FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 7140
Americans for Sensible Solutions PAC and David Garrett	)	

STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND COMMISSIONER JAMES E. "TREY" TRAINOR, III

This matter involves allegations that an independent expenditure-only political committee, Americans for Sensible Solutions PAC (the "Committee"), solicited contributions by fraudulently misrepresenting that it was acting as an agent of congressional candidate Bill Huizenga and his authorized committee, Huizenga for Congress ("Huizenga"), in violation of the Federal Election Campaign Act (the "Act"). In 2018, the Commission found reason to believe that the Committee violated 52 U.S.C. §§ 30124(b)(1) and 30104(a) and (b) by fraudulently misrepresenting that it was acting for or on behalf of Huizenga when soliciting contributions through online media, and by failing to report its receipts, disbursements, and cash-on-hand balance. After completing an investigation into the facts and circumstances in this matter, the Office of General Counsel ("OGC") recommended that the Commission find reason to believe that the Committee's treasurer, David Garrett, violated the fraudulent misrepresentation provision of the Act in his personal capacity; and that we enter into pre-probable cause conciliation with both the Committee and Mr. Garrett [redacted]. The Commission failed to approve OGC's recommendations, dismissed the matter pursuant to *Heckler v. Chaney*,[1] and closed the file.

Mr. Garrett's and the Committee's actions in this matter could be described as many things. Certainly, a failure to file the reports required by the Act. Apparently, the fraudulent conversion of donor funds. And, to be sure, a pun of questionable taste, given the acronym formed by the Committee's full name. But it cannot be described as a violation of 52 U.S.C. § 30124(b), let alone a personal capacity violation by a *pro se* respondent facing a [redacted] civil penalty. As a result, we voted against OGC's recommendations to find reason to believe Mr. Garrett personally violated the fraudulent misrepresentation provision of the Act and to proceed with pre-probable cause conciliation.

[1] 470 U.S. 821 (1985).

I. Background

In an interview with OGC, Mr. Garrett said that he decided to organize the Committee as a "joke" after he read a 2015 news article about a fifteen-year-old who registered a political committee with a funny name, which gained enough attention to merit a mention on the satirical news program *The Daily Show*.[2] As it happens, life doesn't always imitate art—often it imitates bad television—and so Mr. Garrett registered the Committee with the Commission and set up a Twitter account under the name "TrumpHuizenga2016" which solicited contributions via PayPal and directed visitors to a Zazzle page he established that sold "Huizenga Trump 2016 Unity" merchandise.[3] He also opened Imgur, Facebook, and Pinterest accounts using various iterations of the Huizenga-Trump moniker, as well as other pages and social media accounts that included the "Trump Unity" trope in conjunction with the names of other federal candidates.[4] According to OGC, Mr. Garrett "says that he has never reviewed FEC regulations, nor does he have any type of training in running a political committee."[5]

Mr. Garrett's efforts never resulted in a segment on *The Daily Show*,[6] but between May 2016 and January 2017, the Committee received $432.47 in online payments via PayPal and Zazzle.[7] This figure, which falls below the Commission's registration threshold for political committees,[8] is not in dispute. The Committee filed only one report with the Commission—the 2016 July Quarterly Report—which disclosed no activity or cash-on-hand. The Committee did not use any of the funds it received to make independent expenditures or contributions to political committees. Instead, Mr. Garrett used the funds to pay for web and file hosting services, bank fees, and personal expenses for parking, restaurants, and purchases at a pharmacy and on Apple iTunes.[9]

The PayPal account connected to the Committee's Twitter page was established under the name "Americans for Sensible Solutions PAC," included language stating that the Committee was "dedicated to promoting legislative loyalty in all US congressional districts in 2016[],"[10] and suggested readers contribute $64. (Mr. Garrett told OGC that this figure represents either the year

[2] MUR 7140 (Americans for Sensible Solutions PAC, *et al.*), Factual & Legal Analysis at 4.

[3] *Id.* at 8.

[4] *Id*. at 5.

[5] *Id.*

[6] Although he did apparently draw the attention of a "local news broadcast in New Hampshire." *Id*. at 6.

[7] *Id.* at 3.

[8] Currently, $1,000 in contributions received or expenditures made in the aggregate in a calendar year. 52 US.C. § 30101(4) and 11 C.F.R. § 100.5(a).

[9] MUR 7140 (Americans for Sensible Solutions PAC, *et al.*), Second Gen. Counsel's Report at 4.

[10] MUR 7140 (Americans for Sensible Solutions PAC, *et al.*), Factual & Legal Analysis at 7.

in which he mistakenly thought President Richard Nixon was first elected[11] or the 64th line in the U.S. Constitution—he apparently couldn't remember which.)[12] The Zazzle page included the following disclaimer, which Mr. Garrett said he cut-and-pasted from another non-connected PAC's website:

> "This website is managed by the Americans for Sensible Solutions Political Action Committee along with The Republican Organization for Legislative Loyalty, and is intended to encourage unity between these two tremendous candidates and highlight the overwhelming similarity between their respective agendas and policy positions. By law, the Americans for Sensible Solutions P.A.C. may not collaborate, collude or coordinate with either the campaigns of either Adam Kinzinger or Donald Trump. Please support a unified Republican Party in the November Elections by donating to our Political Action Committee or purchasing Unity items below."[13]

Mr. Garrett also said that he added a disclaimer to all the Committee's social media accounts, which he believed was sufficient to show that the Committee was not affiliated with any particular candidate,[14] but OGC does not provide further details on the wording or appearance of these disclaimers.

II. Analysis

a. Section 30124(b) Does Not Reach the Respondents' Actions

The Act and Commission regulations set forth two separate prohibitions that address fraudulent misrepresentation. The first was enacted by Congress in the wake of the Watergate scandal[15] and forbids a candidate or his or her agents from speaking, writing, or acting on behalf of another candidate or political party for the purpose of "damaging" that other candidate or

[11] While it is difficult to imagine someone who would read an FEC Statement of Reasons and not already know this, Lyndon Johnson was elected President in 1964. Nixon's turn would come four years later and end in 1974 with the Watergate scandals, the passage of the Federal Election Campaign Act, and the creation of this agency. *See, e.g.*, U.S. Senate Historical Office, *Senate Select Committee on Presidential Campaign Activities (The Watergate Committee)*, *available at* https://www.senate.gov/about/resources/pdf/watergate-investigation-citations.pdf .

[12] MUR 7140 (Americans for Sensible Solutions PAC, *et al.*), Factual & Legal Analysis at 4.

[13] *Id.* at 14.

[14] *Id.*

[15] In its Final Report on Watergate, the Senate Select Committee on Presidential Campaign Activities recommended that Congress "make it unlawful for any individual to fraudulently misrepresent ... that he is representing a candidate for Federal office for the purpose of interfering with the election." S. Rep. No. 93-981, at 213. The 1974 amendments to the Act included language to this effect at § 30124(a) (originally codified at 2 U.S.C. § 441h).

party.[16] The second, which is at issue in this matter, was added to the Act as part of Section 309 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and bars persons from misrepresenting themselves as "speaking, writing, or otherwise acting for or on behalf of any candidate or political party" for the purpose of soliciting contributions, and from "willfully and knowingly participat[ing] in or conspir[ing] to participate" in any plan or scheme to engage in such misrepresentation.[17] The elements of a section 30124(b) violation are therefore as follows: (1) misrepresentation, (2) that a person is acting for or on behalf of a candidate or political party, (3) for the purpose of soliciting contributions, (4) with fraudulent intent.

First, it is undisputed that the Committee's activity involved soliciting contributions, and that Garrett misrepresented to donors how the money it received would ultimately be spent. However, OGC's contention that the Committee's "lack of disbursement in support of Huizenga or any other federal candidate further demonstrates the Committee's fraudulent intent"[18] lacks basis in the plain language of the statute or Commission precedent. Section 30124(b) requires the fraudulent misrepresentation of *identity or agency*, not misrepresentation of how the solicited funds will be used.[19] In recent years, nonconnected committees have taken advantage of this fact while the Commission—lacking a legislative mandate—has been unable to address the issue at the agency level.[20] The Committee's failure to spend donor money as promised may well be actionable

[16] 52 U.S.C. § 30124(a) and 11 C.F.R. § 110.16(a).

[17] 52 U.S.C. § 30124(b) and 11 C.F.R. § 110.16(b).

[18] MUR 7140 (Americans for Sensible Solutions PAC, *et al.*), Factual & Legal Analysis at 18.

[19] For example, in 2012, congressional candidate Allen West's campaign filed complaints with the Commission against four registered independent expenditure-only political committees that made solicitations using West's name and photograph without permission, registered domains that included West's name, and spent little to nothing raised on non-fundraising-related efforts. The Commission made it clear that they viewed the committees' activities as dubious at best, but concluded that the record did not support a reasonable basis for a finding that a violation of § 30124(b) had occurred—noting that (1) each of the committees was registered with and reporting its contributions and expenditures to the FEC; and (2) the solicitations and communications at issue had included adequate (if technically deficient) disclaimers. The Commission concluded that this indicated that the Respondents' solicitations were not "reasonably calculated to deceive persons of ordinary prudence and comprehension," and therefore did not constitute fraudulent misrepresentation in violation of § 30124(b). MUR 6633 (Republican Majority Campaign PAC, et al.), Factual & Legal Analysis at 1-2; *see also* MUR 5155 (Friends for a Democratic White House), First Gen. Counsel's Report at 8.

[20] This Statement of Reasons does not discuss specific recommendations for how to address what is effectively a gap in the federal statutory prohibition of fraudulent fundraising, but a legislative or regulatory solution, rather than a cobbled-together patchwork of administrative precedent, is the answer.

under federal or state false advertising and fraud statutes,[21] but the Act does not presently provide a remedy.[22]

Second, based on the evidence available, it does not appear that the Committee's solicitations misrepresented its identity as an agent of a candidate or political party. Although the Act and regulations require that all solicitations and public communications (including publicly-available websites) made by a federal political committee that are not paid for or authorized by a candidate contain a "clear and conspicuous" disclaimer that includes the name and address (or telephone number or website) of the person responsible for the communication, as well as a statement that the communication is not authorized by a candidate or their committee,[23] the Commission has previously found that communications containing a technically deficient disclaimer cannot constitute fraudulent misrepresentation if the speaker's identity is clear.[24] As discussed previously, the Committee's Twitter and Zazzle pages included the name of the Committee, and the Zazzle page included a statement that the Committee could not "collaborate, collude or coordinate" with any candidate's campaign. There is no evidence that the Committee's solicitations actually misled potential donors with respect to the identity of the solicitor—rather, OGC argued that "[t]he Committee's full name, not the acronym that Garrett thought was "funny," is used on its communications"[25] and provides a screenshot of the respondent's PayPal donation page, which states that the contribution would be directed to "Americans for Sensible Solutions PAC." Moreover, the Committee's Twitter account had a disclaimer with "[t]he word

[21] In 2012, Virginia gubernatorial candidate Ken Cuccinelli filed suit in federal court against a federal multicandidate committee and the individuals responsible for the committee, alleging violations of the federal Lanham Act and state law claims of false advertising, breach of contract, and unauthorized use of Mr. Cuccinelli's name and picture. The parties settled and the defendants agreed to pay Cuccinelli $85,000, turn over their solicitation lists, and adopt "best practices" in future campaigns (including honoring a request from a candidate to stop using the candidate's name or picture and maintaining contact information on their website). Katie Bukrinsky and M. Miller Baker, *False advertising law as a weapon against scam PACs*, THE HILL (Nov. 11, 2015), https://thehill.com/blogs/congress-blog/campaign/259164-false-advertising-law-as-a-weapon-against-scam-pacs.

[22] The Commission has repeatedly asked Congress to provide such authority. It has declined to do so. Fed. Election Comm'n, *Legislative Recommendations of the Federal Election Commission 2016* at 7 (Dec. 1, 2016) *available at* https://www.fec.gov/resources/cms-content/documents/legrec2016.pdf; Fed. Election Comm'n, *Legislative Recommendations of the Federal Election Commission 2017* at 7 (Dec. 14, 2017), *available at* https://www.fec.gov/resources/cms-content/documents/legrec2017.pdf; Fed. Election Comm'n, *Legislative Recommendations of the Federal Election Commission 2018* at 5 (Dec. 13, 2018), *available at* https://www.fec.gov/resources/cms-content/documents/legrec2018.pdf.

[23] 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11.

[24] *See, e.g.*, MUR 7004 (The 2016 Committee, et al.), Factual & Legal Analysis at 7 (email disclaimer contained "sufficient information for recipients to understand that the Committee paid for the emails and was not authorized by any candidate or candidate's committee"); *see also* MUR 6633 (Republican Majority Campaign PAC, *et al.*), Factual & Legal Analysis at 11 (disclaimer contained "sufficient information for the recipients to identify Republican Majority as the sender or webhost and payor").

[25] MUR 7140 (Americans for Sensible Solutions PAC, *et al.*), Factual & Legal Analysis at 19.

'unofficial'… in the account heading,"[26] and its Facebook pages similarly were titled "Unofficial: [Candidate Name] 2016 Unity Campaign."[27]

The fact that the Committee did not obtain authorization to use a candidate's name and likeness in its solicitations is also not dispositive. As written, the Act prohibits an unauthorized (*e.g.*, independent expenditure-only) political committee from using the name of any candidate in the committee's name.[28] The regulations extend this prohibition to include "any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation"[29]—however, this regulatory prohibition was permanently enjoined on First Amendment grounds in *Pursuing America's Greatness v. FEC*.[30] By focusing on whether a candidate authorized the use of their name in an online solicitation, the Factual & Legal Analysis effectively seeks to revive these provisions through the back door, by incorporating the requirements the court in *Pursuing America's Greatness* found unconstitutional into the test for fraudulent misrepresentation. As a matter of logic and statutory interpretation, this cannot be correct. The Commission cannot do under one regulation what it is constitutionally prohibited from doing under another. And an interpretation that the mere use of candidate's name without the candidate's authorization constitutes fraudulent misrepresentation would make section 30102(e)(4) surplusage, which is generally to be avoided.[31]

The final inquiry in determining whether "fraudulent misrepresentation" has occurred is whether a respondent had the requisite intent. Mr. Garrett's initial registration of the Committee with the Commission, and the fact that he sought to include disclaimers noting the Committee's name and lack of affiliation on its solicitations, do not evince such intent.[32]

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[26] *Id.* at 5. Garrett apparently set up duplicate pages for at least 33 candidates.

[27] *Id.* at 12.

[28] 52 U.S.C. § 30102(e)(4).

[29] 11 C.F.R. 102.14(a).

[30] 363 F. Supp. 3d 94 (D.D.C. 2019).

[31] *See generally* Antonin Scalia and Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

[32] *See* Policy Statement of Commissioner Lee E. Goodman on the Fraudulent Misrepresentation Doctrine (Feb. 16, 2018), *available at* https://www.fec.gov/resources/cms-content/documents/Commissioner_Lee_E._Goodman_Policy_Statement_-_Fraudulent_Misrepresentation.pdf ("The Commission has even concluded that disclaimers with technical deficiencies nonetheless controvert allegations of misrepresentation so long as they accurately identify of [*sic*] the solicitor. By contrast, a disclaimer that misrepresents the identity of the actual sponsor as the candidate is almost always a misrepresentation under the Act." (footnotes omitted)).

b. The Respondents' Actions May Qualify as Protected Speech

The acronym for Americans for Sensible Solutions PAC is, of course, "ASS PAC," and the acronym for "The Republican Organization for Legislative Loyalty,"[33] as Mr. Garrett seems to have informed OGC, spells "TROLL."[34] Mr. Garrett's apparent motivation for creating the Committee seems to have been rooted in an attempt to call attention to the spread of misinformation on social media and what he views as the problems with federal election laws via a satirical political committee.[35] With this in mind, finding a violation of section 30124(b) of the Act under these facts risks infringement of Mr. Garrett's First Amendment right to comment on issues of public concern.

It is true that certain provisions of the Act come at a potential cost to free expression. Much like advertising laws that forbid using misleading information to market a product to consumers,[36] section 30124(b) restricts certain speech to promote the government's interest in protecting the public from persons who fundraise by impersonating candidates and political party committees. However, Congress did not intend for the Act to impinge on the First Amendment rights of critics, commentators, and satirists. Federal courts have taken care to avoid interpretations of any law that court grave constitutional concerns,[37] and the Commission should take heed and do the same. Applying the canon of constitutional avoidance is not an evasion of our responsibilities under the Act; rather, it is a way to reconcile the informational and disclosure purposes set forth by the Act with the democratic value of freedom of expression. Ultimately, the Commission has an obligation to avoid an interpretation of the Act that could impinge on these essential rights.

Indeed, this is the tension at the heart of this matter. Mr. Garrett's speech may be protected, but his allegedly fraudulent conversion of funds is not. That step—his decision to pocket money given for a different purpose—is the crime here. In its zeal to punish that wrongdoing, OGC has tripped into a familiar problem. Because the FEC's authority is limited to regulating Constitutionally-protected speech and association, OGC's suggested remedy targets Mr. Garrett's speech. As already explained, that effort would be ultra vires. But it also would create a potential First Amendment violation that OGC does not appear to have even considered.

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[33] *See supra* note 13 and accompanying text.

[34] Special Counsel Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, Vol. I at 18, n. 28 (Mar. 2019) ("The term 'troll' refers to internet users … who post inflammatory or otherwise disruptive content on social media or other websites").

[35] MUR 7140 (Americans for Sensible Solutions PAC, *et al.*), Factual & Legal Analysis at 4-5.

[36] For example, section 43 of the Lanham Act. 15 U.S.C. § 1125 *et seq.*

[37] *See, e.g.*, *U.S. ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988); *Jones v. U.S.*, 529 U.S. 848, 857 (2000).

III. Conclusion

52 U.S.C. § 30124(b) provides the Commission with a narrow and discrete grant of authority. To be sure, the Committee may well have engaged in fraudulent activity with respect to how it ultimately used the contributions it received. But the Commission would not be charging Mr. Garrett and the Committee with conversion or general fraud under federal or state law. We would instead be claiming that he held himself out as an agent of a candidate's political committee.

We believe that claim fails on the facts. Mr. Garrett's registration of the Committee with the Commission, the fact that he listed himself as the Committee's treasurer, and his attempts to include a disclaimer on the materials in question do not seem to be the actions of a man trying to impersonate a candidate or party committee. Nor are Mr. Garrett's use of candidates' names and likenesses on social media pages and solicitations themselves indicia of fraudulent misrepresentation. Such a claim would pose a danger, and invite litigation, as a matter of legal interpretation. Satire and parody, which Mr. Garrett appeared to be ineptly attempting, are fully protected speech.[38] A joke does not have to be funny to receive constitutional protections, and the Commission should avoid interpretations of the Act that would implicate serious constitutional concerns.

For these reasons, we fully agreed with our colleagues' decision to exercise prosecutorial discretion in this matter. But we are also unable to support the merits of OGC's recommendations to proceed against Mr. Garrett in his personal capacity or to authorize pre-probable cause conciliation against the respondents in this matter.

Allen Dickerson
Vice Chair

April 5, 2021
Date

James E. "Trey" Trainor, III
Commissioner

April 5, 2021
Date

[38] *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). Even efforts to prohibit lying have been subjected to strict scrutiny. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709 (2012).