
FRAUDULENT POLITICAL FUNDRAISING IN THE AGE OF SUPER PACS

Matthew S. Raymer[†]

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[†] General Counsel, National Republican Senatorial Committee (NRSC); J.D., University of Michigan Law School; A.B., Dartmouth College. The author wishes to thank former Federal Exchange Commission (FEC) Chair Michael Toner for graciously sharing his thoughts on the subject. The views expressed in this Article are the author’s alone and do not represent NRSC or any member of the Senate Republican Conference.

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INTRODUCTION

Commissioner Ann Ravel, the immediate past Chair of the Federal Election Commission (FEC), recently sounded the alarm about a rise in fraudulent political fundraising.¹ With “increasing frequency,” she warns, “some political emails you receive are scams, and little or none of the money raised is going toward the cause or candidate.”²

Here’s how the scam works: An urgent email, which often includes the name and photo of a well-known politician, asks that you “sign a petition” and then makes a request for a small contribution. Using the money raised through the urgent email plea, a scam political action committee pays a consulting firm—owned by the scam PAC’s treasurer—that then uses the funds to generate more emails and letters and raise more money.

Because of the way the requests are portrayed, it is assumed the money raised will go to help elect or defeat that candidate. In reality, the money raised largely gets funneled into the pockets of the political operatives who set up these organizations.³

As portrayed, these “scam political action committees (‘PACs’)” raise money by fraudulently misrepresenting to donors that they work to support or oppose a candidate or party, when, in truth, they exist largely, if not entirely, to enrich the individuals who operate them. Ravel laments that the FEC “shockingly . . . can’t stop these scam artists” and warns that, unless “Congress takes action and gives the FEC the tools to regulate scam PACs, we can expect this problem to grow.”⁴

This issue has received increased attention in recent years, particularly as two high-profile Republicans, former Representative Allen West and former Virginia gubernatorial candidate Ken Cuccinelli, each have sought through different means to prevent alleged scam PACs from using their names for fundraising purposes. And while such groups have been portrayed as disproportionately targeting supporters of Tea Party and conservative movement candidates,⁵ this issue is

1. Ann M. Ravel, *Stopping Scam PACs from Ripping off Donors*, ROLL CALL (July 13, 2015), http://www.rollcall.com/news/stopping_scam_pacs_from_ripping_off_donors_commentary-242791-1.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. See, e.g., Matt Lewis, Opinion, *The “Conservative” PACs Trolling for Your*

neither new nor limited to the Right. Democratic candidates and organizations such as former House Majority Leader Dick Gephardt,⁶ Vice President Al Gore,⁷ then-Senator John Kerry,⁸ and the Democratic Congressional Campaign Committee (DCCC)⁹ each have filed complaints regarding alleged fraudulent fundraising activity. More recently, a super PAC purportedly established to support Senator Bernie Sanders's presidential campaign has been labeled a possible "scam PAC" in the media, after it received a nearly \$50,000 contribution from Daniel Craig, the British¹⁰ actor.¹¹

With mixed results, Congress has sought to confront the broader issue of fraudulent misrepresentation in politics since Watergate. The federal fraudulent misrepresentation statute, 52 U.S.C. § 30124,¹²

Money, WALL ST. J. (May 7, 2015), <http://www.wsj.com/articles/the-conservative-pacs-trolling-for-your-money-1431040712>; Will Tucker, *Scam PACs Keep Money Churning, But Not to Candidates*, OPENSECRETS BLOG (July 29, 2015), <http://www.opensecrets.org/news/2015/07/scampacskeepmoneychurningbutnottocandidates/>; John Hawkins, *50 Million down the Tubes: How 17 Conservative PACs Are Spending Their Money*, RIGHT WING NEWS (Feb. 20, 2015), <http://rightwingnews.com/johnhawkins/50milliontubes17conservativepacs-spendingmoney/print>; Kenneth P. Vogel, *The Rise of "Scam PACs": Conservatives Sound Alarms About Self-Dealing Fundraisers*, POLITICO (Jan. 26, 2015), <http://www.politico.com/story/2015/01/superpacscams114581>; Jonathan Martin & Alexander Burns, *Allen West Plagued by Scam PACs*, POLITICO (Oct. 17, 2012), <http://www.politico.com/story/2012/10/allenwestplaguedbyscampacs082498>.

6. See First Gen. Counsel's Report at 2, *Never Stop Dreaming, Inc.*, MUR 5384 (Fed. Election Comm'n Nov. 19, 2004) [hereinafter First. Gen. Counsel's Report, MUR 5384], <http://eqs.fec.gov/eqsdocsMUR/0000526E.pdf>.

7. See Complaint at 1, *Friends for a Democratic White House*, MUR 5155 (Fed. Election Comm'n Nov. 2, 2000), <http://eqs.fec.gov/eqsdocsMUR/0000562A.pdf>.

8. See First Gen. Counsel's Report at 1, *www.johnkerry-2004.com*, MUR 5443 (Fed. Election Comm'n Oct. 20, 2004) [hereinafter First. Gen. Counsel's Report, MUR 5443], <http://eqs.fec.gov/eqsdocsMUR/00005504.pdf>.

9. See Complaint at 1, *Nat'l Democratic Cong. Comm.*, MUR 5444 (Fed. Election Comm'n April 22, 2004), <http://eqs.fec.gov/eqsdocsMUR/28044203773.pdf>.

10. Assuming Mr. Craig is not a permanent resident, the contribution appears to violate federal law. 52 U.S.C.A. § 30121(a)(1)(A), (a)(2) (West 2015) (formerly codified at 2 U.S.C. § 441e(a)(1)(A), (a)(2) (2012), respectively); 11 C.F.R. § 110.20(b), (g) (2015) (prohibiting foreign nationals who are not permanent residents from making "a contribution or a donation of money or other thing of value . . . in connection with a Federal, State, or local election," as well as any person from "solicit[ing], accept[ing], or receiv[ing]" such a contribution).

11. Ted Johnson, *Daniel Craig Donated to Bernie Sanders Super PAC, but Is It a Scam?*, VARIETY (Sept. 10, 2015), <http://variety.com/2015/biz/news/daniel-craig-bernie-sanders-super-pac-1201590270/>; Alan Rappeport, *Bernie Sanders Has a Fan in the James Bond Actor Daniel Craig*, N.Y. TIMES: FIRST DRAFT (Sept. 10, 2015 3:58 PM), <http://www.nytimes.com/politics/first-draft/2015/09/10/bernie-sanders-has-a-fan-in-the-james-bond-actor-daniel-craig/>.

12. 52 U.S.C.A. § 30124 (West 2015). The statute originally appeared as 2 U.S.C. § 441(h) and was editorially reclassified under Title 52 on September 1, 2014. See Office of the Law Revision Counsel, *Editorial Reclassification: Title 52, United States Code*, U.S.

prohibits fraudulent misrepresentation of *identity*, both for the purpose of political sabotage and fraudulent fundraising.¹³ However, as modern campaigns have evolved, so has the potential for fraudulent misrepresentation. With the proliferation of super PACs¹⁴ and other nonconnected committees,¹⁵ would-be scam artists no longer need to misrepresent their identity in order to fraudulently raise funds. Instead, they need only establish an otherwise legally-compliant political committee, and then misrepresent their *intentions* by raising money for supposedly political purposes which instead is used for personal enrichment. In its present form, § 30124 is silent on this issue, leaving a glaring hole in the federal statutory prohibition of fraudulent misrepresentation.

This Article argues that 52 U.S.C. § 30124 is inadequate in the context of modern political fundraising and should be amended to encompass fraudulent fundraising by super PACs and other nonconnected committees. Part I traces the historical development of § 30124 and its application by the FEC. Part II discusses the shortcomings of the statute with respect to so-called “scam PACs.” Part III discusses potential legislative and practical solutions. Part IV identifies the immediate alternative remedy offered by state anti-fraud statutes. Part V concludes.

I. FRAUDULENT MISREPRESENTATION UNDER FEDERAL LAW

This Section presents the federal fraudulent misrepresentation statute, 52 U.S.C. § 30124, tracing its historical development and the FEC’s interpretation of its key terms and provisions.

A. Historical Development of § 30124

The federal fraudulent misrepresentation statute developed in two stages. Following Watergate, Congress enacted subsection (a), which prohibits a candidate or campaign from sabotaging an opponent by posing as a federal candidate, party, or employee or agent of the same

HOUSE REPRESENTATIVES, <http://uscode.house.gov/editorialreclassification/t52/index.html> (last visited Nov. 25, 2015). For ease of reference, this paper refers to the current numbering throughout.

13. 52 U.S.C.A. § 30124(a), (b); 11 C.F.R. § 110.16 (2015).

14. See, e.g., Kenneth P. Vogel, *Dawn of the Planet of the Super PACs*, POLITICO (July 9, 2015 9:03 PM), <http://www.politico.com/story/2015/07/dawn-of-the-super-pac-era-119936>.

15. “Nonconnected committees” are simply PACs—that is, political committees that are not authorized candidate committees, party committees, or separate segregated funds (SSFs) of a corporation or labor organization. 11 C.F.R. §§ 100.5(a), 106.6(a)(1), (b)(1) (2015). As shorthand, this article includes SSFs in the term.

“on a matter which is damaging.”¹⁶

Nearly thirty years later, Congress enacted subsection (b) in response to numerous complaints that scam artists were fraudulently soliciting donations by posing as candidates and parties, prohibiting any “person” from fraudulently misrepresenting that the person is acting “for or on behalf” of a candidate, party, or employee or agent of either for the purpose of soliciting contributions or donations.¹⁷

1. Watergate and the Birth of “Fraudulent Misrepresentation”

“Five men, one of whom said he is a former employee of the Central Intelligence Agency, were arrested at 2:30 a.m. yesterday in what authorities described as an elaborate plot to bug the offices of the Democratic National Committee here.”¹⁸ So began Watergate, the most significant American political scandal of the twentieth century, which brought down a president and popularized the phrase “dirty tricks” within the American political lexicon.¹⁹

As the scandal unfolded, it became clear that “the Watergate bugging incident stemmed from a massive campaign of political spying and sabotage conducted on behalf of President Nixon’s re-election and directed by officials of the White House and the Committee for the Re-election of the President.”²⁰ At its core, the effort was designed to “prank”²¹ Democratic presidential primary candidates as part of a broad strategy of undercutting the Democratic primary frontrunner, Senator Edmund Muskie; poisoning relations within the Democratic Party to prevent it from uniting behind the eventual nominee; and helping to ensure that the weakest candidate possible secured the Democratic nomination.²²

Led by Donald J. Segretti, a young attorney who “helped assemble a cross-country network of amateur spies and saboteurs . . . on behalf of President Nixon’s re-election effort,”²³ Nixon campaign operatives engaged in a breathtaking array of “dirty tricks” through fraudulent

16. 52 U.S.C.A. § 30124(a).

17. *Id.* § 30124(b).

18. Alfred E. Lewis, *5 Held in Plot to Bug Democrats’ Office Here*, WASH. POST, June 18, 1972, at A1.

19. *See generally* CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* (1974).

20. Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST, Oct. 10, 1972, at A1.

21. S. REP. NO. 93-981, at 161 (1974).

22. *Id.* at 158.

23. George Lardner, Jr., *Segretti Pleads Guilty for Immunity*, WASH. POST, Oct. 2, 1973, at A3.

misrepresentation. These included:

- Running fake Muskie ads in Florida touting Muskie's supposed support for the Cuban Government;²⁴
- Distributing fake Muskie flyers comparing Governor George Wallace to Hitler;²⁵
- Sending fake "whistleblower" letters to local media alleging illegal campaign activity by Muskie;²⁶
- Forging letters on Muskie campaign stationary accusing Senator Henry Jackson of having both impregnated a seventeen-year old and been arrested twice for "homosexuality," as well as accusing Senator Hubert Humphrey of having been caught drunk driving with a "known call-girl" in his vehicle;²⁷
- Distributing forged flyers offering free food and alcohol at Muskie campaign headquarters, and then anonymously "tipping" Muskie's staff that a Democratic primary opponent was responsible;²⁸
- Distributing forged press releases announcing that a Democratic campaign event had been cancelled;²⁹ and
- Distributing a forged letter on Humphrey stationary claiming that Rep. Shirley Chisholm, another Democratic primary candidate, had at one point been committed to a mental hospital.³⁰

Sixty-nine individuals ultimately faced charges in connection with Watergate.³¹ However, not one faced charges in connection with the fraudulent misrepresentation of campaign authority, since no provision of federal law specifically prohibited such political sabotage. Segretti himself pleaded guilty to two counts of failing to include a disclaimer

24. S. REP. NO. 93-981, at 173; *Watergate and Related Activities, Phase II: Campaign Practices Hearing Before the Select Comm. on Presidential Campaign Activities*, 93d Cong. 4379 (1973) [hereinafter *Watergate Phase II Hearing*] (testimony of Martin Douglas Kelly).

25. S. REP. NO. 93-981, at 169.

26. *Id.* at 173.

27. S. REP. NO. 93-981, at 169; *Watergate Phase II Hearing*, *supra* note 24, at 4280 (Exhibit No. 206).

28. S. REP. NO. 93-981, at 170; *Watergate Phase II Hearing*, *supra* note 24, at 4380 (testimony of Martin Douglas Kelly).

29. S. REP. NO. 93-981, at 170.

30. *Id.* at 172; *Watergate Phase II Hearing*, *supra* note 24, at 4004 (testimony of Donald H. Segretti).

31. Bill Marsh, *Ideas & Trends: When Criminal Charges Reach the White House*, N.Y. TIMES (Oct. 30, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9904E7DF1F3FF933A05753C1A9639C8B63>.

on political communications³² and one related count of conspiracy in exchange for immunity from further prosecution.³³ He was sentenced to six months in prison and only served four.³⁴

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”³⁵:

[T]here were numerous cases of false, deceptive, and misleading literature published and distributed in the 1972 campaign by fraudulent or nonexistent sponsors

It is important to eliminate this form of deception from Federal campaigns Manipulation of voters’ views through misrepresentation has no place in the democratic process.³⁶

2. Federal Election Campaign Act Amendments of 1974

As Watergate unfolded, Congress responded by amending the Federal Election Campaign Act in 1974.³⁷ The 1974 amendments revolutionized federal campaign finance regulation just three years after the enactment of the original Act, most notably by establishing the FEC and setting hard limits on contributions and expenditures. In addition, the 1974 amendments included the first federal statutory language prohibiting the fraudulent misrepresentation of campaign authority.³⁸

While introducing the fraudulent misrepresentation language as an amendment,³⁹ Senator Birch Bayh of Indiana noted that its purpose “is to direct the Senate’s attention in the context of the pending bill, which is to be our principal legislative response to the past 18 months of Watergate revelations, to . . . the problem of ‘dirty tricks.’”⁴⁰ In particular, Senator Bayh noted that the Nixon campaign had “distributed documents bearing the letterhead of Senator Muskie’s campaign which

32. 18 U.S.C. § 612 (1970), *repealed by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

33. Lardner, *supra* note 23.

34. *Segretti Released from Prison*, ASSOC. PRESS, Mar. 27, 1974, *available at* MILWAUKEE SENTINEL, at 3.

35. S. REP. NO. 93-981, at 213.

36. *Id.*

37. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

38. *Id.* § 101(f)(1), 88 Stat. at 1268.

39. S. 3044, 93d Cong. (1974).

40. 120 CONG. REC. 10,945 (1974).

falsely accused Senators Humphrey and Jackson of the most bizarre type of personal conduct. It is this type of activity with which my amendment is designed to deal.”⁴¹

As amended, that language reads as follows:

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).⁴²

This language is a blunt response to the problem, laid bare by Watergate, of fraudulent misrepresentation by a campaign to sabotage an opponent for political gain. It prohibits federal candidates, and their employees or agents, from engaging in (or conspiring to engage in) dirty tricks whereby they fraudulently misrepresent themselves or any committee they control as acting on behalf of another candidate, political party, or employee or agent of either, on a matter which is damaging to the aggrieved party. As the FEC has explained:

[Section 30124(a)] encompasses, for example, a candidate who distributes letters containing statements damaging to an opponent and who fraudulently attributes them to the opponent. The Commission has determined that ‘on a matter that is damaging’ includes actions or spoken or written communications that are intended to suppress votes for the candidate or party who has been fraudulently misrepresented. . . . While the precise harm may be difficult to quantify, harm is presumed from the nature of the communication.⁴³

Though an important step, the provision’s reach is limited. First, it only applies to prohibit actions by federal candidates and their employees or agents. By its plain language, it does not prohibit fraudulent misrepresentation by individuals not in those categories or groups such as super PACs and other nonconnected political committees. Therefore, under § 30124(a) the FEC only may act on allegations of fraudulent misrepresentation by a federal candidate or their employee or agent, but

41. *Id.*

42. 52 U.S.C.A § 30124(a) (West 2015) (previously codified at 2 U.S.C. § 441h).

43. Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,968–69 (Dec. 13, 2002) (codified at 41 C.F.R. pts. 100, 110, 111, and 113).

not by any other party.⁴⁴

Second, even where a covered individual does engage in fraudulent misrepresentation, the statute only prohibits that activity to the extent it is “damaging” to the party fraudulently misrepresented.⁴⁵ In this vein, the Commission has dismissed complaints it has deemed insufficiently “significant” or where the party misrepresented was someone other than the rival candidate.⁴⁶

Third, as a direct response to campaign “dirty tricks,” § 30124(a) says nothing about fraudulent solicitation specifically and only would appear to apply in the unusual event that a candidate pretended to be an opposing candidate or party for fundraising purposes. To the author’s knowledge, the FEC’s Enforcement Query System and Matters Under Review Archive contain no records of any such allegations.⁴⁷

A. Application by the FEC

As the following selected Matters Under Review (MURs) demonstrate, the FEC has applied § 30124(a) only in limited circumstances involving “misrepresentations by a candidate or the candidate’s employee or agent.”⁴⁸

44. See, e.g., Factual & Legal Analysis at 1, Person Unknown, MUR 148 (Fed. Election Comm’n June 16, 1976), [hereinafter Factual & Legal Analysis, MUR 148], http://www.fec.gov/disclosure_data/mur/148.pdf (no violation where Respondent is unidentified); Factual & Legal Analysis, Grant Lally for Congress, MUR 6837 (Fed. Election Comm’n Oct. 28, 2014), <http://eqs.fec.gov/eqsdocsMUR/14044364369.pdf> (no violation where state candidate makes fraudulent misrepresentation); First Gen. Counsel’s Report at 2, Indianapolis Star, MUR 1145 (Fed. Election Comm’n Mar. 3, 1980), http://www.fec.gov/disclosure_data/mur/1145.pdf (no violation by newspaper).

45. E.g., First Gen. Counsel’s Report at 11, Carnes, MUR 1451 (Fed. Election Comm’n Aug. 13, 1982) [hereinafter First Gen. Counsel’s Report, MUR 1451], http://www.fec.gov/disclosure_data/mur/1451.pdf (“[I]t is clear that the statute requires not only fraudulent misrepresentation of campaign authority, but that the fraudulent misrepresentation be ‘damaging’ to the *misrepresented* party.”).

46. See, e.g., Narrative, Tillman Law Firm, MUR 3775 (Fed. Election Comm’n June 6, 1994) http://www.fec.gov/disclosure_data/mur/3775.pdf (fraudulent instructions regarding when volunteers should sit, stand, and clap at a local political convention did “not appear to have had a significant impact on the process and involved a limited amount of money”); Factual & Legal Analysis, MUR 227, *infra* note 52.

47. The FEC maintains a searchable enforcement database at *FEC Enforcement Query System*, FED. ELECTION COMMISSION, <http://eqs.fec.gov/eqs/searcheqs> (last visited Nov. 25, 2015).

48. Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 79,692, 76,969 (Dec. 13, 2002).

i. MUR 148 (Person Unknown)

On behalf of President Ford, Edward C. Schmults, Deputy Counsel to the President, filed a complaint regarding a fundraising letter falsely purporting to raise money for the National Republican Congressional Committee (NRCC) and fraudulently “signed” by President Ford.⁴⁹ The letter was targeted to 501(c)(3) organizations, which are prohibited from making political contributions under federal law due to their tax-exempt status.⁵⁰

Because Schmults could not identify the sender, the FEC was forced to dismiss the complaint as a matter of law. This was because there was “no evidence to indicate that the purported solicitation involve[d] a misrepresentation by another candidate.”⁵¹ Thus, the FEC found itself powerless to pursue the complaint because the complainant had not shown that the respondent was a federal candidate or employee or agent thereof.

ii. MUR 227 (Mowery)

Congressman Olin Teague, a Democrat, accused his Republican opponent, Wes Mowery, of mailing a fundraising letter fraudulently containing Republican Oklahoma Senator Harry Bellmon’s signature.⁵² The letter criticized Teague’s record in Congress, and Teague alleged that Senator Bellmon had “assured” him that he never authorized his signature on the letter.⁵³

The FEC’s Counsel recommended that the Commission close the file due to the “narrow application of [§ 30124].”⁵⁴ As the Counsel explained, the statute, “if read literally, prohibits fraudulent misrepresentation by speaking or writing for or on behalf of any other candidate. It is not a broad prohibition of all fraudulent misrepresentations of identity.”⁵⁵ Citing Senator Bayh’s statement in the legislative history that the statute would address cases where “not only

49. Complaint, Person Unknown, MUR 148 (Fed. Election Comm’n May 24, 1976) http://www.fec.gov/disclosure_data/mur/148.pdf.

50. *Id.*; 26 U.S.C. § 501(c)(3) (2012).

51. Factual & Legal Analysis, MUR 148, *supra* note 44, at 1.

52. Factual & Legal Analysis at 1, Mowery, MUR 227 (Fed. Election Comm’n Sept. 21, 1976) [hereinafter Factual & Legal Analysis, MUR 227], http://www.fec.gov/disclosure_data/mur/227.pdf.

53. Larry Neal, *Teague Files Complaint About Mowery’s Tactics*, FT. WORTH STAR TELEGRAM, Aug. 13, 1976, *reprinted in* Mowery, MUR 227 (Fed. Election Comm’n Sept. 21, 1976), http://www.fec.gov/disclosure_data/mur/227.pdf.

54. Factual & Legal Analysis, MUR 227, *supra* note 52, at 1.

55. *Id.*

does the candidate or his agent know that statements about another candidate are false but that they are, in fact, damaging to him,” Counsel reasoned that the statement attributed to Senator Bellmon was not damaging to Senator Bellmon himself, but rather to Congressman Teague, and therefore was not prohibited under § 30124(a).⁵⁶

In recommending that the Commission close the file, FEC Counsel suggested that Congressman Teague look to possible remedy under Texas’s state laws prohibiting fraudulent misrepresentation.⁵⁷

iii. MUR 2205 (Foglietta)

Complainant James J. Tayoun, a former Democratic candidate, alleged that his primary opponent, Thomas M. Foglietta, violated § 30124 by mailing a campaign ad, which showed a doctored version of Tayoun’s actual FEC report.⁵⁸ Specifically, the FEC report was changed to list conservative Senator Jesse Helms as Tayoun’s employer, mocking Tayoun as a closet conservative.⁵⁹

The FEC’s General Counsel advised that the ad did not violate §30124(a), because it contained the proper disclaimer language identifying Foglietta’s campaign as the sender. Although Foglietta “certainly attempted to damage [Tayoun’s] campaign,” Counsel reasoned, “the advertising material is clearly printed as Foglietta material Therefore, it cannot be said that the Foglietta campaign represented itself as acting for another candidate on a matter damaging to that candidate.”⁶⁰

iv. MUR 3690 (La Rocco for Congress)

La Rocco for Congress alleged that its Republican opponent, Rachel Gilbert for Congress, and the NRCC violated § 30124(a) by mailing a satirical flyer in which La Rocco purportedly informs his constituents what he has been doing in Washington, such as voting to borrow \$400 billion and receiving hundreds of thousands of dollars from special interest groups.⁶¹ The FEC found no reason to believe a

56. *Id.* at 2; *see also* First Gen. Counsel’s Report, MUR 1451, *supra* note 45, at 11.

57. Factual & Legal Analysis, MUR 227, *supra* note 52, at 2.

58. First Gen. Counsel’s Report at 1–2, Foglietta, MUR 2205 (Fed. Election Comm’n Sept. 9, 1986) [hereinafter First Gen. Counsel’s Report, MUR 2205], http://www.fec.gov/disclosure_data/mur/2205.pdf.

59. *Id.* at 2.

60. *Id.*

61. First Gen. Counsel’s Report at 1–3, Nat’l Republican Cong. Comm., MUR 3690 (Fed. Election Comm’n June 30, 1993) [hereinafter First Gen. Counsel’s Report, MUR 3690], http://www.fec.gov/disclosure_data/mur/3690.pdf.

violation of § 30124(a) had occurred, in relevant part because the mail piece contained clear disclaimers identifying Gilbert and NRCC as the source of the mailer⁶²:

A violation of Section [30124] requires *fraudulent* misrepresentation. Key elements of fraud are the maker's intent that the representation 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.⁶³

Because the piece contained the appropriate disclaimer, the Commission concluded that the Respondents did not "pretend they are their opponents. Therefore, there is no deceit or fraud of the type required to violate Section [30124(a)]."⁶⁴

v. MUR 4919 (Charles Ball for Congress)

Complainants alleged that Charles Ball, a Republican candidate for Congress, violated § 30124(a) through a mailer and follow-up phone calls by a fraudulent group called the "East Bay Democratic Committee."⁶⁵ The mailers appeared as if they were signed by Congressman George Miller, also a Democrat, who purportedly advocated for Ball's opponent's defeat.⁶⁶

During its investigation, the FEC identified the company that printed the flyers and was able to confirm that Charles Ball had been a client.⁶⁷ Therefore, having found a link between Ball's campaign and the alleged fraudulent misrepresentation, the FEC found reason to believe that § 30124(a) had been violated.⁶⁸

Note, however, that the FEC's reasoning in MUR 4919 is at odds with its prior reasoning in MUR 2205 (Foglietta), above. There, the Commission understood § 30124(a) to cover only fraudulent statements that were damaging to the misrepresented party. Here, the Commission took a more expansive view, applying § 30124(a) to a fraudulent

62. *Id.* at 6–7.

63. *Id.* at 3–4; *see also* First Gen. Counsel's Report at 6–7, Nat'l Republican Cong. Comm., MUR 3700 (Fed. Election Comm'n June 30, 1993) [hereinafter First Gen. Counsel's Report, MUR 3700], http://www.fec.gov/disclosure_data/mur/3700.pdf (involving nearly identical facts and containing nearly the same explanation).

64. First Gen. Counsel's Report, MUR 3690, *supra* note 61, at 7.

65. Tel. Incident Report Form, Charles Ball for Congress, MUR 4919 (Fed. Election Comm'n Nov. 2, 1998), <http://eqs.fec.gov/eqsdocsMUR/0000112C.pdf>.

66. *Id.*

67. Factual & Legal Analysis at 3, Charles Ball for Congress, MUR 4919 (Fed. Election Comm'n Aug. 28, 2000), <http://eqs.fec.gov/eqsdocsMUR/0000114D.pdf>.

68. *Id.*

misrepresentation that was damaging to the party intended to be affected, Ball's opponent, rather than George Miller, the candidate whose name was fraudulently used.

vi. MUR 4735 (Bordonaro)

The campaign manager for Lois Capps, a Democrat, alleged that her Republican opponent's campaign, Bordonaro for Congress, used a phone bank on election night to fraudulently call voters on behalf of the non-existent "Central Coast Democrats for Honest Representation," in order to spread false information about Capps.⁶⁹ Noting that § 30124(a) prohibits only "fraudulently misrepresent[ing] oneself as speaking on behalf of any other candidate or political party," the FEC found no reason to believe a violation of § 30124(a) had occurred.⁷⁰ "The mere fact that the word 'Democrats' was used would not appear to be enough to bring the activity within the scope of speaking on behalf of a political party under the terms of the Act."⁷¹ In other words, the Commission reasoned that claiming to represent "Democrats" does not constitute claiming to represent the Democratic Party.

Then-Commissioner Michael Toner, a Republican, wrote separately to explain that, while he voted to dismiss the matter, he believed nevertheless that "alleged violations of [§ 30124] should be a top Commission enforcement priority."⁷² Noting that the "Supreme Court had ruled that the First Amendment does not shield fraud,"⁷³ Commissioner Toner argued that "political actors do not have a constitutional right to misrepresent themselves or otherwise engage in fraudulent conduct."⁷⁴

69. Third Gen. Counsel's Report at 4, Bordonaro, MUR 4735 (Fed Election Comm'n Dec 10, 2002) (quoting 52 U.S.C.A § 30124(a) (West 2015) (previously codified at 2 U.S.C. § 441h)), <http://eqs.fec.gov/eqsdocsMUR/00000186.pdf>.

70. *Id.*

71. *Id.*

72. Statement of Reasons of Comm'r Michael E. Toner at 3, Bordonaro, MUR 4735 (Fed. Election Comm'n Dec. 1, 2003), <http://eqs.fec.gov/eqsdocsMUR/000005BD.pdf>.

73. *Id.* at 2 (citing *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948); *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 123 S. Ct. 1829, 1843 (2003); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

74. *Id.* at 3.

vii. *MUR 5089 (Matta Tuchman for Congress)*

The individual complainant alleged that the campaign committee for Matta Tuchman, a Republican, had sent a mailer criticizing Representative Loretta Sanchez for attending a fundraiser at the Playboy Mansion.⁷⁵ The letter appeared on letterhead for “Orange County Democrats,” a fictitious group, expressing disappointment in Rep. Sanchez and urging readers to “take a look at” Tuchman.⁷⁶ A disclaimer indicating that the mailing was paid for by Tuchman’s campaign appeared on the flap of the envelope in small letters.⁷⁷

With respect to the fraudulent misrepresentation, the FEC noted that in “evaluating matters similar to the instant matter, the Commission has emphasized the requirement that the misrepresentation be fraudulent, an element of which is the intent to deceive.”⁷⁸ The disclaimer, though technically imperfect, led the Commission to determine that fraudulent misrepresentation had not occurred.⁷⁹

viii. *MUR 5886 (Democratic Voters Choice)*

The complainant, an unsuccessful Democratic nominee for the U.S. House of Representatives, argued that an unincorporated organization posing as a pro-Democratic group had sent a “slate mailer” urging Democratic voters to vote for his Republican opponent.⁸⁰ Without commenting on the factual basis of the complaint, the FEC found “no reason to believe” that the respondents had violated § 30124(a).⁸¹ As the FEC explained, the “communication does not appear to meet the Act’s threshold requirement that a candidate or the employee or agent of a candidate be involved in the alleged misrepresentation.”⁸²

75. Complaint, Matta Tuchman for Congress, MUR 5089 (Fed. Election Comm’n Sept. 1, 2000) <http://eqs.fec.gov/eqsdocsMUR/00000E80.pdf>.

76. *Id.*

77. *Id.*

78. First Gen. Counsel’s Report at 8, Tuchman, MUR 5089 (Fed. Election Comm’n Jan. 21, 2004) [hereinafter First Gen. Counsel’s Report, MUR 5089], <http://eqs.fec.gov/eqsdocsMUR/00000E89.pdf> (citing MURs 3700, 3690, and 2205).

79. *Id.* at 9.

80. Complaint, Responses, Designation of Counsel and Extensions of Time at 1, Democratic Voters Choice, MUR 5886 (Fed. Election Comm’n Nov. 27, 2006), <http://eqs.fec.gov/eqsdocsMUR/0000655C.pdf>.

81. Letter Enclosing Factual & Legal Analysis, Democratic Voters Choice, MUR 5886 (Fed. Election Comm’n July 25, 2007), <http://eqs.fec.gov/eqsdocsMUR/0000655F.pdf>.

82. Factual & Legal Analysis at 3, Democratic Voters Choice, MUR 5886 (Fed. Election Comm’n July 25, 2007) [hereinafter Factual & Legal Analysis, MUR 5886], <http://eqs.fec.gov/eqsdocsMUR/0000655F.pdf>.

3. *Bipartisan Campaign Reform Act of 2002*

Section 30124(a) therefore proved wholly inadequate with respect to fraudulent fundraising, as the FEC “received a number of complaints that substantial amounts of money were raised fraudulently by persons or committees purporting to act on behalf of candidates [but was] unable to take any action on these matters because the statute gives it no authority in this area.”⁸³

As the Commission explained:

Because the language and purpose of the pre-BCRA misrepresentation statute [§ 30124(a)] encompasses only misrepresentations by a candidate or the candidate’s employee or agent, the Commission has historically been unable to take action in enforcement matters where persons unassociated with a candidate or candidate committee have solicited funds by purporting to act on behalf of a specific candidate or party. Candidates have complained that contributions that contributors believed were going to benefit the candidate were diverted to other purposes, harming both the candidate and contributor.⁸⁴

From 1982 until 2002, the FEC urged Congress in its annual Legislative Recommendations to meet this problem by amending the fraudulent misrepresentation statute to further prohibit “persons from fraudulently misrepresenting themselves as representatives of candidates or political parties for the purpose of soliciting contributions which are never forwarded to or used by or on behalf of the candidate or party.”⁸⁵

Congress responded with the passage of the Bipartisan Campaign Reform Act in 2002,⁸⁶ passed amid widespread calls for campaign finance reform.⁸⁷ In his statement introducing the amending language, Senator Bill Nelson (D-FL) echoed the FEC’s concern that “people have fraudulently raised donations by posing as political committees or

83. Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,969 (Dec. 13, 2002); 1990 FED. ELECTION COMM. ANN. REP. at 39, <http://www.fec.gov/pdf/ar99.pdf#page=45>.

84. Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 55,348, 55,352 (proposed Aug. 29, 2002) (codified at 11 C.F.R. § 113).

85. FED. ELECTION COMM’N, LEGISLATIVE RECOMMENDATIONS 34 (1982), <http://www.fec.gov/pdf/legrec1982.pdf>; compare 2001 FED. ELECTION COMM’N ANN. REP., LEGISLATIVE RECOMMENDATIONS 39 (containing substantially identical language, but omitting the phrase, “which are never forwarded to or used by or on behalf of the candidate or party”).

86. Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 52 U.S.C. § 30124).

87. See Neil Reiff & Don McGahn, *A Decade of McCain-Feingold*, CAMPAIGNS & ELECTIONS (Apr. 16, 2014), <http://www.campaignsandelections.com/magazine/1705/a-decade-of-mccain-feingold>.

candidates and . . . the current law does not allow the Commission to pursue such cases.”⁸⁸

This language, added as Section 309 of BCRA, reads as follows:

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).⁸⁹

This language differs from § 30124(a) in two important ways. First, it applies to any “person,” as opposed to the limited scope of § 30124(a). Second, it specifically applies to fundraising activities, rather than political activity alone. Note, however, that it does not apply to prohibit fraudulent activity which does not include acting “for or on behalf of” a candidate, political party, or employee or agent of either.

A. Application by the FEC

The following selected MURs illustrate the FEC’s application of § 30124(b) where one or more respondents is accused of falsely representing themselves as acting on behalf of a candidate or party for fundraising purposes.

i. MURs 5384 and 5385 (Never Stop Dreaming, Inc. & Groundswell Voters PAC)

Gephardt for President, Inc., the Presidential campaign committee for then-House Majority Leader Dick Gephardt (D-MO) brought complaints alleging that two organizations, Never Stop Dreaming, Inc. (NSD) and Groundswell Voters PAC (“Groundswell”) violated § 30124(b).

NSD was accused of hiring the National Museum of Women in the Arts in Washington, D.C. to host a fundraiser purportedly to benefit Gephardt, representing to the museum that NSD was in close contact with the Gephardt campaign and that the campaign would be responsible for all payments associated with the fundraiser.⁹⁰ The museum subsequently contacted the campaign, which confirmed that it

88. 107 CONG. REC. S3122 (Mar. 29, 2001).

89. BCRA of 2002 § 309, Pub. L. No. 107-155, 116 Stat. 81, 104 (2002) (codified at 52 U.S.C.A. § 30124(b)).

90. First Gen. Counsel’s Report, MUR 5384, *supra* note 6, at 3.

had no contact with NSD and brought the complaint.⁹¹ Although the fundraiser had not occurred, the Commission found that the group had “participated in a plan, scheme, or design to fraudulently solicit funds” in violation of § 30124(b)(2).⁹² Reviewing the factual allegations, including that NSD’s representatives evidently had used aliases in their dealings with the museum, the Commission found that NSD’s actions “are explained only by a motivation to defraud prospective donors and engage in fraudulent solicitation.”⁹³

Groundswell had mailed fundraising letters soliciting \$5000 contributions purportedly to be used to “help propel Dick Gephardt to the Democratic nomination and on to the Presidency in 2004 through get-out-the-vote activities.”⁹⁴ The Commission found that the letters were misleading “and could have led reasonable people to conclude that the Gephardt Committee authorized the communications or was involved in generating the fundraising solicitation,” particularly because the letters lacked the appropriate disclaimer attributing them to Groundswell.⁹⁵ In addition, the “circumstances present[ed] a classic case of fraud,” as “Groundswell held itself out as a PAC even though it has not registered with the Commission and provided what appear to be a false address and false IRS registration number on its website.”⁹⁶

Ultimately, the FEC’s General Counsel recommended that, despite the apparent violation of § 30124(b), no action be taken apart from sending letters of admonishment, because Groundswell’s treasurer had already been convicted and served jail time under Michigan’s state fraud statutes in relation to the same fraudulent fundraising.⁹⁷

ii. MURs 5443, 5495, and 5505 (www.johnfkerry-2004.com)

Then-Senator John Kerry’s presidential campaign filed complaints regarding a series of fraudulent websites and emails which appeared to have originated outside the United States, alleging fraudulent solicitation in violation of § 30124(b).⁹⁸ The websites mimicked actual campaign websites, including displaying the campaign disclaimer in the website and email solicitations, as well as using website and email

91. *Id.* at 5.

92. *Id.* at 8.

93. *Id.* at 9.

94. *Id.* at 10, 15–16.

95. First Gen. Counsel’s Report, MUR 5384, *supra* note 6, at 10.

96. *Id.*

97. Third Gen. Counsel’s Report at 5, Groundswell Voters PAC, MUR 5385 (Fed. Election Comm’n Feb. 28, 2006), <http://eqs.fec.gov/eqsdocsMUR/00005267.pdf>.

98. First Gen. Counsel’s Report, MUR 5443, *supra* note 8, at 2.

addresses containing John Kerry's name.⁹⁹ The solicitations falsely claimed that donations directly would benefit the Kerry campaign.¹⁰⁰ Lastly, the unknown persons responsible went "to great lengths to hide their identities."¹⁰¹ Because the FEC could not "verify that the persons named by complainant are in fact the persons responsible for the fraudulent solicitations," the FEC's Counsel recommended investigation to determine those individuals' identities.¹⁰² Ultimately, the FEC simply closed the file, "following careful consideration of the resources needed to further pursue respondents, known or unknown, outside the United States."¹⁰³

iii. MUR 5444 (National Democratic Campaign Committee)

The Democratic Congressional Campaign Committee, a national party committee, filed a complaint against the National Democratic Campaign Committee (NDCC) and its treasurer, Marcus Belk.¹⁰⁴ Belk previously had registered the official-sounding NDCC, the National Democratic Senatorial Committee, the National Democratic Political Committee, and Democratic Majority 2004.¹⁰⁵ Despite having terminated each of those committees, the NDCC nevertheless had received, and Belk had personally endorsed the check for, a maximum contribution evidently intended for the DCCC.¹⁰⁶ Noting that Belk had not responded to the FEC's communications, the Commission found that Belk's actions lead to a "reasonable inference that he was attempting to defraud prospective donors and engage in fraudulent solicitation."¹⁰⁷

99. *Id.* at 2–8.

100. *Id.* at 2.

101. *Id.* at 10.

102. *Id.*

103. Second Gen. Counsel's Report at 2, www.johnfkerry-2004.com, MUR 5443 (Fed. Election Comm'n Mar. 21, 2006), <http://eqs.fec.gov/eqsdocsMUR/00005507.pdf>.

104. Factual & Legal Analysis at 1, Belk, MUR 5444 (Fed. Election Comm'n Dec. 22, 2004) [hereinafter Factual & Legal Analysis, MUR 5444], <http://eqs.fec.gov/eqsdocsMUR/28044203822.pdf>.

105. *Id.* at 2.

106. The donor, Ford Motor Company Civil Action Fund, was a long-time contributor to DCCC. *Id.* The contribution to NDCC appeared to be the result of a clerical error. *Id.*

107. *Id.*

B. Section 30124(b): Key Terms and Provisions

This Section outlines § 30124(b)'s key terms in greater detail, as well as the functional safe harbors recognized by the FEC.

1. Defining Key Terms

A. "Fraudulently Misrepresent"

A violation of § 30124(b) requires "fraudulent misrepresentation," which the FEC consistently has understood as requiring the "intent to deceive," even in the absence of an express misrepresentation of fact.¹⁰⁸

Accordingly, the FEC has considered a representation to be fraudulent "if it was reasonably calculated to deceive persons of ordinary prudence and comprehension."¹⁰⁹ Because the statute "does not require that the violator sustain all elements of common law fraud[,] proof of justifiable reliance and damages is not necessary."¹¹⁰

B. "For Or On Behalf Of"

The FEC has long interpreted the term "for or on behalf of" to require the fraudulent misrepresentation of *agency*, rather than mere support or opposition.¹¹¹ This understanding is perhaps the key factor limiting both § 30124(b) to fraudulent misrepresentations of identity, rather than intention to act in support of or opposition to a candidate or party.

108. First Gen. Counsel's Report, MUR 3690, *supra* note 61, at 6; First Gen. Counsel's Report, MUR 3700, *supra* note 63, at 6.

109. First Gen. Counsel's Report at 19, Republican Majority Campaign PAC, MUR 6633 (Fed. Election Comm'n April 22, 2013) [hereinafter First Gen. Counsel's Report, MUR 6633], <http://eqs.fec.gov/eqsdocsMUR/14044352131.pdf> (citing *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010)); *see also* First Gen. Counsel's Report, MUR 5089, *supra* note 78, at 8 (citing First Gen. Counsel's Report, MUR 3700, *supra* note 63) ("In evaluating matters similar to the instant matter, the Commission has emphasized the requirement that the misrepresentation be fraudulent, an element of which is the intent to deceive."); Factual & Legal Analysis, MUR 5444, *supra* note 104, at 5 n.5 ("Courts have held that even absent an express misrepresentation, a scheme devised with the intent to defraud is still fraud if it was reasonably calculated to deceive persons of ordinary prudence and comprehension.").

110. First Gen. Counsel's Report at 4, Vincent Harris, MUR 6868 (Fed. Election Comm'n Mar. 13, 2015), <http://eqs.fec.gov/eqsdocsMUR/15044373258.pdf> (citing Explanation and Justification of 11 C.F.R. §110.16, 67 Fed. Reg. 76,962, 76,969 (Dec. 13, 2002); *Neder v. United States*, 527 U.S. 1, 24–25 (1999)).

111. *E.g.*, First Gen. Counsel's Report at 8, Friends for a Democratic White House, MUR 5155 (Fed. Election Comm'n Nov. 16, 2000) [hereinafter First Gen. Counsel's Report, MUR 5155], <http://eqs.fec.gov/eqsdocsMUR/0000562F.pdf> (finding no violation of § 30124(a) because respondent "is not an agent of Al Gore or the Gore Committee, nor does it purport to be . . . it cannot be considered an agent of Al Gore").

One could argue, however, that the FEC reads this language too narrowly, and in doing so, has unnecessarily tied its hands regarding scam PACs. In interpreting the phrase, the FEC seems to focus upon the words “on behalf of,” which implies agency, but gloss over the “for or” which precedes it. The terms are not interchangeable, however, as “for” could be read to indicate support, rather than agency. An individual who votes “for” a candidate, for instance, is not the candidate’s agent, but their supporter, just as that individual generally can be “for” better schools, lower taxes, or any other policy preference. By interpreting the entire phrase as requiring agency, the FEC interprets the law in such a way as to render the word “for” superfluous.¹¹² Nevertheless, given the legislative history’s clear indication that the statute prevents posing as a candidate or party to fraudulently solicit funds,¹¹³ the phrase “for or on behalf of” appears simply to be the result of poor drafting.

C. “Willfully and Knowingly”

With respect to § 30124(b)(2), a violation is “willful and knowing” if the defendant “acted deliberately and with knowledge” that the representation was false.¹¹⁴ The evidence does not have to show that a defendant had specific knowledge of the regulations or conclusively demonstrate a conspirator’s state of mind, if there are facts and circumstances from which a jury could reasonably infer that a defendant knew that her conduct was unauthorized and illegal.¹¹⁵

2. Safe Harbors

Through its treatment of the above terms, the FEC functionally has created two safe harbors under § 30124(b) which, if satisfied, indicate that “fraudulent misrepresentation” has not occurred. As discussed in Section II, below, these safe harbors render § 30124(b) all but meaningless in the context of super PACs and other nonconnected committees.

112. See generally Yule Kim, CONG. RES. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 12–13 (2008).

113. See 147 CONG. REC. S3122 (2001) (statement of Sen. Nelson) (“[P]eople have fraudulently raised donations by posing as political committees or candidates and that the current law does not allow the Commission to pursue such cases.”).

114. *Novacek*, 739 F. Supp. 2d at 961.

115. *Id.*

A. Use of Disclaimers

Because a violation of § 30124 requires the “intent to deceive,” the FEC repeatedly has found that a communication which includes accurate disclaimer language does not constitute “fraudulent misrepresentation” under the statute.¹¹⁶ In short, “the inclusion of a disclaimer negates the requisite intent to deceive element of fraudulent misrepresentation, since the disclaimer discloses the source of the mailer.”¹¹⁷ By including a disclaimer, the “intent is to expose themselves as the source Therefore, there is no deceit or fraud of the type required to violate Section [30124].”¹¹⁸

As the Commission has explained, § 30124(b),

has been enforced against respondents who misled visitors to their websites by fashioning their sites to mimic the candidate’s official website, and by including on the website various statements that the websites were “paid for and authorized by” the candidate’s committee when the respondents knew that the website was neither paid for nor authorized by the candidate or the candidate’s authorized committee.¹¹⁹

B. Compliance with Registration and Reporting Requirements

Similarly, the FEC has looked at whether an organization accused of violating § 30124(b) is properly registered and reporting with the FEC, thereby publicly disclosing its contributions and expenditures as required under federal law. Noting that “[f]ailure to file reports with the Commission indicating on what, if anything, the money raised has been spent may be probative of the Committee’s intent to misrepresent itself to the public,”¹²⁰ the FEC found that proper registration and reporting weighs against finding that the organization violated § 30124(b).¹²¹

116. *E.g.*, Factual & Legal Analysis, MUR 5886, *supra* note 82, at 3 (citing Statement of Reasons at 2, Matta Tuchman for Congress, MUR 5089 (Fed. Election Comm’n Sept. 6, 2000) [hereinafter Statement of Reasons, MUR 5089]); First Gen. Counsel’s Report, MUR 3690, *supra* note 61, at 6; First Gen. Counsel’s Report, MUR 3700, *supra* note 63, at 6; First Gen. Counsel’s Report, MUR 2205, *supra* note 58, at 2.

117. Factual & Legal Analysis, MUR 5886, *supra* note 82, at 3 (citing Statement of Reasons, MUR 5089, *supra* note 116, at 2).

118. First Gen. Counsel’s Report, MUR 3690, *supra* note 61, at 7; *see* First Gen. Counsel’s Report, MUR 3700, *supra* note 63, at 6.

119. First Gen. Counsel’s Report, MUR 6633, *supra* note 109, at 19 (citing First Gen. Counsel’s Report, MUR 5443, *supra* note 8, at 3).

120. *Id.* at 16 (citing First Gen. Counsel’s Report at 12, Republican Victory 2004 Comm., Inc., MUR 5472 (Fed. Election Comm’n Jan. 31, 2005), <http://eqs.fec.gov/eqsdocsMUR/11044291111.pdf>).

121. *Id.* at 21.

As with the disclaimer requirement, compliance with federal registration and reporting requirements not only indicates that the organization has displayed at least some intent to follow federal law, but also provides would-be donors with information enabling them to understand the means by which the organization has spent its money.¹²²

II. MODERN “SCAM PACS” AND THE INADEQUACY OF § 30124(B)

With the proliferation of outside groups such as super PACs,¹²³ fraudulent fundraising has evolved beyond the confines of § 30124(b). Would-be scam artists no longer need to pretend to represent a candidate or political party in order to fraudulently raise funds. Under § 30124(b), nothing prevents would-be scam artists from registering a nonconnected, political committee with the FEC, raising funds by fraudulently misrepresenting that those funds will be used for a particular political purpose, and then pocketing most, if not all, of those funds for themselves.¹²⁴

If anything, scam artists are better off hiding in plain sight. While it is relatively easy to determine whether, for instance, the National Democratic Campaign Committee and the DCCC are the same entities, it is more difficult to determine whether a particular nonconnected committee actually is using its funds to engage in the types of political activities represented to its donors or, if they are, whether they are doing just “enough” to obscure otherwise fraudulent activity.¹²⁵

122. Cf. *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1974) (explaining that disclosure serves three compelling governmental interests: (1) “providing the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office”; (2) deterring “actual corruption” and avoiding “the appearance of corruption by exposing large contribution and expenditures to the light of publicity”; and (3) providing an “essential means of gathering the data necessary to detect violations of the contribution limitations” (internal quotations omitted)), *superseded by statute*, BCRA of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

123. See, e.g., Joseph Tanfani, *New ‘Super PACs’ Help Donors Customize Their Political Clout*, L.A. TIMES (Aug. 2, 2015), <http://www.latimes.com/nation/politics/la-na-personal-super-pacs-20150802-story.html>.

124. No federal law requires nonconnected committees to spend money they raise in a certain way, nor does the prohibition on personal use of campaign funds apply to individuals and organizations that are not candidates. See 52 U.S.C.A. § 30124 (West 2015) (previously codified at 2 U.S.C. § 437g); 11 C.F.R. §§ 113.1, 113.2(e) (2015).

125. See e.g., Philip A. Thompson, Note, *Put Your Mouth Where Your Money Is: How Political Organizations Profit off the First Amendment and What Congress Should Do About It*, 12 FIRST AMEND. L. REV. 725 (2014).

A. Allen West for Congress

In 2012, Allen West for Congress (“West”) filed complaints with the FEC against four FEC-registered political committees, Republican Majority Campaign PAC, Coalition of Americans for Political Equality PAC, Patriot Super PAC, and the Conservative Strikeforce, as well as their officers, for “fraudulently misrepresenting themselves in solicitations and in their communications as acting on behalf of West in violation of [§ 30124(b)].”¹²⁶ At the time, Congressman West, a popular figure in the conservative movement, was locked in a bitter election contest with Patrick Murphy, the eventual winner. Combined, the four Respondents raised over fourteen million dollars in 2012, more than three times what Patrick Murphy raised for the race.¹²⁷

West complained that the Respondents had made solicitations designed to make recipients “easily conclude that . . . the solicitation is either from Congressman West’s campaign or that the solicitor is working with the West campaign.”¹²⁸ In particular, he alleged, the solicitations indicated that the organizations were supporting specific get-out-the-vote efforts, as well as running television ads and social media.¹²⁹ Furthermore, the solicitations and accompanying websites used West’s name and photo without permission, as well as stylized Allen West campaign logos.¹³⁰ The websites also had domain names which included West’s name, such as “www.votewest2012.org” and “wesaluteAllenWest.com.”¹³¹

The Respondents spent little, if any, money on actually supporting West’s campaign. In fact, one Respondent had not made a single non-fundraising communication in four years.¹³² As West therefore alleged,

solicitations prey on civic-minded citizens who are led to believe that their contribution may actually be used in support of Allen West, and who presumably have no idea that [each Respondent] simply engages

126. First Gen. Counsel’s Report, MUR 6633, *supra* note 109, at 1–2.

127. Luke Rosiak, *FEC Says It’s Powerless Against ‘Scam PACs’ that May Have Cost Allen West His Seat*, WASH. EXAMINER (Apr. 9, 2014), <http://www.washingtonexaminer.com/fec-says-its-powerless-against-scam-pacs-that-may-have-cost-allen-west-his-seat/article/2546992/comments>.

128. See Complaint at 3, Republican Majority Campaign PAC, MUR 6633 (Fed. Election Comm’n Apr. 22, 2013) [hereinafter Complaint, MUR 6633], <http://eqs.fec.gov/eqsdocsMUR/14044352131.pdf>.

129. See First Gen. Counsel’s Report, MUR 6633, *supra* note 109, at 6–14 (quoting Republican Majority Complaint at 4, MUR 6633 (Fed. Election Comm’n Aug. 23, 2012), <http://eqs.fec.gov/eqsdocsMUR/14044352110.pdf>).

130. *Id.* at 8.

131. *Id.* at 8, 11.

132. See Complaint, MUR 6633, *supra* note 128, at 6.

in an endless cycle of fundraising that ultimately pays for little more than the officer's own fees and benefits.¹³³

The FEC made clear that it found the Respondents' activities to be questionable:

The record leaves little doubt that Respondents sought to use Representative West's likeness to raise funds independently to support his candidacy. Moreover, it appears that Respondents spent very little of the money they raised to support West. Rather, the funds appear to have been spent primarily on additional fundraising, much apparently to vendors in which some Respondents' officers may have held personal financial interest.¹³⁴

Nevertheless, the Commission found that the "record here does not provide a reasonable basis to believe that [the Respondents] made fraudulent misrepresentations in violation of [§ 30124(b)] through their email solicitations, radio advertisement, press releases, or websites."¹³⁵ The Commission based its finding on two main reasons, each indicating that the Respondents' solicitations were not "reasonably calculated to deceive persons of ordinary prudence and comprehension," and therefore did not constitute fraudulent misrepresentations in violation of § 30124(b).¹³⁶

First, the Commission noted, each of the Respondents was properly registered and reporting with the FEC, thereby publicly disclosing its contributions and expenditures.¹³⁷ Explaining that "[f]ailure to file reports with the Commission indicating on what, if anything, the money raised has been spent may be probative of the Committee's intent to misrepresent itself to the public,"¹³⁸ the Commission viewed the Respondents' registration and reporting compliance as weighing in their favor.

Second, the Commission noted that each of the solicitations and communications at issue had included adequate, if sometimes imperfect, disclaimers.¹³⁹ As the Commission had found in previous MURs, "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

133. *Id.* at 5 (internal quotations omitted).

134. First Gen. Counsel's Report, MUR 6633, *supra* note 109, at 2.

135. *Id.* at 20.

136. *Id.* at 19 (quoting *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010)).

137. *Id.* at 21.

138. *Id.* (quoting First Gen. Counsel's Report, MUR 5472, *supra* note 120, at 12).

139. First Gen. Counsel's Report, MUR 6633, *supra* note 109, at 21.

[§ 30124(b)] violation.”¹⁴⁰

The Allen West MURs illustrate the shortcomings of § 30124(b) in the context of nonconnected committees. First, the presence of a disclaimer is functionally meaningless in this context, because so-called scam PACs do not need to misrepresent their identities, but rather their intentions, when engaging in fraudulent fundraising. Second, while compliance with registration and reporting requirements does give donors, in theory, access to information regarding a supposed scam PAC’s expenditures, in reality it is easy to disguise how that money was actually used. For instance, a scam PAC might disclose a payment to a particular vendor, but would not be required to disclose that the PAC’s officers owned the vendor or the amount of work the vendor actually produced. In this sense, § 30124(b) does little to prevent fraud.

III. IDENTIFYING SOLUTIONS

This Section sets forth potential solutions to § 30124(b)’s inadequacy with respect to modern scam PACs. These include the following: (1) amending § 30124(b) to prohibit fraudulent misrepresentations that a person is supporting or opposing a candidate or party; (2) setting forth clear factors which, if found to be present, would indicate fraudulent misrepresentation; and (3) for candidates and parties, understanding that alternative remedy exists under state anti-fraud statutes.

A. Amending § 30124(b)

As Commissioner Ravel notes, the FEC has “for many years, unanimously approved recommendations to Congress that would have taken small steps toward addressing scam PAC activity.”¹⁴¹ As discussed below, however, the FEC’s recommendations would fall short. The author therefore proposes alternative language below.

140. *Id.* (citing First Gen. Counsel’s Report, MUR 2205, *supra* note 58, at 2); *see* First Gen. Counsel’s Report, MUR 3690, *supra* note 61, at 8; First Gen. Counsel’s Report, MUR 3700, *supra* note 63, at 8 (finding no violation where disclaimer disclosed that respondents were responsible for negative satirical postcards that appeared written by the opposing candidate and committee); First Gen. Counsel’s Report, MUR 5089, *supra* note 78, at 8.

141. Ravel, *supra* note 1.

1. *FEC's Proposed Language*

In its most recent Legislative Recommendations,¹⁴² the FEC urges Congress to “revise the prohibitions on fraudulent misrepresentation of campaign authority to encompass all persons purporting to act on behalf of candidates and real or fictitious political committees and political organizations.”¹⁴³

Accordingly, the FEC urges Congress to amend 52 U.S.C. § 30124 as follows¹⁴⁴:

(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, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing* ~~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; [. . .]~~

(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, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing* ~~candidate or political party or employee or agent thereof~~ for the purpose of soliciting contributions or donations [. . .]¹⁴⁵

This language would have three effects. First, it would prohibit any person, rather than any federal candidate or employee or agent of the same, from engaging in fraudulent misrepresentation under subsection (a). Second, it would prohibit fraudulently misrepresenting one’s self as an “other real or fictitious political committee or organization,”¹⁴⁶ for either political or fundraising purposes, in addition to candidates, political parties, and employees or agents of the same. Third, it would

142. As this is written, the FEC has yet to release its Legislative Recommendations for 2015.

143. LEE E. GOODMAN ET AL., LEGISLATIVE RECOMMENDATIONS OF THE FEDERAL ELECTION COMMISSION 7 (2014), <http://www.fec.gov/law/legrec2014.pdf>.

144. The FEC’s proposed additions are in italics, and its deletions are crossed through.

145. *Id.* at 7–8; 52 U.S.C.A § 30124 (West 2015).

146. 52 U.S.C.A. § 30124(b)(1).

remove the requirement under subsection (a) that a fraudulent misrepresentation for political purposes be “damaging” to the misrepresented party, thereby expanding the scope of fraudulent misrepresentations prohibited under that subsection by removing that qualifier.

With respect to this proposed language, the Legislative Recommendation notes that “the current statute does not bar fraudulent misrepresentation or solicitation on behalf of a corporate or union separate segregated fund or *a non-connected political committee*.”¹⁴⁷ Put another way, the FEC’s concern is that § 30124(b) prohibits a would-be scam artist from posing as fundraising on behalf of a candidate or party, but it does not prohibit that same individual from posing as fundraising on behalf of an outside organization, such as a super PAC or other nonconnected political committee.

While this concern is valid, the FEC’s proposed amendment would do nothing to address the concern of outside groups openly raising money under their own identity, but on the fraudulent pretense of supporting or opposing a particular candidate or party.

2. *Alternative Proposed Language*

In order to address this vulnerability, amended language should prohibit the fraudulent misrepresentation of acting, not only “for or on behalf of,” but also “in support of or opposition to” a candidate, political party, political committee or organization, or employee or agent of the same. Section 30124(b) therefore should be amended to read as follows¹⁴⁸:

(b) Fraudulent solicitation of funds

No person shall—

- (1) fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of, **or in support of or opposition to**, any *candidate, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing* ~~candidate or political party or employee or agent thereof~~ for the purpose of soliciting contributions or donations [. . .]

This language would prohibit a person from misrepresenting themselves, with the intent to deceive,¹⁴⁹ that they are speaking, writing, or otherwise acting in support of or opposition to a candidate, party,

147. *Id.* (emphasis added).

148. The author’s added language is in bold. The FEC’s proposed additions are in italics, and its deletions are crossed through.

149. *E.g.*, *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010).

committee, or employee or agent of the same, bringing fraudulent misrepresentation of intentions for fundraising purposes under the FEC's authority.

B. Interpretive Factors

As discussed above, the key inquiry in determining whether "fraudulent misrepresentation" has occurred is whether or not there was the intent to deceive.¹⁵⁰ Although it might be unclear in many circumstances whether such intent was present, the FEC should identify clear factors under which it will find that fraudulent misrepresentation has occurred.

First, the presence of demonstrable factual misstatements in solicitations, such as that a PAC already is engaged in political activities like get-out-the-vote (GOTV) or running ads, should weigh in favor of finding fraudulent misrepresentation. Unlike generalized, prospective statements, such as "help us support Candidate X," obvious factual misstatements, particularly about past activity, are hard to explain as anything other than having been intended to deceive.

Second, while it is difficult to project in any meaningful fashion a standard percentage a PAC "should" be spending on any particular candidate or activity, a history of not spending money over time could be taken as evidence that a committee is raising money under fraudulent circumstances. Fundraising can be arduous, even for popular, established candidates. As the Allen West Respondents noted, for instance, Representative West's own October 2011 Quarterly Report showed that the campaign spent sixty-seven percent of its operating expenditures on fundraising activity.¹⁵¹ Fundraising can be frustratingly inefficient, with costs affected by factors such as whether donors primarily are large-dollar donors contributing, for instance, to a super PAC not subject to contribution limits, or small-dollar donors who respond to direct mail paid for by the soliciting committee. A super PAC dependent upon a few high-level donors, for instance, might well spend less on fundraising as a total percentage of its expenditures than a political committee which relies upon direct mail to solicit contributions from individuals in smaller amounts.

That said, where a committee raises substantial funds over time, but engages only in minimal political activity, it should be within the FEC's good judgment to weigh that fact when determining whether the committee is raising funds through fraudulent misrepresentation.

150. See First Gen. Counsel's Report, MUR 3690, *supra* note 61, at 6.

151. See First Gen. Counsel's Report, MUR 6633, *supra* note 109, at 16.

Third, evidence that one or more principals of a committee are raising funds to both support or oppose rival candidates in the same election would seem to indicate an attempt to deceive, provided the Respondent is otherwise alleged to have engaged in fraudulent misrepresentation, since those groups or individuals would be “playing both sides,” or at least motivated by something other than political concern.¹⁵²

C. Increasing Donor Awareness

By law, MURs are confidential until such time as the file is closed,¹⁵³ which might be several years after the initial complaint is filed, and frequently does not occur until after the affected election.¹⁵⁴ This means that, apart from news reports or other secondary accounts, donors have no means of identifying whether a particular PAC has been accused of fraudulently misrepresenting itself to donors or even if, as in the case of Allen West, the candidate or party has actively sought to distance itself from a PAC claiming to support it. This confidentiality serves the important function of protecting the accused amidst the fluidity of an election cycle, but it leaves donors in the dark about whether a candidate or party has filed a complaint against a possible scam PAC.

The FEC should implement certain practical solutions that would enable donors, as well as candidates and committees, to be better informed about potential scam PACs, thereby limiting the ability of would-be scam PACs to obtain contributions under fraudulent pretenses.

1. “Do Not Donate” Lists

The FEC could establish a searchable database on its website which allows candidates and parties to submit the names of groups those entities want to flag for donors or otherwise make clear that they are not affiliated. An Allen West, for instance, could submit the names

152. In MUR 5155 (Friends for a Democratic White House), the FEC did not take into consideration at all the fact that the Respondent Treasurer maintained two committees, each raising funds to support opposing candidates, in finding no evidence of fraudulent misrepresentation. See First Gen. Counsel’s Report, MUR 5155, *supra* note 111, at 8–9.

153. 52 U.S.C.A. § 30109(a)(12)(A) (2012); FED. ELECTION COMM’N, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS 22 (May 2012), http://www.fec.gov/em/respondent_guide.pdf.

154. Compare, e.g., FED. ELECTION COMMISSION, *supra* note 47 (search MUR 5155 under field for “Case #”) (complaint filed Nov. 16, 2000; file closed May 9, 2006), *with id.* (search MUR 6633 under field for “Case #”) (complaint filed Aug. 23, 2012; file closed Feb. 25, 2014).

of an alleged scam PAC and/or its treasurer or other officers, which would appear on the FEC's website, without reference to any ongoing or closed MUR. Donors who receive solicitations from outside groups then could search the database to see whether that organization and/or any individual officers are listed. Without disclosing the existence of an ongoing MUR, this would enable candidates and parties to effectively warn donors to beware of those organizations. Alternatively, the FEC could clarify that national party committees or candidates themselves could maintain such "Do Not Donate" lists without violating the confidentiality requirement for Matters Under Review, provided no mention is made of any specific, ongoing MUR.¹⁵⁵

2. Disclosure of Financial Interests in Vendors

FEC-registered committees currently are required to itemize and report any operating expenditure which aggregates to more than \$200 in a calendar year, meaning that information regarding the salaries paid to employees and vendors of a committee is publically disclosed.¹⁵⁶ What is not readily available to the average donor, however, is information regarding whether the decision-makers at a particular committee are self-dealing, contracting with firms owned by those decision-makers for committee work.

There is nothing inherently wrong with cross-pollination between the principals of a political committee and vendors serving the committee. For instance, a political committee whose treasurer is an attorney might well use that attorney's law firm for related legal work.¹⁵⁷ Nevertheless, there is something unsettling about the scenario envisioned by Commissioner Ravel and others whereby a PAC overwhelmingly uses the funds it has raised to pay for more fundraising by a firm which the PAC's principals happen to own, thereby effectively funneling contributions into those officers' pockets, without that information being available to donors.

Without prohibiting PACs from engaging the vendors of their choosing, the FEC could require a nonconnected PAC to disclose on its Statement of Organization or its regular filings any outside vendors under contract in which PAC officers or board members have financial

155. 52 U.S.C.A. § 30109(a)(12) (West 2015) (previously codified at 2 U.S.C. § 437g).

156. 11 C.F.R. § 104.3(b)(3)(i) (2015).

157. See, e.g., Marin Corgan, *The Campaign-Finance Activist Who Thinks We Need More Money in Politics, Not Less*, N.Y. MAG. (Sept. 21, 2015), <http://nymag.com/daily/intelligencer/2015/09/frat-house-fund-raising-with-dan-backer.html> (describing attorney Dan Backer's role with numerous PACs).

interests. This would provide donors with a clearer picture of the committee's financial dealings.

IV. ALTERNATIVE REMEDY UNDER STATE ANTI-FRAUD STATUTES

This Article, like the discussion about fraudulent misrepresentation in general, has focused on the FEC's role in regulating and preventing such activity. However, FEC enforcement is not the only means by which a candidate, party, or even donors may seek redress. Nor is it guaranteed to be the most effective. After all, the FEC's own Chair at the time recently described the FEC as "worse than dysfunctional" and cast doubt on its ability to enforce election laws.¹⁵⁸

Recent experience suggests that candidates should look to state anti-fraud statutes when combating fraudulent misrepresentation. Whereas Representative West filed a complaint with the FEC and lost, former Virginia Attorney General Ken Cuccinelli brought a civil lawsuit against several organizations he characterized as "scam PACs" under state and federal anti-fraud laws, resulting in a favorable settlement.¹⁵⁹

*A. Ken Cuccinelli for Governor, Inc.*¹⁶⁰

In September 2014, Ken Cuccinelli, the Republican candidate for Governor in Virginia in 2013, and his campaign filed a civil complaint against Conservative StrikeForce PAC (of the Conservative StrikeForce at issue in the Allen West complaint), its treasurer, and others alleging that they had "engaged in a national fundraising scam aimed at small donors supportive of" his campaign.¹⁶¹ Unlike Allen West, Cuccinelli eschewed the FEC entirely and instead filed suit in the United States District Court for the Eastern District of Virginia.¹⁶²

Echoing Allen West, Cuccinelli alleged that "Defendants' political fundraising . . . was not a means to the legitimate end of supporting the Cuccinelli campaign, but rather was an illegitimate end in itself, with the Virginia gubernatorial election merely serving as 'cover' for

158. Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?_r=0.

159. *Ken Cuccinelli for Governor, Inc. v. Conservative Strikeforce PAC*, No. 1:14-cv-1215-LO-MSN (E.D. Va. Sept. 8, 2012).

160. In the interest of full disclosure, the author has previously worked at a law firm that represented one of the defendants in this matter. The author had no involvement in that representation, however.

161. Complaint at 1, *Ken Cuccinelli for Governor, Inc.*, No. 1:14-cv-1215-LO-MSN [hereinafter Cuccinelli Complaint].

162. See *Ken Cuccinelli for Governor, Inc.*, No. 1:14-cv-1215-LO-MSN.

Defendants to prey on unsuspecting small donors across the country.”¹⁶³ In particular, he alleged, the defendants fraudulently had “explicitly promised donors that all money donated in response to Defendants’ solicitations would either be contributed by Defendants directly to the Cuccinelli campaign or spent by Defendants as independent expenditures in support of the Cuccinelli campaign,” but instead spent “less than one half of 1% of the approximately \$2.2 million that Defendants raised in 2013” on helping the campaign.¹⁶⁴

Cuccinelli alleged violations of the federal Lanham Act,¹⁶⁵ Virginia’s false advertising statute,¹⁶⁶ common law breach of contract, and Virginia’s state statute prohibiting the unauthorized use of an individual’s “name, portrait, or picture without having first obtained the written consent of such person . . . for advertising purposes or for the purposes of trade.”¹⁶⁷

In particular, Cuccinelli alleged that the defendants had sent numerous fundraising solicitations misrepresenting that they performed specific tasks in support of Cuccinelli’s candidacy. These included specific statements such as:

- “Please make an urgent contribution . . . to help elect Ken Cuccinelli”;¹⁶⁸
- “We must pay for phone banks, get-out-the-vote programs, mailings, rallies—whatever it takes”;¹⁶⁹
- “We just launched our emergency Virginia Victory Money Bomb because Tea Party hero Ken Cuccinelli is about six points behind and he’s desperately short on cash”;¹⁷⁰
- “We are putting together one of the largest GOTV efforts in Virginia history. Ken has offices and volunteers in every corner of the state. Now all we need is to pay for the massive phone banks, the absentee ballot campaigns, and the massive ‘knock and drag’ effort that will win this”;¹⁷¹ and
- “With your support, we were able to give \$15,000 directly to Ken’s campaign and invest tens of thousands more in get-out-

163. Cuccinelli Complaint, *supra* note 161, at 2.

164. *Id.*

165. 15 U.S.C. § 1125(a) (2012).

166. VA. CODE ANN. §§ 18.2-216, 59.1-68.3 (2014).

167. *Id.* § 8.01-40(A).

168. Cuccinelli Complaint, *supra* note 161, at 5.

169. *Id.*

170. *Id.* at 6.

171. *Id.* at 8.

the-vote work on his behalf.”¹⁷²

Defendants also maintained a donation website, the “Cuccinelli Fund,” which represented to prospective donors that “[all] money raised by [the fund] will be spent on behalf of Ken Cuccinelli or given as a direct contribution.”¹⁷³

According to the complaint, these statements were all false. Defendants did not spend any money at all to support Cuccinelli, either through “independent expenditures . . . GOTV activities, phone banks, radio ads, direct mail, door-to-door canvassing, poll workers, Election Day drivers, absentee ballot campaigns, voter identification efforts, rallies, and election lawyers” as had been promised in the solicitation emails.¹⁷⁴ Defendants did make a single \$10,000 contribution to the campaign, which Cuccinelli called “cover” for the defendants’ “‘Scam PAC’ scheme.”¹⁷⁵ Given that Virginia has no contribution limits, the defendants lawfully could have contributed an unlimited amount to the campaign.¹⁷⁶

The defendants ultimately settled out of court, agreeing not to use any political candidate’s name for future fundraising efforts without prior permission, paying Cuccinelli’s campaign \$85,000, and giving it exclusive rights to the PACs’ direct mail and donor lists.¹⁷⁷

Compared to Allen West’s experience, this is a significant victory and illustrates how candidates and parties might better seek remedy against fraudulent political fundraising. Unlike the FEC, courts also have the advantage of potentially enjoining an alleged scam PAC from further solicitations, providing temporary, but immediate injunctive relief during the campaign.¹⁷⁸ Allen West no doubt would have preferred to stop the respondents in his matter before the election, rather than seek (and fail to obtain) remedy after the fact.

172. *Id.* at 12.

173. Cuccinelli Complaint, *supra* note 161, at 25.

174. *Id.* at 16.

175. *Id.* at 12, 16.

176. VA. CODE ANN. § 24.2-900 (2014).

177. Alan Suderman, *Ken Cuccinelli, Former Va. Gubernatorial Candidate, Settles Lawsuit Against Conservative PAC*, WASH. TIMES (May 27, 2015), <http://www.washingtontimes.com/news/2015/may/26/cuccinelli-settles-lawsuit-against-conservative-pa/>.

178. *See* 52 U.S.C.A. § 30109(a)(6) (West 2015) (previously codified at 2 U.S.C. § 437g) (provides that the FEC may seek injunctions in civil court, but does not enable the FEC to issue injunctions itself).

CONCLUSION

Fraudulent political fundraising should worry candidates, parties, and donors alike. The current law is woefully outdated and does not reflect the role that super PACs and other nonconnected committees play in modern elections. Congress should expand the scope of § 30124 to prohibit the fraudulent misrepresentation of *intention*, meaning how contributions will be spent, as well as *identity*, to prevent nonconnected committees from raising money under fraudulent pretenses from unsuspecting donors. In addition, the FEC should take the steps suggested in this Article to ensure that individual donors are less likely to be duped by bad actors. Although the FEC cannot ensure that donors always will make informed decisions, it can help make sure that donors have enough information to identify potential scam PACs. Fraudulent political fundraising is a blight which threatens to undermine the integrity of our elections. It should not be tolerated.