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July 13, 2023

Federal Election Commission
Lisa J. Stevenson, Office of General Counsel
1050 First Street, NE
Washington, D.C. 20463

Submitted via email and USPS

Second Submission: Petition for Rulemaking to Clarify that the Law Against “Fraudulent Misrepresentation” (52 U.S.C. §30124) Applies to Deceptive AI Campaign Communications

Dear Ms. Stevenson:

Public Citizen respectfully submits this second petition for rulemaking pursuant to 11 C.F.R. §200.1 *et seq.* on the subject of “fraudulent misrepresentation” regarding deliberately misleading campaign communications generated through the use of artificial intelligence (AI). This petition requests the Federal Election Commission conduct a rulemaking to clarify the meaning of “fraudulent misrepresentation” at 11 C.F.R. §110.16.

The first petition by Public Citizen on this matter was debated by the Commission on June 22, 2023. The Commission declined to issue a Notice of Availability (NOA) on a 3-3 vote, depriving the public of any opportunity to comment on the proposal and halting consideration of the petition. It is highly irregular for the Commission to decline to issue an NOA.

Commissioners posited two key reasons for voting to reject the petition. The first concern expressed doubt whether the Commission has the statutory authority to regulate deliberately deceptive AI-produced content in campaign ads and other communications under the federal law against “fraudulent misrepresentation” (52 U.S.C. §30124). The second concern was that the petition failed to cite the specific regulation it wished to amend.

These issues are addressed in this second submission of a petition for rulemaking to clarify that the law against “fraudulent misrepresentation” (52 U.S.C. §30124) applies to deliberately deceptive AI-produced content in campaign communications.

BACKGROUND

Extraordinary advances in artificial intelligence now provide political operatives with the means to produce campaign ads and other communications with computer-generated fake images, audio or video of candidates that appear real-life, fraudulently misrepresenting that what candidates say

or do. Generative artificial intelligence and deepfake technology – a type of artificial intelligence used to create convincing images, audio and video hoaxes¹ – is evolving very rapidly. Every day, it seems, new and increasingly convincing deepfake audio and video clips are disseminated, including, for example, an audio fake of President Biden,² a video fake of the actor Morgan Freeman³ and an audio fake of the actress Emma Watson reading *Mein Kampf*.⁴

Deceptive deepfakes are already appearing in elections and it is a near certainty that this trend will intensify absent action from the Federal Election Commission and other policymakers:

- In Chicago, a mayoral candidate in this year’s city elections complained that AI technology was used to clone his voice in a fake news outlet on Twitter in a way that made him appear to be condoning police brutality.⁵
- As the 2024 presidential election heats up, some campaigns are already testing AI technology to shape their campaign ads. The presidential campaign of Gov. Ron DeSantis, for example, posted deepfake images of former President Donald Trump hugging Dr. Anthony Fauci.⁶

Deepfakes’ quality is impressive and already able to fool listeners and viewers. Generally, however, on careful examination, it is now possible to identify flaws that show them to be fake.

But as the technology continues to improve, it will become increasingly difficult and, perhaps, nearly impossible for an average person to distinguish deepfake videos and audio clips from authentic media. It is an open question how well digital technology experts will be able to distinguish fakes from real media.

The technology will almost certainly create the opportunity for political actors to deploy it to deceive voters in ways that extend well beyond any First Amendment protections for political expression, opinion, or satire. A political actor may well be able to use AI technology to create a video that purports to show an opponent making an offensive statement or accepting a bribe. That video may then be disseminated with the intent and effect of persuading voters that the opponent said or did something they did not say or do. The crucial point is that the video would not purport to characterize how an opponent *might* speak or behave, but to convey deceptively that they actually did so, when they did not.

A blockbuster deepfake video with this kind of fraudulent misrepresentation could be released shortly before an election, go “viral” on social media, and be widely disseminated, with no ability for voters to determine that its claims are fraudulent.

¹ <https://www.techtarget.com/whatis/definition/deepfake>

² <https://twitter.com/zachsilberberg/status/1627438454756835329>

³ <https://www.youtube.com/watch?v=oxXpB9pSETo&t=9s>

⁴ <https://www.thetimes.co.uk/article/ai-4chan-emma-watson-mein-kampf-elevenlabs-9wghsmt9c>

⁵ <https://www.nytimes.com/2023/06/25/technology/ai-elections-disinformation-guardrails.html#:~:text=Gaps%20in%20campaign%20rules%20allow,increasingly%20powerful%20artificial%20intelligence%20technology.>

⁶ <https://www.theverge.com/2023/6/8/23753626/deepfake-political-attack-ad-ron-desantis-donald-trump-anthony-fauci>

REQUEST FOR RULEMAKING

Federal law proscribes candidates for federal office or their employees or agents from fraudulently misrepresenting themselves as speaking or acting for or on behalf of another candidate or political party on a matter damaging to the other candidate or party. [52 U.S.C. §30124] Specifically, that section reads:

§30124. Fraudulent misrepresentation of campaign authority

(a) In general

No person who is a candidate for Federal office or an employee or agent of such a candidate shall-

(1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or

(2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

(b) Fraudulent solicitation of funds

No person shall-

(1) fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or

(2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

A deepfake audio clip or video by a candidate or their agent that purports to show an opponent saying or doing something they did not do would violate this provision of the law. It would constitute a candidate or their agent “fraudulently misrepresent[ing]” themselves “as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof.”

Specifically, by falsely putting words into another candidate’s mouth, or showing the candidate taking action they did not, the deepfake would fraudulently speak or act “for” that candidate in a way deliberately intended to damage him or her. This is precisely what the statute aims to proscribe. The key point is that the deepfake purports to show a candidate speaking or acting in a way they did not. The deepfake misrepresents the identity of the true speaker, which is an opposing candidate or campaign. The deepfaker misrepresents themselves as speaking for the deepfaked candidate. The deepfake is fraudulent because the deepfaked candidate in fact did not say or do what is depicted by the deepfake and because the deepfake aims to deceive the public. And this fraudulent misrepresentation aims to damage the campaign of the deepfaked candidate.

It is important to distinguish how deceptive deepfakes violate the prohibition on fraudulent misrepresentation compared to other practices:

- The prohibition on fraudulent misrepresentation does not apply generally to the use of artificial intelligence in campaign communications, but only to deepfakes or similar communications.
- The prohibition on fraudulent misrepresentation would not apply to cases of parody, where an opposing candidate is shown doing or saying something they did not, but where the purpose and effect is not to deceive voters and, therefore, where there is no fraud.
- The prohibition on fraudulent misrepresentation would not apply in cases where there is a sufficiently prominent disclosure that the image, audio or video was generated by artificial intelligence and portrays fictitious statements and actions; the fact of a sufficiently prominent disclosure would eliminate the element of deception and fraud.

1. The Commission has already recognized its statutory authority to regulate under the law against “fraudulent misrepresentation”

In 2018, former Commissioner Lee Goodman explained how the law against “fraudulent misrepresentation” is part and parcel of the Federal Election Campaign Act (FECA), subject to regulation by the FEC. As Goodman observed:

“The Act and Commission regulations set forth two prohibitions with respect to fraudulent misrepresentation. The first prohibits a candidate or his or her employees or agents from speaking, writing or otherwise acting on behalf of another candidate or political party committee on a matter which is damaging to such other candidate or political party. The second prohibits other 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. The Act further provides that no person shall willfully and knowingly participate in or conspire to participate in any plan or scheme to engage in such behavior.”⁷

Former Commissioner Goodman’s full statement, which is attached as Appendix A, also provides some useful guidance for the current Commission regarding disclosure in developing further guidance in regulating the law against “fraudulent misrepresentation.”

2. 11 C.F.R. §110.16 is the specific regulation implementing the statutory prohibition on “fraudulent misrepresentation” and is the regulatory provision that the Commission should modify

The FEC has implemented the law against “fraudulent misrepresentation” in 11 C.F.R. §110.16, which reads:

§ 110.16 Prohibitions on fraudulent misrepresentations.

- a. In general. No person who is a candidate for Federal office or an employee or agent of such a candidate shall—*
- 1. Fraudulently misrepresent the person or any committee or organization under the person's control as speaking or writing or otherwise acting for or on behalf of any*

⁷ The full statement by Commissioner Lee Goodman is attached as Appendix A, “Policy Statement of Commissioner Lee E. Goodman.”

other candidate or political party or employee or agent thereof in a matter which is damaging to such other candidate or political party or employee or agent thereof; or

2. *Willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (a)(1) of this section.*

b. *Fraudulent solicitation of funds.* No person shall—

1. *Fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or*
2. *Willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (b)(1) of this section.*

The Commission expanded this regulation following passage of the Bipartisan Campaign Reform Act of 2002 which added the provision on “fraudulent solicitation of funds” to 52 U.S.C. §30124.

In April 2021, Commissioner Dickerson joined Commissioner James Trainor in a statement of reasons issued in an enforcement case specifically addressing the law against “fraudulent misrepresentation” and its implementing regulation in the matter of Americans for Sensible Solutions PAC and David Garrett (MUR 7140), which is attached as Appendix B, “Statement of Reasons of Vice Chair Allen Dickerson and Commissioner James Trainor.”

In view of the novelty of deepfake technology and the speed with which it is improving, Public Citizen encourages the Commission to specify in guidance as well as in an amendment to 11 C.F.R. §110.16(a) that if candidates or their agents fraudulently misrepresent other candidates or political parties through deliberately false AI-generated content in campaign ads or other communications – absent clear and conspicuous disclosure in the communication itself that the content is generated by artificial intelligence and does not represent real events – then the restrictions and penalties of the law and the Code of Regulations are applicable.

Sincerely,

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POLICY STATEMENT OF COMMISSIONER LEE E. GOODMAN

Section 30124(b) of the Federal Election Campaign Act of 1971, as amended (the "Act"), and 11 C.F.R. § 110.16, prohibit any person from fraudulently misrepresenting that the person is acting for, or on behalf of, a federal candidate or political party under certain circumstances. The Commission's historical approach to this prohibition has been long on ambiguity and short on discipline. Likewise, the Commission has not acknowledged the level of First Amendment sensitivity appropriate for the core right of political solicitation. Commercial fraud regulations are not appropriate templates for regulation of political solicitations. Yet, Commission precedents have relied upon case law involving the federal mail fraud statute-which does not contain the word "misrepresentation"- for guidance on interpreting the Act.

I believe a clearer, more disciplined legal test is needed to implement this speech prohibition. This statement of policy sets forth what I believe should be the proper analytical framework, based on the text of the Act, its legislative history, federal court cases, and Commission enforcement action in prior MURs, for determining when fraudulent misrepresentation occurs.

The Fraudulent Misrepresentation Doctrine

The Act and Commission regulations set forth two prohibitions with respect to fraudulent misrepresentation. The first prohibits *a candidate* or his or her employees or agents from speaking, writing or otherwise acting on behalf of *another candidate* or political party committee on a matter which is damaging to such other candidate or political party.¹ The second prohibits *other 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.² The Act further provides that no person shall willfully and knowingly participate in or conspire to participate in any plan or scheme to engage in such behavior.³ The prohibition against other persons misrepresenting candidates to solicit contributions is at issue in this matter.

Of course, because an individual's or group's solicitation of contributions constitutes core First Amendment protected activity, the Commission must implement the Act's prohibition

52 U.S.C. § 30124(a); 11 C.F.R. § 110.16(a)(1).

² 52 U.S.C. § 30124(b); 11 C.F.R. § 110.16(b).

52 U.S.C. § 30124 (a)(2), (b)(2); *see also* 11 C.F.R. § 110.16 (a)(2), (b)(2).

against "fraudulent misrepresentation" with clarity and precision.⁴ The Commission cannot prohibit solicitations under a vague or overbroad concept of the language that constitutes a "fraudulent misrepresentation."⁵ Nor can the definition of "misrepresentation" turn on the subjective perceptions of listeners.⁶ The public must have objective standards delineating what constitutes a prohibited "misrepresentation" under the Act in order to avoid chilling political solicitations at the core of the First Amendment protection.

Ambiguous or even confusing solicitations must be judged with First Amendment sensitivity so as not to chill vast realms of legitimate solicitation. Many solicitors feature the names, photographs, and biographies of the candidates they support. They often use red, white and blue logos that may vaguely resemble the red, white and blue logos of other campaigns. If every use of a candidate's photograph and name on a website were deemed to misrepresent the identity of the solicitor, otherwise identified accurately in a disclaimer, then many organizations' websites would be at risk of violating the Act. At some level, citizens must assume responsibility for reading and understanding FEC-compliant disclaimers and, for those donating on websites, performing rudimentary online searches to identify the sponsor of a website. This is one of the purposes of the www.fec.gov website.

With these principles in mind, below I set forth what appear to be the essential elements of the violation known as "Fraudulent Misrepresentation."

⁴ *Van Hollen v. FEC*, 811 F.3d 486,499 (D.C. Cir. 2016) (noting FEC's unique constitutional prerogative "to safeguard the First Amendment when implementing its congressional directives") (citing *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003); see also *Arizona v. Inter. Tribal Council of Ariz., Inc.*, 570 U.S. 1, 18-19 (2013) ("[B]y analogy to the rule of statutory interpretation that avoids questionable constitutionality- validly conferred discretionary executive authority is properly exercised ... to avoid serious constitutional doubt.").

Citizens United v. FEC, 558 U.S. 310, 324 (2010) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney ... before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"); *id.* at 329 ("We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned") (internal quotations omitted); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) ("[L]aws ... must give fair notice of conduct that is forbidden or required ... [T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." (citations omitted)); *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 ("[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.") (internal quotations omitted); *id.* at 41 (requiring "precision ... in an area so closely touching our most precious freedoms.") (internal quotations omitted).

⁶ In *Buckley*, the Supreme Court observed that restrictions placing a speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning ... 'offers no security for free discussion.'" 424 U.S. at 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). The Court again emphasized this principle in *FEC v. Wisconsin Right to Life, Inc.*, holding that "the proper standard for [evaluating political speech] must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." 551 U.S. 449,469 (2007).

A. "Misrepresentation"

I. *Presence of An Adequate Disclaimer*

The Act requires solicitations by federal political committees made through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising to include disclaimers identifying the person responsible for the communication.⁷ For communications that are not authorized by a candidate, the candidate's authorized committee, or an agent of either, the disclaimers must clearly state: (1) the name and permanent street address, telephone number, or website of the committee and (2) that the communication is not authorized by a candidate or candidate's committee.⁸ Disclaimers "must be presented in a clear and conspicuous manner."⁹ Internet websites of political committees that are available to the general public must include disclaimers.¹⁰

Because a disclaimer identifies the person paying for a communication and informs the reader whether or not a communication is authorized by a candidate, no misrepresentation can be presumed when an adequate disclaimer is present.¹¹ The Commission has a long history of finding no misrepresentation where communications contain disclaimers accurately identifying the true sponsor.¹² The Commission has even concluded that disclaimers with technical deficiencies nonetheless controvert allegations of misrepresentation so long as they accurately

52 U.S.C. § 30120(a)(3).

Id.; 11 C.F.R. § 110.11(b)(3).

⁹ 11 C.F.R. § 110.11(c)(1). A disclaimer is not considered "clear and conspicuous" if it is difficult to read or if the placement is easily overlooked. *Id.*; *see also* Communications Disclaimer Requirements, 60 Fed. Reg. 52,069, 52,070-71 (Oct. 5, 1995).

11 C.F.R. § 110(a)(1); *see* U.S.C. § 30120(a).

¹¹ *See* F&LA at 9, MUR 6645 (Conservative Strikeforce, *et al.*) (finding website statements were not made on candidate's behalf despite use of candidate's image and name because disclaimers "give the reader ... adequate notice of the identity of the person or political committee that paid for and, where required, authorized the communication").

¹² *See, e.g.*, F&LA at 9, MUR 6645 (Conservative Strikeforce); F&LA at 3, MUR 3690 (National Republican Congressional Committee) (determining satirical representation by respondent as speaking on behalf of their opponents coupled with disclaimer identifying the speaker was not a prohibited misrepresentation under Section 30124(a)); Certification (Sept. 12, 1986), MUR 2205 (Foglietta) (agreeing with OGC's recommendation in the First General Counsel's Report to find no reason to believe a violation of Section 30124 occurred when advertising material at issue was "clearly printed" as respondent's material, containing the committee's name, address and picture).

identify of the solicitor.¹³ By contrast, a disclaimer that explicitly misrepresents the identity of the actual sponsor as the candidate is almost always a misrepresentation under the Act.¹⁴

2. *Misrepresentation Despite Adequate Disclaimer*

A proper disclaimer clearly and accurately identifies the person responsible for the solicitation. Therefore, it affords a strong presumption against finding misrepresentation. That presumption may nonetheless be defeated where an *explicit* misrepresentation in the text of a solicitation countermands an otherwise accurate disclaimer.¹⁵

Pictures of candidates, biographical information and similar logos, however, are not inherently misleading. Nor are general statements of advocacy or common slogans indicating support for particular candidates. Indeed, such images and statements can be expected on websites of individuals and groups soliciting contributions to support candidates for federal office.

3. *Absence of Adequate Disclaimer*

In the absence of an adequate disclaimer or other sufficiently identifying information, however, the Commission has not required the misrepresentation to be explicit to violate the Act's prohibition. The Commission has, in those cases, considered less explicit misrepresentations sufficient to satisfy the misrepresentation element.¹⁶

4. *False Disclaimer Constitutes Misrepresentation*

A disclaimer that falsely claims the solicitation is paid for and/or authorized by a candidate or political party constitutes *per se* misrepresentation under section 30124(b). For

¹³ See F&LA at 7, MUR 7004 (The 2016 Committee, *et al.*) (dismissing, in part, because deficient 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"); F&LA at 11, MUR 6633 (Republican Majority Campaign PAC, *et al.*) (disclaimers, although technically deficient, "nonetheless contained sufficient information for[] recipients to identify Republican Majority as the sender or webhost and payor"); F&LA at 4-5, MUR 3690 (National Republican Congressional Committee) (concluding that a small, inconspicuous disclaimer that violated the Act's requirements for disclaimers nonetheless accurately identified the true sponsor of a postcard sufficient to avoid violation of section 30124); *id* at n.1 (noting the post cards at issue "display the NRCC post mark and the return address on their face" and that such information "dispel[s] any theory of fraudulent misrepresentation ... because they notify the readers of the true identity of the senders").

¹⁴ See F&LA at 5, MUR 5443 (www.johnfkeny-2004.com); F&LA at 3, MUR 5505 (<http://testhost.yahooogoogle.biz>); F&LA at 4, MUR 5495 (www.johnkerry-edwards.org).

¹⁵ See Statement of Reasons of Commissioners Weintraub, McDonald, Thomas and Toner at 1-2, MUR 5089 (Matta Tuchman for Congress) (fictitious letterhead, return address, and letter purporting to speak for the Orange County Democrats countermanded a small disclaimer inconspicuously placed on the flap of an envelope in small letters).

¹⁶ See F&LA at 10, MUR 5951 (Californians for Change) (finding that, in the absence of appropriate disclaimers, a series of implicit misrepresentations "when taken together ... likely led reasonable people to believe [respondent] was acting on behalf of Sen. Obama").

example, in a series of matters involving a website that mimicked presidential candidate John Kerry's official website, the Commission found that the use of the disclaimer "Paid for and authorized by John Kerry for President, Inc. 2004" on the website and in solicitation emails patently misrepresented the identity of the website's sponsor in violation of section 30124(b).¹⁷

B. "For Or On Behalf Of"

Section 30124(b) prohibits misrepresentations about one subject: the identity of the solicitor. The solicitor cannot misrepresent himself "as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof."¹⁸ The focus of the fraudulent misrepresentation inquiry must be the representation of *identity* of the person soliciting the funds, not the use to which the funds are put.

This prohibition was enacted as Section 309 of the Bipartisan Campaign Reform Act of 2002.¹⁹ The amendment's sponsor, Senator Bill Nelson, stated that the provision "makes it illegal to fraudulently misrepresent any candidate or political party employee or party employee in soliciting contributions" in response to complaints that people had "fraudulently raised donations by posing as political committees or candidates."²⁰

The Commission has enforced section 30124(b) consistent with its legislative focus on posing as a candidate.²¹ For example, in MUR 6641 (CAPE PAC), the Commission found that the third-person statement "Help CAPE PAC re-election Allen West to Congress" did not pretend to be Allen West.²² Therefore, the Commission found no violation of the Act.

Thus, the subject of a misrepresentation prohibited under section 30124(b)(1) must be the identity of the solicitor as the candidate or agent of the candidate or political party and the proper focus of the Commission's misrepresentation inquiry must be the misrepresentation of *identity* of the person soliciting the funds, not the use to which the funds are put.²³

¹⁷ See F&LA at 5, MUR 5543 (www.johntkerry-2004.com) (determining there is a "prima facie case for reason to believe" when unauthorized website claimed it was "[p]aid for and authorized by John Kerry for President, Inc." and copies multiple pages from the campaign's legitimate website); see also F&LA at 4, MUR 5495 (www.johnkerry-edwards.org) (finding reason to believe where email stated it was "[p]aid for by John Kerry for President, Inc."); F&LA at 3, MUR 5505 (<http://testhost.yahoogle.biz>) (explicit misrepresentation in email solicitation "[p]aid for by John Kerry for President, Inc." presented "prima facie case for reason to believe").

¹⁸ 52 U.S.C. § 30124(b)(1).

¹⁹ Pub. L. No. 107-155, § 309(b), 116 Stat. 81, 104 (2002).

²⁰ 148 CONG. REC. S3122 (daily ed. March 29, 2001) (statement of Sen. Nelson) (offering amendment to the Bipartisan Campaign Reform Act).

²¹ See generally, Matthew S. Raymer, *Fraudulent Political Fundraising in The Age of Super PACs*, 66 SYRACUSE L. REV. 239, 257-58 (2016).

²² F&LA at 9, MUR 6641 (CAPE PAC).

²³ The Commission has unanimously recommended that Congress consider amending Section 30124 to cover fraudulent misrepresentations regarding the ultimate use to which the solicitor will put the funds. See *Legislative*

C. "For The Purpose of Soliciting Contributions"

The object of a misrepresentation under section 30124(b)(1) targets one purpose of the misrepresentation: soliciting contributions or donations. The solicitor must misrepresent his identity for the purpose of soliciting contributions or donations. Misrepresentations for other purposes are not prohibited by Section 30124(b).²⁴

By the same token, Section 30124(b) does not encompass other transactions that may cause injury or otherwise result in unfairness to contributors.²⁵ In certain instances, a respondent's alleged injury may be more appropriately addressed through other federal or state anti-fraud statutes.²⁶

D. "Fraudulent" Intent

The Act also requires that the misrepresentation of identity be "fraudulent." As the Commission observed in MUR 3690,

A violation of Section [30124] requires *fraudulent* misrepresentation. Key elements of fraud are the maker's intent that the misrepresentation be relied on by the person and in a manner reasonably contemplated, the person's ignorance of the falsity of the representation, and the person's rightful or justified reliance. More significantly, a fraudulent misrepresentation requires intent to deceive.²⁷

Recommendations of the Federal Election Commission 2016 at 7, (Dec. 1, 2016), available at <https://transition.fec.gov/pdf/legrec2016.pdf>.

²⁴ Compare 52 U.S.C. § 30124(a)(1) (prohibiting misrepresentations for the purpose of damaging an opposing candidate or political party in any way).

²⁵ Cf. *Schmuck v. United States*, 489 U.S. 705, 710 (1989) ("The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud.") (internal quotations omitted); *id.* at 723 ("It is mail fraud, not mail and fraud, that incurs liability ... [t]he mailing must be in furtherance of the fraud.") (Scalia, J., dissenting).

²⁶ See, e.g. 18 U.S.C. § 1341 (prohibiting use of mails to further a "scheme or artifice to defraud"); 18 U.S.C. § 1343 (prohibiting use of interstate wire communications to further a "scheme or artifice to defraud"). In *Friends of Phil Gramm v. Americans for Phil Gramm In '84*, the U.S. District Court for the Eastern District of Virginia concluded the pre-BCRA Act does not "categorically preclude a state law cause of action for fraud." 587 F. Supp. 769, 776 (E.D. Va. 1984) (denying injunction where defendant's fundraising efforts were "circular"); see also *Galliano v. U.S. Postal Service*, 836 F.2d 1362, 1371 (D.C. Cir. 1988) (Bader Ginsburg, J.) (citing *Friends of Phil Gramm*, 587 F. Supp. 769).

²⁷ F&LA at 3-4, MUR 3690 (National Republican Congressional Committee) (emphasis in original).

According to one federal court interpreting Section 30124, a misrepresentation can be deemed fraudulent "if it was reasonably calculated to deceive persons of ordinary prudence and comprehension."²⁸

Proving a respondent's subjective intent can be difficult to prove with direct evidence. At the reason to believe stage, the Commission has been willing, on appropriate facts, to make an inference that a respondent acted with the requisite intent to deceive. However, in making the determination, the Commission considers whether some facts that could lead to an inference of fraudulent intent may be negated by other reasonable inferences. In other words, the facts supporting an inference of fraudulent intent must be *more reasonable* than competing reasonable inferences that could be drawn.

Since section 30124(b)'s passage, the Commission has considered certain evidence that can, in proper circumstances, evince the fraudulent nature of a misrepresentation. Such evidence includes (1) whether the respondent was properly registered and reporting to the Commission, if required;²⁹ (2) whether respondent had knowledge that contributors believed they were contributing to a candidate or party;³⁰ (3) the solicitor's acceptance of contributions clearly intended for a candidate or party;³¹ (4) false statements that contributions to the respondent would go directly to the represented candidate or party;³² (5) the presence of a false disclaimer;³³

²⁸ See *FEC v. Novacek*, 739 F. Supp. 2d 957,961 (N.D. Texas Apr. 14, 2010) ("*Novacek*"). The court in *Novacek* and prior Commission legal analyses have defined "fraudulent" by looking to decisions interpreting the federal mail fraud statute, which does not require a misrepresentation of identity. *Id.* (citing *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir. 1954) ("[T]he fact that there is no misrepresentation of a single existing fact makes no difference in the fraudulent nature of the [mail fraud] scheme."); see also F&LA at 8, MUR 6645 (Conservative Strikeforce, *et al.*); F&LA at 9, MUR 6643 (Patriot Super PAC, *et al.*); F&LA at 9, MUR 6641 (CAPE PAC, *et al.*); F&LA at 9, MUR 6633 (Republican Majority Campaign PAC, *et al.*). A *misrepresentation of identity* is the required *actus reus* under 52 U.S.C. § 30124 and that misrepresentation must be made *with fraudulent* intent. By comparison, the *actus reus* targeted by the federal mail fraud statute, 18 U.S.C. § 1341, is any use of the mails, and that use must be fraudulent, regardless whether there is an actual misrepresentation. This distinction is significant to applying Section 30124(b): the statute prohibits specific types of misrepresentations that are fraudulent.

²⁹ F&LA at 10, MUR 6633 (Republican Majority Campaign) ("Weighing against a finding of reason to believe that the Respondent violated [52 U.S.C. § 30124(b)] is the fact that [the Respondent] is registered with the Commission and complies with its reporting requirements").

³⁰ See *Novacek*, 739 F. Supp. 2d at 962 ("Novacek admits that she knew solicitees were confused as to the entities calling, because they would ask for information about the RNC or the Bush-Cheney '04 campaign, or would send checks made out to those entities.").

³¹ F&LA at 5, MUR 5444 (National Democratic Congressional Committee) (solicitor endorsed and deposited a check made payable to a party committee and diverted the funds to his personal use).

³² Compare, e.g., Gen. Counsel's Brief at 8, MUR 5472 (RVC) (recommending probable cause in part on the basis of the statement "Contributions or gifts to the *Republican Party* are not deductible as charitable contributions") (emphasis in original), with F&LA at 10, MUR 6641 (CAPE PAC) (finding no reason to believe statements such as "Help CAPE PAC re-elect Allen West to Congress" indicated fraudulent intent).

³³ See F&LA at 5, MUR 5443 (www.johnkerry-2004.com); F&LA at 3, MUR 5505 (<http://testhost.yahoogoogle.biz>); F&LA at 4, MUR 5495 (www.johnkerry-edwards.org).

and (6) whether the solicitor made other false statements regarding its identity.³⁴ Such evidence is probative of whether a respondent's conduct was reasonably calculated to deceive people into believing they were giving to a candidate or party.

The Commission has found that the inclusion of an adequate disclaimer, absent a countermending explicit misrepresentation of identity, can negate any inference arising from other evidence indicating a respondent maintained the requisite intent to deceive for purposes of a section 30124 violation.³⁵

Significantly, however, not all misrepresentations are fraudulent. In MUR 3690, the Commission found that a flyer sponsored by a national political party committee purporting (falsely) to be written by a candidate informing constituents of his profligate spending ways in Washington, D.C. - although a misrepresentation- was satire and lacked the requisite fraudulent intent to violate Section 30124.³⁶

Conclusion

I believe this policy statement accurately synthesizes prior cases and sets forth a workable and Constitutional framework for approaching this important speech prohibition in the Act. In the future, a rulemaking or policy statement on this subject may be appropriate. In the absence of a clear Commission policy, I have committed my view to paper for reference by the Commission and the public.

February 16, 2018

³⁴ See F&LA at 8, MUR 5385 (Groundswell Voters PAC) (finding "circumstances present a classic case of fraud because respondents claimed to be a PAC, used a false address, and false IRS registration number).

³⁵ F&LA at 10, MUR 6641 (CAPE PAC, *et al.*) ("The Commission has previously held that the presence of an adequate disclaimer identifying the person or entity that paid for and authorized a communication can defeat an inference that a respondent maintained the requisite intent to deceive for purposes of a section [30124] violation.") (*citing* MUR 2205 (Foglietta) and MURs 3690, 3700 (National Republican Congressional Committee)).

³⁶ F&LA at 3-4, MUR 3690 (National Republican Congressional Committee) (applying the "fraudulent misrepresentation" prohibition under 52 U.S.C. § 30124(a)(1)).



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

Americans for Sensible Solutions PAC)
and David Garrett)

) MUR 7140
)
)
)

**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 U.S.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 elected¹¹ 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 scandal¹⁵ 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-scum-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

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.

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.

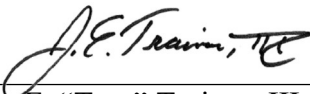
For these reasons, we fully agreed with our colleagues' decision to exercise prosecutorial discretion in this matter. But we are also unable to support the merits of OGC's recommendations to proceed against Mr. Garrett in his personal capacity or to authorize pre-probable cause conciliation against the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