

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2011 JUN 13 P 4: 47

AGENDA ITEM

June 13, 2011

For the Meeting of 6-15-11

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Christopher Hughey
Acting General Counsel

pch

Rosemary C. Smith
Associate General Counsel

RCS

Robert M. Knop
Assistant General Counsel

RMK

Cheryl A.F. Hemsley
Attorney

CAFH by RMK

Theodore M. Lutz
Attorney

TML

SUBJECT: Notice of Availability – Petition for Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations submitted by the James Madison Center for Free Speech

On January 26, 2010, the Commission received a Petition for Rulemaking (“Petition”) from the James Madison Center for Free Speech. The Petition asks the Commission to conform its regulations regarding independent expenditures and electioneering communications made by corporations, membership organizations, and labor organizations to the decision of the Supreme Court in Citizens United v. FEC. See Attachment 1.

The Office of General Counsel has examined the Petition and determined that it meets the requirements of 11 CFR 200.2(b). Therefore, we have drafted the attached Notice of Availability (“Notice”) seeking comment on whether the Commission should initiate a rulemaking on the proposal in the Petition. See Attachment 2. The Notice will be published in the *Federal Register* pursuant to 11 CFR 200.3(a)(1).

In keeping with the Commission's usual procedure, the Notice does not address the merits of the Petition. Instead, it states that consideration of the merits will be deferred until the close of the comment period.

The Office of General Counsel requests that this draft be placed on the agenda for the June 15, 2011, open meeting.

Attachments

James Madison

JAMES MADISON CENTER FOR FREE SPEECH

GENERAL COUNSEL

James Bopp, Jr., Esq.

January 26, 2010

The Federal Election Commission
c/o Amy Rothstein, Assistant General Counsel
999 E Street, N. W.
Washington, D. C. 20463
ARothstein@fec.gov

Ladies and Gentlemen:

Enclosed please find a petition for rulemaking from the James Madison Center for Free Speech following *Citizens United v. FEC*, 558 U.S. ____, 130 S.Ct. ____ (2010).

Thank you for your consideration.

Respectfully submitted,

JAMES MADISON CENTER
FOR FREE SPEECH

James Bopp

James Bopp, Jr., General Counsel
Randy Elf, Counsel

Copies to commissioners' offices

ATTACHMENT 1 OF 2

Before the Federal Election Commission

**Petition for Rulemaking Following *Citizens United v. FEC*
Regarding 11 C.F.R. §§ 114.2, 114.4, 114.9, 114.10, 114.14, and 114.15**

The James Madison Center for Free Speech respectfully submits this rulemaking petition following *Citizens United v. FEC*, 558 U.S. ____, 130 S.Ct. ____ (2010), and requests that the Federal Election Commission adopt temporary and permanent regulations (1) stating that it will not enforce 2 U.S.C. § 441b against any independent spending for political speech, including independent expenditures, *see generally Buckley v. Valeo*, 424 U.S. 1, 44 & n.52, 80 (1976), and electioneering communications, *see generally 2 U.S.C. § 434.f.3.A.i* (2002), and (2) conforming FEC regulations to *Citizens United*. *See* 11 C.F.R. § 200.2.a.1 (1992). The James Madison Center submits that such conformance should include:

- Repealing 11 C.F.R. §§ 114.2 (2007) and 114.14 (2007) insofar as they implement the Section 441b bans *Citizens United* struck down.
- Acknowledging that Section 441b no longer bans corporations, unions, or membership organizations from engaging in independent spending for political speech beyond their restricted classes, *see generally 2 U.S.C. § 431.9.B.iii* (2002); 11 C.F.R. 114.3 (2002), and repealing 11 C.F.R. § 114.4 (2007) insofar as it implements Section 441b and bans such speech.

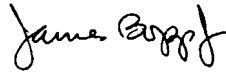
- Repealing 11 C.F.R. § 114.9 (2006) insofar as it implements Section 441b and bans independent spending for political speech.
- Repealing 11 C.F.R. § 114.10 (2002), because the *MCFL*-corporation analysis is an exception to the Section 441b ban on corporate independent expenditures and electioneering communications, yet *Citizens United* renders the *MCFL*-corporation analysis unnecessary, compare *McConnell v. FEC*, 540 U.S. 93, 209-11 (2003), and *FEC v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238, 256-65 (1986) (“*MCFL*”), with *Citizens United*, slip op. at 10-12, 20-50,¹ and
- Repealing 11 C.F.R. § 114.15 (2007), the FEC’s version of the appeal-to-vote test. Compare *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457, 469-70, 474 n.7 (2007) (“*WRTL I*”), with *Citizens United*, slip op. at 18-20. The test applies only to electioneering communications as defined in FECA. *WRTL II*, 551 U.S. at 474 n.7. However, under *Citizens United*, the Section 441b ban on electioneering communications is unconstitutional regardless of whether their only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate or candidates in the jurisdiction. Compare *WRTL II*, 551 U.S. at 469-70, with *Citizens United*, slip op. at 7-8, 20-50.

The James Madison Center requests that the FEC adopt these regulations quickly, because 2010 is an election year, and speakers will want

¹ Available at <http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf>.

to exercise – without fear of enforcement or prosecution – the First Amendment rights to political speech *Citizens United* recognizes.

Respectfully submitted,



James Bopp, Jr.
Randy Elf
JAMES MADISON CENTER
FOR FREE SPEECH
1 South Sixth Street
Terre Haute, Ind. 47803
Telephone: (812) 232-2434
Facsimile: (812) 235-3685

January 26, 2010

FEDERAL ELECTION COMMISSION

11 CFR Part 114

[NOTICE 2011 - XX]

**Rulemaking Petition: Independent Expenditures and Electioneering
Communications by Corporations and Labor Organizations**

AGENCY: Federal Election Commission

ACTION: Rulemaking petition: Notice of Availability

SUMMARY: On January 26, 2010, the James Madison Center for Free Speech submitted to the Commission a Petition for Rulemaking. The Petition urges the Commission to conform its regulations regarding independent expenditures and electioneering communications made by corporations, membership organizations, and labor organizations to the decision of the Supreme Court in Citizens United v. FEC. The Petition is available for inspection in the Commission's Public Records Office, on its website, <http://www.fec.gov/fosers/>, and through its Faxline service.

DATES: Statements in support of or in opposition to the Petition must be submitted on or before [insert date 60 days after the date of publication in the Federal Register].

ADDRESSES: All comments must be in writing. Comments may be submitted electronically via the Commission's website at <http://www.fec.gov/fosers/>. Commenters are encouraged to

1 submit comments electronically to ensure timely receipt and
2 consideration. Alternatively, comments may be submitted in
3 paper form. Paper comments must be sent to the Federal
4 Election Commission, Attn.: Robert M. Knop, Assistant
5 General Counsel, 999 E Street, NW., Washington, D.C. 20463.
6 All comments must include the full name and postal service
7 address of a commenter, and of each commenter if filed jointly,
8 or they will not be considered. The Commission will post
9 comments on its website at the conclusion of the comment
10 period.

11 **FOR FURTHER**
12 **INFORMATION**
13 **CONTACT:**

Mr. Robert M. Knop, Assistant General Counsel, or Ms. Cheryl
14 A. F. Hemsley, Attorney, 999 E Street, NW., Washington, D.C.
15 20463, (202) 694-1650 or (800) 424-9530.

16 **SUPPLEMENTARY**
17 **INFORMATION:**

18 The Federal Election Commission (“Commission”) has received a Petition for
19 Rulemaking from the James Madison Center for Free Speech. The petitioner asks that
20 the Commission conform FEC regulations at 11 CFR 114.2, 114.4, 114.9, 114.10,
21 114.14, and 114.15 to the decision of the Supreme Court in Citizens United v. FEC, 558
22 U.S. ____, 130 S. Ct. 876 (2010) allowing corporations, membership organizations, and
23 labor organizations to make independent expenditures and electioneering
24 communications. The Commission seeks comments on the petition.

1 Copies of the Petition for Rulemaking are available for public inspection at the
2 Commission's Public Records Office, 999 E Street, NW., Washington, D.C. 20463,
3 Monday through Friday between the hours of 9 a.m. and 5 p.m., and on the
4 Commission's website, <http://www.fec.gov/fosers/>. Interested persons may also obtain a
5 copy of the Petition by dialing the Commission's Faxline service at (202) 501-3413 and
6 following its instructions, at any time of the day and week. Request document # 272.

7 Consideration of the merits of the Petition will be deferred until the close of the
8 comment period. If the Commission decides that the Petition has merit, it may begin a
9 rulemaking proceeding. Any subsequent action taken by the Commission will be
10 announced in the Federal Register.

11
12
13
14
15
16
17
18
19
20
21

Cynthia L. Bauerly
Chair
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U