



Office of the Attorney General
Washington, D. C. 20530

September 26, 2016

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Pursuing America's Greatness v. Federal Election Commission*,
--- F. 3d ---, 2016 WL 4087943 (D.C. Cir. Aug. 2, 2016)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to call your attention to the above-referenced decision of the United States Court of Appeals for the District of Columbia Circuit. A copy of the decision is enclosed.

The Federal Election Campaign Act of 1971 (FECA) requires an authorized political committee of a candidate for federal office to identify itself by including the candidate's name in its own. 52 U.S.C. 30102(e)(4). "In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name." *Ibid.*

A regulation promulgated by the Federal Election Commission (FEC), 11 C.F.R. 102.14(a), generally applies the prohibition against including a candidate's name in the name of an unauthorized political committee to "any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation." The FEC has interpreted its regulation to preclude unauthorized political committees from using a candidate's name in the names of online special projects, such as websites and social-media pages. FEC Advisory Op. 2015-04, 2015 WL 4480266, at *2 (July 16, 2015). The regulation contains exceptions for, *inter alia*, inclusion of "the name of a candidate in the title of a special project name or other communication if the title clearly and unambiguously shows opposition to the named candidate." 11 C.F.R. 102.14(b)(3).

In this case, an unauthorized political committee brought suit to enjoin the FEC from enforcing Section 102.14(a) against a website and Facebook page named "I Like Mike Huckabee." The district court denied the plaintiff's motion for a preliminary injunction. 132 F. Supp. 3d 23 (D.D.C. 2015). The court concluded, among other things, that the FEC's rule is consistent with the First Amendment, because it permissibly promotes "the government's interests in limiting confusion, fraud, and abuse" by "clarify[ing] the candidate-authorization status of political committees." *Id.* at 42 (internal quotation marks and citation omitted).

The court of appeals reversed and remanded for entry of a preliminary injunction against enforcement of Section 102.14(a) against the plaintiff's "websites and social media pages." 2016 WL 4087943, at *8. The panel described Section 102.14(a) as "a content-based ban on speech that likely violates the First Amendment." *Id.* at *1. The panel viewed the regulation as a form of "content-based discrimination" because the regulation would allow the plaintiff to "use a candidate's name in a title of a communication only if the title demonstrates opposition to the candidate." *Id.* at *5. Applying strict scrutiny, the panel "assume[d] that the government has a compelling interest in avoiding the type of voter confusion identified by the FEC." *Id.* at *7. It perceived, however, a "substantial likelihood that section 102.14 is not the least restrictive means to achieve the government's interest." *Ibid.* The panel stated, for example, that the FEC had "offered no evidence" that "a large disclaimer at the top of the websites and social media pages of unauthorized committees * * * would be less effective at curing fraud or abuse than a ban on speech." *Ibid.*

Although the FEC defended the constitutionality of Section 102.14(a) in the district court and court of appeals, the Department of Justice has decided, in consultation with the FEC, not to file a petition for a writ of certiorari seeking review of the court of appeals' decision. The decision is interlocutory, and it does not conflict with any decision of the Supreme Court or another court of appeals. The decision also allows the FEC either to adopt an alternative approach to addressing the risks of fraud, abuse, and confusion about the authorization of particular political committees or to justify its current regulation by providing evidence as to why any alternative approach would be unsatisfactory.

A petition for a writ of certiorari would be due on October 31, 2016. Please let me know if we can be of further assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Loretta E. Lynch". The signature is fluid and cursive, with the first name being the most prominent.

Loretta E. Lynch
Attorney General

Enclosure