FEDERAL ELECTION COMMISSION
Washington, DC 20463

In the Matter of	)	
	)	
NRCC, *et al.*	)	MURs 6781, 6786, & 6802
	)	

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONER CAROLINE C. HUNTER

The Federal Election Campaign Act of 1971, as amended (the "Act"), prohibits an unauthorized committee — that is, a committee other than a candidate committee — from including the name of a candidate in its own name.[1] The Commission has interpreted that prohibition to extend to an unauthorized committee's "special projects," such as communications, solicitations, and websites, unless the "title [of the special project] clearly and unambiguously shows opposition to the named candidate."[2]

The complaints in these matters allege that the National Republican Congressional Committee ("NRCC"), an unauthorized committee, violated these naming rules when the NRCC created a series of websites that "included candidate names without showing opposition to those candidates in the web addresses, page titles, and banner titles."[3] The Commission's Office of General Counsel ("OGC") generally agreed with the complaints and recommended that we find reason to believe that the NRCC violated the naming rules for unauthorized committees.[4]

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1 *See* 52 U.S.C. § 30102(e)(4).

2 11 C.F.R. § 102.14(a), (b)(3); Advisory Opinion 2015-04 at 3-4 (Collective Actions PAC) (applying section 102.14 to a super PAC's website and social media accounts in support of a federal candidate).

3 MURs 6781/6786/6802 (NRCC), First Gen. Counsel's Rpt. at 2 ("FGCR"). One complaint further alleged that (1) Frank LoBiondo and LoBiondo for Congress was also responsible for the websites referencing candidate Bill Hughes, and that (2) the websites violated the ban on fraudulent misrepresentation of campaign authority at 52 U.S.C. § 30124. OGC recommended against pursuing these allegations because the record did not suggest that LoBiondo or LoBiondo for Congress were involved with the websites, *see* FGCR at 3, n.2, and the solicitations were "made expressly on behalf of the NRCC, not Hughes." FGCR at 18. We agreed.

4 Drawing on how the HTML coding language operates, OGC rejected the NRCC's argument that the websites did not have titles. FGCR at 10-12 ("Although the title is embedded in the website's HTML code, it is readily visible to all visitors to the website, whether on the top of the browser window or in the browser's tab, and is the name of the website that viewers click if they searched for the site, rather than navigating directly to the website's URL."). In an advisory opinion issued after OGC circulated its recommendation, the Commission determined that section 102.14 applied to a super PAC's websites and social media accounts. *See* Advisory Opinion 2015-04 (Collective Actions PAC).

After OGC circulated its recommendations (but before the Commission considered the matter in executive session), an otherwise unrelated super PAC challenged these same naming rules in federal court.[5] The super PAC, Pursuing America's Greatness, supported then-candidate Mike Huckabee and wanted to use his name in a website URL (www.ilikemikehuckabee.com) and social media pages (*e.g.*, a Facebook page titled "I Like Mike Huckabee").[6] The super PAC brought claims under the Administrative Procedure Act and the First Amendment, and sought to enjoin the Commission from enforcing the naming rules as applied to its online activities.[7] In the course of that litigation, a panel of the United States Court of Appeals for the District of Columbia Circuit unanimously held that "there is a substantial likelihood that, as applied to PAG, the FEC's naming restrictions in section 102.14(a) violate the First Amendment."[8] Critical to that result was the determination that the regulation is "content-based discrimination pure and simple" and subject to strict scrutiny.[9] Subsequently, the Commission was preliminarily enjoined from enforcing section 102.14(a) against the super PAC's websites and social media pages.

Thus, in light of the injunction issued in the *Pursuing America's Greatness* litigation, it would have been imprudent to pursue enforcement of a regulation that the D.C. Circuit held was substantially likely to be constitutionally flawed.[10] We further noted the breadth of circuit court's language: Section 102.14 "[o]n its face . . . 'draws distinctions' based solely on what PAG says."[11] Accordingly, we withheld enforcement action on these complaints during the pendency of the *Pursuing America's Greatness* litigation because we saw no material factual distinctions between these matters and the underlying facts in *Pursuing America's Greatness*, as

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5 *See* Plaintiff's Verified Complaint for Declaratory and Injunctive Relief, *Pursuing America's Greatness v. FEC*, 363 F. Supp. 3d 94 (D.D.C. 2019) (No. 15-1217).

6 *Id.*

7 *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 503-04 (D.C. Cir. 2016).

8 *Id.* at 504.

9 *Id.* at 509. The Court of Appeals found that the regulation was substantially likely to fail strict scrutiny at least as applied to Pursuing America's Greatness "[b]ecause the FEC has not shown that its speech ban is the least restrictive means of achieving the government's interest." *Id.* at 511.

10 Our colleague maintains that "we have an obligation to enforce duly adopted laws and regulations unless and until the courts instruct us otherwise." *See* MURs 6781, 6786, & 6802 (NRCC, *et al.*), Statement of Reasons of Chair Ellen L. Weintraub. But doing so here in the face of the *Pursuing America's Greatness* injunction would contravene the directive that the Commission must enforce the Act in a manner harmonious with the values that the First Amendment is meant to protect, *see, e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007); *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016), and result in uneven and unfair application of the Act and Commission regulations between similarly situated parties.

11 *Pursuing America's Greatness*, 831 F.3d at 509.

each pertained to an unauthorized committee's use of a candidate's name in a website title without expressing clear opposition.

We therefore waited for the federal district court's decision on remand, because it would directly bear upon the Commission's decisions in these matters. Some Commissioners were not so inclined, preferring to prosecute these matters in the face of an injunction from enforcing the same regulation in a case indistinguishable from the allegations here. We instead voted against finding reason to believe that the NRCC's websites violated the Act.

Two days after that vote the district court held section 102.14(a) violated the First Amendment and permanently enjoined the Commission from enforcing it.[12]

Matthew S. Petersen
Vice Chairman

5/22/19
Date

Caroline C. Hunter
Commissioner

5/22/19
Date

[12] *Pursuing America's Greatness v. FEC*, No. 15-cv-01217, 2019 WL 1296949, at *1 (D.D.C. March 21, 2019).