FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Unknown Respondents	)	MUR 6543
	)	

STATEMENT OF REASONS
OF CHAIR ELLEN L. WEINTRAUB

The facts in this case present an issue that has been before the Commission on numerous occasions: whether the text of a particular communication, in this case a single robocall, contained express advocacy. I did not view this as a hard case, and would have supported a finding that the text of the robocall contained express advocacy as defined under 11 C.F.R. § 100.22(a) or 11 C.F.R. § 100.22(b). The Commission has made clear since at least 2007 that both provisions are equally enforceable; recent case law has uniformly supported this view.[1] Be that as it may, there were not four votes here to support any application of the regulation. In the very least, however, we could have disposed of this matter quickly in advance of the November 2012 general election. Instead, it took almost six months to decide.[2] We need to do better.

The facts in this case present a clear example of express advocacy. The complainant, a resident of North Carolina's Tenth Congressional District, alleged that he received the following recorded message on his home answering machine:

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[1]For example, just recently, the United States District Court for the District of Wyoming dismissed as-applied and facial challenges to 11 C.F.R. § 100.22(b). The court relied on *McConnell v. FEC*, 540 U.S. 93 (2003), *FEC v. Wisconsin Right To Life (WRTL)*, 551 U.S. 449 (2007), and *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010), concluding that "(t)he FEC disclaimer requirements at issue are necessary to provide the electorate with information and to insure that the voters are fully informed about the person or group who is speaking." *Free Speech v. FEC*, No. 2:12-cv-00127-SWS (D. Wyo. Mar. 19, 2013)(citing *Citizens United*, 130 S. Ct. at 915).

[2] The First General Counsel's Report (FGCR) in this matter was circulated to the Commission on August 29, 2012. The Commission first took up the matter at our October 16, 2012 executive session. After it was raised at multiple meetings, on January 29, 2013, I voted with Commissioner Walther and then-Commissioner Bauerly to find reason to believe that respondents violated 2 U.S.C. §§ 441d and 434. Vice Chairman McGahn and Commissioners Hunter and Petersen dissented. *See* Certification in MUR 6543, dated January 31, 2013. Another month passed. Finally, on February 26, 2013 – six months after the original circulation – the Commission voted unanimously to close the file. *See* Certification in MUR 6543, dated February 27, 2013.

> Hello, this is Betty, one of your neighbors. I'm calling to share some thoughts about voting on May 8th of this year. Let me tell you, I'm a Republican and my husband John is an Independent, and we agree on one thing – *what are we doing sending Congressman McHenry back to Washington? McHenry is not one of us.* McHenry's politics and personal life style is going to blow up in our face sooner or later. Remember Delay from Texas, Foley from Florida, and Senator Craig from Idaho. We are also voting for a marriage amendment in May and McHenry is not that kind of Conservative. McHenry is not one of us. Bye now.[3]

If the robocall was a public communication[4] expressly advocating the election or defeat of a clearly identified candidate, it required a disclaimer. 11 C.F.R. § 110.11(a)(2). Under 11 C.F.R. § 100.22(a), a communication contains express advocacy when it uses phrases, campaign slogans, or individual words "which in context can have no other reasonable meaning than to encourage the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter 76,' 'Reagan/Bush' or 'Mondale!'"

The communication at issue here explicitly states that its subject is "voting on May 8th of this year" and then declares "what are we doing sending Congressman McHenry back to Washington? McHenry is not one of us." I had no difficulty supporting a finding that these statements satisfied the express advocacy requirements under 11 C.F.R. § 100.22(a). Heard "in context [they] can have no other reasonable meaning than to encourage the...defeat of" Congressman McHenry. This is true notwithstanding that the call to defeat is phrased as a question. One cannot sidestep the regulation simply by using a rhetorical device.

Section 100.22(b) is applicable as well. Under 11 C.F.R. § 100.22(b), a communication is considered express advocacy if "[w]hen taken as a whole and with limited reference to external events...[the communication] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates(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."

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[3] *See* FGCR at 2 (emphasis added).

[4] A "public communication" includes a communication by "telephone bank to the general public." 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. The "telephone bank" standard is satisfied when "more than 500 calls of an identical or substantially similar nature were made within any 30-day period." 2 U.S.C. § 431(24); 11 C.F.R. § 100.28. Here, the same robocall was allegedly made to multiple voters in the 10th Congressional District of North Carolina on or about March 3, 2012. The facts of this case suggest that there is ample reason to believe that the quantity and timing requirements under the Act and Commission regulations are met. *See* FGCR at 5.

Here, there is an unambiguous electoral reference to "voting on May 8th." Moreover, reasonable minds could not differ about the meaning of the statement "what are we doing sending Congressman McHenry back to Washington? McHenry is not one of us." The statement plainly encourages McHenry's defeat and does not encourage any other kind of action. Accordingly, the robocall satisfies 11 C.F.R. § 100.22(b) as well.

I have consistently voted to enforce both provisions of 11 C.F.R. § 100.22.[5] It has been suggested that, at least until recently, section 100.22(b) was unenforceable in the Fourth Circuit (including North Carolina), but this is simply not true. There was a time when the Commission did not enforce section 100.22(b) in the First and Fourth Circuits as a result of litigation in those circuits.[6] This changed with the Supreme Court's ruling in *McConnell v. FEC*, which effectively invalidated those lower court decisions that had struck down section 100.22(b).[7] Based on this development, in 2007, the Commission made plain its decision to enforce section 100.22(b) nationwide by publishing a notice to that effect in the Federal Register.[8] Accordingly, the Commission's Office of General Counsel defended the constitutionality of section 100.22(b) in the Fourth Circuit beginning in 2008 with *Real Truth About Obama v. FEC*. That case culminated in the Fourth Circuit decision's last year holding that section 100.22(b) was constitutional.[9] Whatever questions there might have been about the enforceability of section 100.22(b)

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[5] *See, e.g.*, Advisory Opinion 2012-11 (Free Speech); MUR 5831 (Softer Voices); MUR 5833 (Ohio Democratic Party); MUR 5887 (Republican Main Street Partnership PAC).

[6] The First Circuit invalidated 11 C.F.R. § 100.22(b) in 1996, on the grounds that express advocacy could not extend beyond so-called "magic words" of the type referenced in section 100.22(a). *See Maine Right to Life, Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996). The Fourth Circuit reached the same conclusion (in ruling on a fee petition) in *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir.1997) – a holding that made the regulation unenforceable in that circuit as well. On September 22, 1999, the Commission voted to take the position that it would not enforce 11 C.F.R. § 100.22(b) in the First or Fourth Circuits unless or until the law of those circuits changed or was overruled. The Fourth Circuit later formally held that section 100.22(b) was unconstitutional. *See Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001).

[7] The Court pronounced the "magic words" test to be "functionally meaningless" and expressly upheld disclosure requirements applicable to communications that do not contain magic words. *See* 540 U.S. at 191-92. In dissent, Justice Thomas noted that "the Court has, in one blow, overturned every Court of Appeals that has addressed this question," including the First and Fourth Circuits. *See id.* at 278 (Thomas, J., dissenting).

[8] In describing "The Expenditure Path to Political Committee Status," the Commission stated that it can "apply the alternative test set forth in 11 C.F.R. § 100.22(b) *free of constitutional doubt* based on *McConnell*'s statement that a 'magic words' test was not constitutionally required, as certain Federal courts had previously held." Supplemental Explanation and Justification on Political Committee Status, 72 Fed. Reg. 5595, 5604 (Feb. 7, 2007) (emphasis added).

[9] *See RTAA*, 681 F.3d at 550 n.2. Plaintiff Real Truth About Obama, Inc. changed its name to Real Truth About Abortion, Inc. after the 2008 election. In rejecting RTAA's challenge to section 100.22(b), the Fourth Circuit stated that its previous holdings in *Virginia Society for Human Life* and *Christian Action Network* could "no longer stand in light of *McConnell* and [*WRTL*]." *Id.* at 550.

in North Carolina or anywhere else, they were resolved long ago.

Putting our substantive disagreements aside, the Commission has an obligation to conclude matters on a timely basis. This was not a complex case. Unlike some previous matters,[10] here the Commission only needed to evaluate a single robocall. This case is a perfect example of one that could have been resolved in a much shorter period of time – certainly before the November 2012 General Election. While the substantive disagreement here might have been inevitable, there was no excuse for protracted delay. I will continue to do everything in my power to resolve cases efficiently and at a pace the public deserves.

4/1/13
Date

Ellen L. Weintraub
Chair

[10] *See, e.g.*, Advisory Opinion 2012-11 (Free Speech) (eleven proposed advertisements).