



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
 Informed Catholic Citizens) MUR 6137
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)

**STATEMENT OF REASONS
OF CHAIR CYNTHIA L. BAUERLY AND
COMMISSIONERS STEVEN T. WALTHER AND ELLEN L. WEINTRAUB**

This matter concerns an automated telephone call to almost 70,000 people that expressly advocated the election of John McCain and the defeat of Barack Obama in the 2008 presidential election. Informed Catholic Citizens (“ICC”), a Colorado-based 501(c)(4) organization, paid for the call. On January 19, 2011, all six Commissioners voted to find reason to believe that ICC violated the Federal Election Campaign Act of 1971, as amended (the “Act”) and Commission regulations by failing to report an independent expenditure for the call and by failing to include a full disclaimer.¹ However, based on the relatively small amount of money spent on the production and dissemination of the call, the Office of General Counsel (“OGC”) subsequently recommended that the Commission exercise its prosecutorial discretion² and take no further action other than sending a letter of caution to ICC about the Act’s independent expenditure reporting and disclaimer requirements. We disagreed with OGC’s recommendation to take no

¹ Chair Bauerly, Vice Chair Hunter, and Commissioners McGahn, Petersen, Walther and Weintraub voted to find reason to believe that ICC violated 2 U.S.C. §§ 434(c), 434(g), and 441d(a) and authorize an investigation. Certification in MUR 6137, dated January 24, 2011 (“Jan. 24 Cert.”). Additionally, while the complainant alleged that ICC made prohibited corporate independent expenditures to pay for the call at issue in this matter, the Commission voted unanimously to find no reason to believe that ICC violated 2 U.S.C. § 441b in light of the holding in *Citizens United v. FEC*, ---U.S.---, 130 S.Ct. 876 (2010) (prohibition on corporate independent expenditures found unconstitutional), which rendered this allegation moot. *Id.* Finally, the complainant also alleged that ICC should have registered and complied with certain other reporting requirements as a political committee. See 2 U.S.C. §§ 433, 434. The Commission was evenly divided as to whether to find reason to believe regarding this allegation. See Jan. 24 Cert. For the reasons set forth in the First General Counsel’s Report (FGCR), we voted to find reason to believe regarding this allegation. See *id.*; FGCR at 6-12.

² See *Heckler v. Chaney*, 470 U.S. 821 (1985).

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further action, and instead voted to seek a statutory penalty of \$7,500,³ as permitted under the Act. *See* 2 U.S.C. § 437g(a)(5)(A).⁴

Shortly before the 2008 election, ICC paid for an automated phone call that was placed to nearly 70,000 Colorado households featuring Fr. Bill Carmody, pastor of Holy Family parish in Colorado Springs, Colorado (the “Carmody call”). The Carmody call followed this script:

Hello, this is Fr. Bill Carmody, Pastor of Holy Family parish in Colorado Springs. I’m calling on behalf of Informed Catholic Citizens about the importance of your vote in this election.

Regardless of the spinning that some politicians have done, the Catholic Church’s opposition to the evil of abortion has always been the same and is crystal clear.

Why is it important in this election? John McCain has a record of supporting life, but in the words of Denver Archbishop Charles Chaput, Barack Obama “is the most committed abortion-rights presidential candidate of either major party” in 35 years, and the Democratic Party platform adopted in Denver is “clearly anti-life.”

There are many important issues to consider, but as Archbishop Chaput says, “every other human right depends on the right to life.”

If you have not already voted, I pray that you will search your conscience carefully and consider all the information you deem important. And, then vote like life depended on it – because it does.

This message is paid for by Informed Catholic Citizens.

ICC Response (“Resp.”), Ex. A-1.

On January 19, 2011, the Commission unanimously concluded that the Carmody call contained express advocacy and voted to find reason to believe that ICC violated the reporting

³ The term “statutory penalty” refers to a civil penalty at the statutorily-prescribed amount, which is indexed for inflation and is currently set at \$7,500. *See* 2 U.S.C. § 437g(a)(5)(A); Pub. L. 101-410, § 5(a); 11 CFR § 111.24(a)(1) (2009).

⁴ The vote to support OGC’s recommendation failed by a vote of 3-3. Vice Chair Hunter and Commissioners McGahn and Petersen voted to take no further action. We dissented. Certification in MUR 6137 (ICC), dated October 21, 2011. Subsequently, Chair Bauerly and Commissioner Weintraub voted to seek a statutory penalty, which failed by a vote of 3 to 2. Vice Chair Hunter and Commissioners McGahn and Petersen dissented. *Id.* While Commissioner Walther could not be present for the vote, he would have supported a statutory penalty for the reasons set forth herein.

requirements in 2 U.S.C. §§ 434(c), 434(g) and 441d(a).⁵ The Commission also authorized a limited additional investigation to ascertain the amount of money spent, timing and number of recipients for the call. During the investigation, ICC produced an October 29, 2008 invoice indicating that the Carmody call cost \$2,723.92 and that the call had been made to 68,098 recipients.⁶

ICC argued that the Carmody call was not subject to any reporting or disclaimer requirements because the call script does not contain express advocacy, as it lacks “specific words” calling for the election or defeat of a federal candidate. See ICC Response at 4. We disagree. The call script compares McCain’s (pro-life) and Obama’s (pro-choice) positions on abortion, and then directs the recipient to “vote like life depended on it – which it does.” The message is clear: vote for McCain and not for Obama. In fact, the Carmody call’s message bears a striking resemblance to the “vote pro-life” message that the Supreme Court confirmed was express advocacy in *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238, 248 (1986) (“*MCFL*”). Therefore, all six Commissioners agreed that the Carmody call contained express advocacy, should have been reported as an independent expenditure, and required a full disclaimer under the Act.⁷

Having reached this consensus, we had hoped the Commission could have agreed on a civil penalty in this matter after the investigation revealed that ICC’s message, which went unreported and contained only a partial disclaimer, reached so many voters. However, based on the Carmody call’s low dollar value, OGC recommended no further action. See General Counsel Report #2 at 3-4. Nonetheless, the Act does not require penalties to be rigidly calculated based on the amount of money at issue. Rather, the Act provides that if the Commission believes a violation has been committed, as part of a conciliation agreement, the violator may be required to pay a penalty that “does not exceed the greater of [the statutory penalty] or an amount equal to any contribution or expenditure involved.” 2 U.S.C. § 437g(a)(5)(A). Thus, the Commission has discretion through conciliation to seek a statutory penalty amount, notwithstanding the relatively low cost of a given expenditure. The exercise of this discretion should be based on the statutory guidelines, and the mitigating and aggravating circumstances present in any given case.

⁵ Although the Carmody call script does contain a partial disclaimer, it does not state ICC’s “permanent street address, telephone number or World Wide Web address” or “that the communication is not authorized by any candidate or candidate’s committee” as required by the Act. See 2 U.S.C. § 441d(a)(3); see also footnote 7 below.

⁶ The parties’ submissions appear to conflict about the exact date the call was transmitted, but there is no dispute that it took place within 20 days of, but more than 24 hours before, the election. See 2 U.S.C. § 434(g)(1); see also footnote 7 below.

⁷ The Act requires any person who is not a political committee and who makes independent expenditures of at least \$250 in aggregate during a calendar year to comply with certain reporting requirements. See 2 U.S.C. § 434(c). In addition, a person making an independent expenditure in excess of \$1000 within 20 days of, but more than 24 hours before, an election must report the independent expenditure with the Commission within 24 hours. See 2 U.S.C. § 434(g)(1). Finally, the Act and Commission regulations also require all “public communications” resulting from independent expenditures (including 500 or more identical calls) to contain disclaimers stating that the communications are not authorized by any candidate or candidate committee and providing contact information for the person who paid for the communication. See 2 U.S.C. § 441d(a)(3); 11 C.F.R. §§ 100.26, 100.28, 110.11(a).

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See *Guidebook for Complainants and Respondents on the FEC Enforcement Process*, at 15-16, December 2009.

A statutory penalty is warranted here. Although the Carmody call may have been relatively inexpensive, it appears to have reached almost 70,000 recipients. Thus, while the cost was low, the potential impact was substantial. And the message conveyed – that recipients should vote for McCain over Obama – was express advocacy. Indeed, the call to action in this script is virtually identical to the message deemed to be express advocacy in *MCFL*.⁸

The civil penalties contemplated by the Act serve an important purpose – to provide an incentive for accurate and timely reporting and compliance with the other requirements of the Act and Commission regulations. Moreover, the disclosure and disclaimer provisions that ICC failed to follow “help citizens make informed choices in the political marketplace.” *Citizens United v. FEC*, —U.S.—, 130 S.Ct. 876, 914 (2009) (internal quotations omitted). The Commission should encourage compliance with these core provisions of the Act. The Commission’s failure to pursue any civil penalty risks sending the message that the Commission does not take the Act’s disclosure requirements seriously. That would be unfortunate.

11/21/2011
Date

Cynthia L. Bauerly
Cynthia L. Bauerly
Chair

11/21/11
Date

Steven T. Walther
Steven T. Walther
Commissioner

11/21/11
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

⁸ Additionally, we note that ICC, led by a former member of Congress, appears to be a sophisticated organization that was, or should have been, aware of the Act’s reporting and disclaimer requirements.

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