

BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of)
The National Republican Congressional Committee) MUR 6802
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 a known partisan organization whose purpose is to support Democratic candidates, the Complaint alleged that NRCC's websites attacking 19 Democratic candidates 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

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

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 websites were in clear opposition to the named candidates, 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 websites they published were replete with opposition research and criticism of the candidates' records. Moreover, they carried the NRCC's disclaimer, as required by law. As such, there could be no confusion among viewers as to the sponsor of the sites or their message. We refer the Commission to the Response filed on May 20, 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

²The 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).

