



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of)
)
National Republican Congressional) MURs 6781, 6802
Committee)
&)
Frank LoBiondo, *et al.*) MUR 6786

STATEMENT OF REASONS OF CHAIR ELLEN L. WEINTRAUB

People rely on Internet searches to get information about political candidates, and exploiting search engines for the purpose of luring voters to misleading websites is simply dishonest. Yet in the months preceding the 2014 midterm elections, the congressional campaign arm of the Republican Party created over thirty websites masquerading as the pages of Democratic candidates, diverting information-seeking voters to virtual hit jobs.¹ The Office of the General Counsel (“OGC”) recommended in 2014 that the Federal Election Commission find reason to believe that the National Republican Congressional Committee (“NRCC”) violated federal campaign finance law because NRCC used the names of federal candidates in the titles of thirty-five websites without the candidates’ authorizations.² The titles of NRCC’s websites—all of which included the phrase “[Democratic candidate] for Congress”—raised the risk of confusion or abuse in connection with fundraising or disseminating information.³

Nearly five years after OGC’s recommendation, the Commission was finally able to vote on this enforcement action despite years of delays instigated by my Republican colleagues.⁴ At the time of the vote, the U.S. District Court for the District of Columbia was considering whether the Commission’s naming requirements passed constitutional muster; the regulation remained valid at the time.⁵ We have an obligation to enforce duly adopted laws and regulations unless and until the

¹ See First Gen. Counsel’s Report at 4-7, MURs 6781, 6786, 6802 (NRCC, *et al.*) (Oct. 28, 2014) [hereinafter “FGCR”]; see, e.g., ANNKIRKPATRICK.COM, <https://web.archive.org/web/20131231075649/http://annkirkpatrick.com/> (last visited Apr. 22, 2019).

² FGCR at 10-13, MURs 6781, 6786, 6802 (NRCC, *et al.*).

³ *Id.* at 14.

⁴ The Commission voted on this matter on March 19, 2019, with my two Republican colleagues voting against finding reason to believe against NRCC. Certification at 1, MURs 6781, 6786, 6802 (NRCC, *et al.*).

⁵ The court invalidated 11 C.F.R. § 102.14(a) on March 21, 2019, and enjoined the FEC from enforcing the regulation. See *Pursuing Am.’s Greatness v. FEC*, 363 F. Supp. 3d 94, 2019 WL 1296949 at *8 (D.D.C. 2019) [hereinafter “PAG Litigation”].

courts instruct us otherwise.⁶ Now, the Commission cannot currently enforce parts of committee-naming requirements. While the Commission determines whether to appeal the court's decision, it bears emphasizing here why these naming requirements are important.

The Federal Election Campaign Act of 1971, as amended (the "Act"), contains a bright-line, content-neutral requirement when it comes to naming political committees that are not authorized by a candidate to receive or spend money on his or her behalf: such unauthorized committees may not include in their names the name of any candidate.⁷ Congress intended that "the average contributor or voter be able to determine, by reading the committee's name, on whose behalf the committee is operating."⁸ This statutory naming requirement applies to committee names only.

The Commission's regulations extend this requirement to the titles of solicitations or special projects, including websites.⁹ The logic behind the extension is simple. If the name of an unauthorized committee cannot include a candidate's name, then the unauthorized committee should not be allowed to use the candidate's name on the title of a special project or website.¹⁰ The Commission has stated that the purpose of this naming requirement is to "minimiz[e] the possibility of fraud and abuse" that may occur when an unauthorized committee raises funds on behalf of itself rather than the named candidate.¹¹ Without this regulation, a political campaign could ostensibly publish a website in its opponent's name.

The Commission carved out an exception to the naming requirement, however, that allows unauthorized committees to use a candidate's name "in the title of a special project name or other communication if the title clearly and unambiguously shows opposition to the named candidate."¹² This exception to the naming restriction exists because there is a "significantly reduced" risk of a committee fraudulently misleading donors where the project title clearly and unambiguously opposes the named candidate.¹³ Aside from the title, the content of the communication was immaterial—the restriction applies specifically to the title of a special project and not the body of

⁶ I anticipate that my Republican colleagues may shed crocodile tears over my invoking a regulation that has been called into question by a federal district court. That would be odd criticism from a duo that does not consider itself bound by judicial decisions. *See, e.g.*, Statement of Vice Chair Ellen L. Weintraub Regarding *Crew v. FEC & Am. Action Network* (Apr. 19, 2018), <https://www.fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf>. The *PAG Litigation* is the latest development regarding the naming requirement, a disclosure issue that has been litigated since the 1980s. *See Common Cause v. FEC*, 842 F.2d 436 (D.C. Cir. 1988).

⁷ 52 U.S.C. § 30102(e)(4).

⁸ H.R. Rep. No. 95-982, at 11-12, 46 (1978).

⁹ 11 C.F.R. § 102.14(a).

¹⁰ *See* Explanation and Justification for Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 57 Fed. Reg. 31,424, 31,424 (July 15, 1992) [hereinafter "1992 E&J"]; Advisory Op. 1995-09 at 6 (NewtWatch) (Apr. 21, 1995) (establishing that "a website operated by an unauthorized committee can be considered a committee special project that is subject to the naming requirements in 11 C.F.R. § 102.14(b)(3)").

¹¹ 1992 E&J at 31,425.

¹² 11 C.F.R. § 102.14(b)(3).

¹³ Explanation and Justification for Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 59 Fed. Reg. 17267, 17269 (Apr. 12, 1994).

the accompanying communication.¹⁴ At its core, the regulations serve the Act’s disclosure framework, giving effect to unauthorized committees’ requirements to disclose that its communications are “not authorized by any candidate or candidate’s committee.”¹⁵

Did the thirty-five websites use candidate names in their titles? Yes, in two ways. First, the websites’ source codes included candidate names in their HTML title element.¹⁶ In other words, the websites were programmed to display candidate names in the “title bar” of a viewer’s Internet browser and to affect the results of Internet searches. The impact of the websites’ titles on Internet searches deserves special attention. Internet search engines like Google use the HTML title element to determine whether a website should be displayed in response to a user’s search.¹⁷ The contents of a simple title like “Ann Kirkpatrick for Congress” will usually appear in a link to the website if included in the search results.¹⁸ When NRCC programmed these websites, they exploited search engine optimization techniques to sneak deceptive websites into the search results of information-seeking voters googling the names of Democratic candidates. It’s a dirty trick one should expect from Internet trolls and hackers, but not from a national party organization.

Second, the websites displayed titles in their content. The websites showed candidate names in larger text, using distinctive font—a title by any commonsense definition.¹⁹ But only a picture can do these facts justice:²⁰



¹⁴ *Id.* at 17,268-69.

¹⁵ 52. U.S.C. § 30120(a)(3).

¹⁶ FGCR at 4-6, MURs 6781, 6786, 6802 (NRCC, *et al.*).

¹⁷ GOOGLE.COM, *Create Good Titles and Snippets in Search Results*, <https://support.google.com/webmasters/answer/35624> (last visited Apr. 22, 2019).

¹⁸ *Id.*; *Search Engine Optimization Starter Guide* at 4, GOOGLE, <http://static.googleusercontent.com/media/www.google.com/en/us/webmasters/docs/search-engine-optimization-starter-guide.pdf> (last visited Apr. 22, 2019).

¹⁹ *Search Engine Optimization Starter Guide* at 7.

²⁰ The full-size website is available [here](http://www.annkirkpatrick.com). ANNKIRKPATRICK.COM, *supra* note 1. The complaints in these matters contain other examples of these “attack microsites.” *See, e.g.*, Compl., Ex. 1, MUR 6802.

NRCC incorrectly argues that because the websites contain opposition language, they qualify for an exemption under 11 C.F.R. § 102.14(b)(3).²¹ The exception to the naming restriction applies “if the title clearly and unambiguously shows opposition to the named candidate.”²² To have it otherwise would mire the Commission in the cumbersome task of parsing every bit of content in every website to ascertain whether a committee’s political speech conveyed enough opposition to dispel the confusion caused by the misleading title. More alarmingly, such a standard would likely result in political committees attempting to get away with misleading the public by including a bare minimum of opposition language. Adding some words of opposition and the usual disclaimers is not enough for the exception to apply here.

The next question is whether NRCC’s websites were fraudulent misrepresentations in violation of 52 U.S.C. § 30124(b). The statute prohibits anyone from “fraudulently misrepresent[ing]” that they are acting on behalf of any candidate for the purpose of soliciting contributions or donations.²³ This question turns on whether, “[e]ven absent an express misrepresentation,” NRCC’s websites were “reasonably calculated to deceive persons of ordinary prudence and comprehension.”²⁴ These websites were reasonably calculated to deceive ordinary people. A disclaimer alone may not suffice to overcome otherwise deceptive solicitations. Moreover, not all disclaimers were “immediately adjacent to the donation link.”²⁵ Look at a clip from the donation page bearing the face and name of Democratic candidate Alex Sink:²⁶



²¹ NRCC Resp. at 8-9, MUR 6781; NRCC Resp. at 4, MUR 6786; NRCC Resp. at 18, MUR 6802.

²² 11 C.F.R. § 102.14(b)(3) (emphasis added).

²³ 52 U.S.C. § 30124(b)(1).

²⁴ See *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010) (analyzing MUR 5472 (Republican Victory Committee, Inc.), a matter about fraudulent misrepresentations).

²⁵ FGCR at 19, MURs 6781, 6786, 6802 (NRCC, et al.).

²⁶ This clip is a portion of a graphic provided by the NRCC. NRCC Resp., App. A, MUR 6781.

The text immediately below the “contribute” button does not identify NRCC as the entity soliciting this contribution. The disclaimers with NRCC’s name are not necessarily visible at the foot of the websites, especially on mobile devices with limited screen sizes. In fact, one person gave a \$250 contribution to the NRCC instead of Alex Sink after a Google search for the Democratic candidate directed him to one of these Republican websites.²⁷ That one of these websites did fool “a doctor from Tallahassee who follows Florida politics” is evidence that they could fool a person of ordinary prudence and comprehension.²⁸

The *titles* of NRCC’s websites clearly did not include words of opposition. To the contrary, the websites used language that commonly conveys support for a candidate—Kirkpatrick for Congress, for example. And what is the point of entitling an opposition website with words of support written in big, bold letters? Or programming these titles into the websites? The natural conclusion is that the websites were designed to confuse or mislead voters and divert Internet traffic away from the websites of Democratic candidates. We know that at least one person mistakenly contributed to the NRCC, but without an investigation we will never learn how many others may have been similarly duped. The Republican Commissioners’ delay and denial of enforcement in this case is sadly typical. The American public deserves not only freedom from political operatives manipulating their Internet searches, but better government.

April 26, 2019

Date



Ellen L. Weintraub
Ellen L. Weintraub
Chair

²⁷ Compl., App. B at 1, MUR 6781.

²⁸ *Id.*