AGENDA DOCUMENT NO. 00-13

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2000 JAN 28 P 12:26

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JAN 27 2000

MEMORANDUM

AGENDA ITEM
For Meeting of: 2-03-00

SUBMITTED LATE

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Rosemary C. Smith
Assistant General Counsel

Rita A. Reimer
Attorney

SUBJECT: Motion to Begin a Rulemaking to Repeal 11 CFR 100.22(b)

On February 3, 2000, the Commission will consider Agenda Document No. 00-11, a motion that the Office of General Counsel be directed to initiate a rulemaking to repeal 11 CFR 100.22(b).[1] The Commission addressed this same issue on April 29, 1999, when it voted 3-3 on two motions concerning its response to a Petition for Rulemaking filed by the Virginia Society for Human Life. The first vote came on a motion to adopt the Office of General Counsel's recommendation not to open the requested rulemaking, while the second came on a motion to open a rulemaking on this topic. Since neither

[1] 11 CFR 100.22 reads as follows:

Expressly advocating means any communication that – * * *

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

motion received the affirmative vote of four members of the Commission, a Notice of Disposition was issued stating that no further action would be taken on the rulemaking petition at that time. 64 *Fed. Reg.* 27478 (May 20, 1999).

We are circulating Agenda Document No. 99-40, which served as the basis for those votes, as background material for the upcoming discussion on this motion.

Attachment

AGENDA DOCUMENT NO. 99-40

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APR 7 5 18 PM '99

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 7, 1999

MEMORANDUM

AGENDA ITEM
For Meeting of: 4-29-99

TO: The Commission

THROUGH: James A. Pehrkon
Acting Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Susan E. Propper
Assistant General Counsel

Rita A. Reimer
Attorney

SUBJECT: Petition for Rulemaking Filed by James Bopp, Jr., on Behalf of the Virginia Society for Human Life

On January 11, 1999, the Commission received a Petition for Rulemaking from James Bopp, Jr., and the James Madison Center for Free Speech on behalf of the Virginia Society for Human Life. The Commission published a Notice of Availability on the Petition on February 3, 1999, 64 *Fed. Reg.* 5200, and received six comments in response.[1] After reviewing these comments and other information, the Office of General Counsel is recommending that the Commission decline to open a rulemaking in response to this Petition.

The Petition urges the Commission to revise the definition of "express advocacy" set forth at 11 CFR 100.22 by repealing paragraph 100.22(b). The challenged paragraph defines "express advocacy" to include communications in which the electoral portion is "unmistakable, unambiguous, and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."

[1] The Commission received comments from the Brennan Center for Justice; Common Cause; Craig A. Dimitri; the Free Speech Coalition, Inc.; Cleta Mitchell, on behalf of the First Amendment Project of the Americans Back in Charge Foundation; the National Citizens Legal Network; and William Westmiller.

The James Madison Center for Free Speech filed on its own behalf a similar Petition for Rulemaking in 1997. That Petition urged the Commission to repeal paragraph 100.22(b) to reflect the First Circuit's decision in *Maine Right to Life Committee v. FEC ("MRL")*, 914 F.Supp. 8 (D.Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct. 52 (1997), and the Fourth Circuit's decision in *FEC v. Christian Action Network ("CAN")*, 92 F.3d 1178 (4th Cir. 1997), both of which invalidated this provision.

In declining to open a rulemaking in response to the 1997 Petition, the Commission noted that the Ninth Circuit had earlier reached a contrary result in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), the decision on which 11 CFR 100.22(b) is largely based. Thus there is a conflict among the circuits on this issue. The Supreme Court has recognized that, when confronted with this situation, an agency is free to adhere to its preferred interpretation in all circuits that have not rejected that interpretation. *United States v. Mendoza*, 464 U.S. 154 (1984). Indeed, the *Mendoza* Court encouraged agencies to seek reviews in other circuits if they disagree with one circuit's view of the law, since to allow "only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants *certiorari*." *Id.* at 160 (citations omitted). *See* Notice of Disposition, 63 *Fed. Reg.* 8363 (Feb. 19, 1998).

Moreover, the Supreme Court has repeatedly admonished "that denial of a petition for *certiorari* imports nothing as to the merits of a lower court decision." *Griffin v. United States*, 336 U.S. 704, 716 (1949), *reh. denied*, 337 U.S. 921. "A denial of *certiorari* means only that, for one reason or another ... there were not four members of the Court who thought the case should be heard." *Brown v. Allen*, 344 U.S. 443, 492 (1953) (Frankfurter, J., stating the position of a majority of the Court on this point). This is especially true where, as here, the Court has declined to review decisions from different circuits that reach different results on the same question. Notice of Disposition, 63 *Fed. Reg.* at 8363.

However, the primary reason the Commission declined to open a rulemaking in response to the 1997 Petition was its continued belief that the definition of "express advocacy" found at 11 CFR 100.22(b) is constitutional. Limiting express advocacy to communications that are "unmistakable, unambiguous, and suggestive of only one meaning," where "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action" is a narrow standard that can be read consistently with both *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*"). *See* Notice of Disposition, 63 *Fed. Reg.* at 8364.

The reason given in the current Petition for Rulemaking for opening a rulemaking so soon after the earlier Petition was denied is the Commission's decision not to appeal the decision of a U.S. District Court in *Right to Life of Dutchess Co. v. FEC*, 6 F.Supp.2d

248 (S.D.N.Y. 1998), an action which the Petition characterizes as "apparently abandoning the regulations" (Petition at 1, n.1). However, just as is the case when the Supreme Court denies a petition for a writ of *certiorari*, this action simply means that, for whatever reason, there were not the affirmative votes of four Commissioners to appeal the decision. *See* 2 U.S.C. § 437c(c).

The comments on this Petition largely followed those on the 1997 Petition. Some commenters strongly supported the Petition, while others argued that 11 CFR 100.22(b) remains constitutional. For example, one commenter said it is "obvious" all other courts in the country will follow *MRL* and *CAN*. However, it is not unusual for circuits to split on the issues. *See, e.g., IBEW v. NLRB*, 814 F.2d 697, 703-705 (D.C. Cir. 1987), in which the District of Columbia Circuit rejected an NLRB rule which had been issued in response to decisions in eight other circuits and a denial of *certiorari* in one of those cases.[2]

The only changed circumstance presented in the current Petition is the Commission's decision not to appeal the *Dutchess County* decision. The Office of General Counsel does not believe this failure to appeal a district court decision is a sufficiently significant changed circumstance to overturn that earlier decision. Accordingly, we are recommending that the Commission decline to open a rulemaking in response to this Petition.

A draft Notice of Disposition and a letter to the counsel for Petitioner advising him of the Commission's action are attached.

Recommendation

The Office of General Counsel recommends that the Commission:

1. Decline to open a rulemaking in response to the Petition for Rulemaking filed on January 11, 1999, by James Bopp, Jr., on behalf of the Virginia Society for Human Life;

2. Approve the Attached Notice of Disposition for publication in the *Federal Register;* and

3. Approve the attached letter to Mr. Bopp.

Attachments

[2] The NLRB then promulgated another regulation on the topic, closer to its original construction, which was upheld by the Supreme Court in *America Hospital Association v. NLRB*, 499 U.S. 606 (1991).

FEDERAL ELECTION COMMISSION

[NOTICE 1999 -]

11 CFR PART 100

DEFINITION OF "EXPRESS ADVOCACY"

AGENCY: Federal Election Commission.

ACTION: Notice of Disposition of Petition for Rulemaking.

SUMMARY: The Commission announces its disposition of a Petition for Rulemaking filed on January 11, 1999 by James Bopp, Jr., and the James Madison Center for Free Speech on behalf of the Virginia Society for Human Life. The petition urged the Commission to revise its definition of "express advocacy" to reflect certain recent court decisions on this issue. The Commission has decided not to initiate a rulemaking in response to this Petition.

DATE: [insert date of Commission action]

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, or Ms. Rita A. Reimer, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On January 11, 1999, the Commission received a Petition for Rulemaking from James Bopp, Jr., and the James Madison Center for Free Speech on behalf of the Virginia Society for Human Life. The Petition urged the Commission to revise the definition of "express advocacy" set forth at 11 CFR 100.22 by repealing paragraph 100.22(b).

The challenged paragraph defines "express advocacy" to include communications in which the electoral portion is "unmistakable, unambiguous, and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other action."

The Commission published a Notice of Availability on the Petition on February 3, 1999, 64 Fed. Reg. 5200, and received six comments in response. The Commission received comments from the Brennan Center for Justice; Common Cause; Craig A. Dimitri; the Free Speech Coalition, Inc.; Cleta Mitchell, on behalf of the First Amendment Project of the Americans Back in Charge Foundation; the National Citizens Legal Network; and William Westmiller.

The James Madison Center for Free Speech filed on its own behalf a similar Petition for Rulemaking in 1997. That Petition urged the Commission to repeal paragraph 100.22(b) to reflect the First Circuit's decision in *Maine Right to Life Committee v. FEC ("MRL")*, 914 F.Supp. 8 (D.Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct. 52 (1997), and the Fourth Circuit's decision in *FEC v. Christian Action Network ("CAN")*, 92 F.3d 1178 (4th Cir. 1997), both of which invalidated this provision.

In declining to open a rulemaking in response to the 1997 Petition, the Commission noted that the Ninth Circuit had earlier reached a contrary result in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), the decision on which 11 CFR 100.22(b) is largely based. Thus there is a conflict among the circuits on this issue. The Supreme Court has recognized that, when confronted with this situation, an agency is free to adhere to its preferred interpretation in all circuits that have not rejected that interpretation. *United States v. Mendoza*, 464 U.S. 154 (1984). Indeed, the *Mendoza* Court encouraged agencies to seek reviews in other

circuits if they disagree with one circuit's view of the law, since to allow "only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants *certiorari*." *Id.* at 160 (citations omitted). *See* Notice of Disposition, 63 *Fed. Reg.* 8363 (Feb. 19, 1998).

Moreover, the Supreme Court has repeatedly admonished "that denial of a petition for *certiorari* imports nothing as to the merits of a lower court decision." *Griffin v. United States*, 336 U.S. 704, 716 (1949), *reh. denied*, 337 U.S. 921. "A denial of *certiorari* means only that, for one reason or another ... there were not four members of the Court who thought the case should be heard." *Brown v. Allen*, 344 U.S. 443, 492 (1953) (Frankfurter, J., stating the position of a majority of the Court on this point). This is especially true where, as here, the Court has declined to review decisions from different circuits that reach different results on the same question. Notice of Disposition, 63 *Fed. Reg.* at 8363.

However, the primary reason the Commission declined to open a rulemaking in response to the 1997 Petition was its continued belief that the definition of "express advocacy" found at 11 CFR 100.22(b) is constitutional. Limiting express advocacy to communications that are "unmistakable, unambiguous, and suggestive of only one meaning," where "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action" is a narrow standard that can be read consistently with both *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*"). *See* Notice of Disposition, 63 *Fed. Reg.* at 8364.

The sole reason given in the current Petition for opening a rulemaking so soon after the earlier Petition was denied is the Commission's decision not to appeal a U.S. District Court's

decision in *Right to Life of Dutchess Co. v. FEC*, 6 F.Supp.2d 248 (S.D.N.Y. 1998), an action which the Petition characterizes as "apparently abandoning the regulations" (Petition at 1, n.1). However, just as is the case when the Supreme Court denies a petition for a writ of *certiorari*, this action simply means that, for whatever reason, there were not the affirmative votes of four Commissioners to appeal the decision. *See* 2 U.S.C. § 437c(c).

The comments on this Petition largely followed those on the 1997 Petition. Some commenters strongly supported the Petition, while others argued that 11 CFR 100.22(b) remains constitutional.

As noted above, the only basis for action presented in the current Petition is the Commission's decision not to appeal the *Dutchess County* decision. The Commission does not believe this failure to appeal a district court decision is a sufficiently significant changed circumstance for it to reverse its recent decision not to open a rulemaking on this issue.

Therefore, at its open meeting of >, 1999, the Commission voted not to initiate a rulemaking to review the Commission's definition of express advocacy found at 11 CFR 100.22. Copies of the General Counsel's recommendation on which the Commission's decision is based are available for public inspection and copying in the Commission's Public Records Office, 999 E St. N.W., Washington, D.C. 20463, (202) 694-1120 or toll-free (800)

424-9530. Interested persons may also obtain a copy by dialing the Commission's FAXLINE service at (202) 501-3413 and following its instructions (request document >).

Scott E. Thomas
Chairman
Federal Election Commission

DATED:_____

BILLING CODE: 6715-01-M

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

James Bopp, Jr., Esq.
JAMES MADISON CENTER FOR FREE SPEECH
1747 Pennsylvania Ave. N.W., Suite 1000
Washington, D.C. 20006

Dear Mr. Bopp,

On > , 1999, the Commission decided not to initiate a rulemaking at this time to revise the definition of "express advocacy" set forth at 11 CFR 100.22(b), as proposed in the Petition for Rulemaking you filed on behalf of the Virginia Society for Human Life.

The only new information contained in this second petition is the fact that the Commission failed to appeal a federal district court decision. However, this does not mean, as you assert, that the Commission has "abandoned" its support of this regulation.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Scott E. Thomas
Chairman

Enclosures