.²

Even prior to the recent ruling by the D.C. Circuit, the Commission should have found no reason to believe that NRCC violated the law as its website was in clear opposition to the named candidate, in keeping with the exception that the regulation enumerates for projects "that clearly and unambiguously" show opposition to the named candidate at 11 CFR § 102.14(b)(3). As our clients' initial response details, the website they published was replete with opposition research and criticism of the candidate's record. Moreover, the website carried the NRCC's disclaimer, as required by law. As such, there could be no confusion among viewers as to the sponsor of the site or the message. We refer the Commission to the Response filed on June 24, 2014 for a full discussion of these issues.

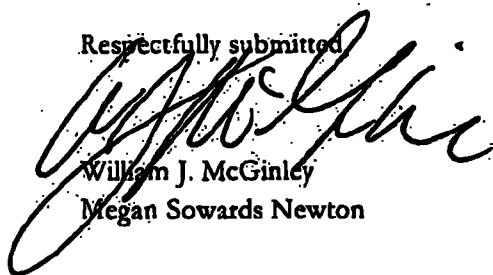
Conclusion

For the reasons succinctly stated by the DC Circuit in *Pursuing America's Greatness v. FEC* and by the Respondents to this complaint, there is no factual or legal basis for the Commission to find

² The DC Circuit's decision in *Protect America's Greatness* serves as binding authority upon the Commission in the D.C. Circuit. *See, e.g., Carey v. FEC*, 864 F.Supp. 2d 57, 63 (D.D.C. 2012) (finding that the FEC's position was not substantially justified and awarding attorney's fees to the challenger because the FEC failed to follow D.C. Circuit precedent which bound the agency because the advisory opinion was sought at the District-based agency).

reason to believe a violation occurred in this matter. Therefore, we respectfully request that the Commission dismiss the complaint, close the file, and take no further action in this matter.

Respectfully submitted



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