



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, D.C. 20463

January 28, 2011

Mario D. Nicolais, Esq.  
Scott E. Gessler, Esq.  
Hackstaff Gessler, LLC  
1601 Blake Street, Suite 310  
Denver, Colorado 80202

RE: MUR 6137  
Informed Catholic Citizens

Dear Messrs. Nicolais and Gessler:

On December 3, 2008, the Federal Election Commission notified your client, Informed Catholic Citizens, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your client, the Commission, on January 19, 2011, found that there is reason to believe Informed Catholic Citizens violated 2 U.S.C. §§ 434(c), 434(g), and 441d(a), provisions of the Act. The Commission also found no reason to believe that Informed Catholic Citizens violated 2 U.S.C. § 441b. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

The Commission was equally divided on whether to find reason to believe Informed Catholic Citizens violated 2 U.S.C. §§ 433 and 434. A Statement of Reasons providing the basis for the Commission's decision will be forthcoming when the entire file in this matter closes.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office along with answers to the enclosed questions and document requests within 30 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

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If your client is interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Kasey Morgenheim, the attorney assigned to this matter, at (202) 694-1650.

On behalf of the Commission,

  
Cynthia L. Bauerly  
Chair

Enclosures  
Factual and Legal Analysis  
Questions and Document Requests

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS: Informed Catholic Citizens**

**MUR 6137**

**I. GENERATION OF MATTER**

This matter was generated by a complaint filed with the Federal Election Commission by Rebecca Kratz. *See* 2 U.S.C. § 437g(a)(1).

**II. FACTUAL SUMMARY**

This matter concerns allegations that Informed Catholic Citizens ("ICC"), a Colorado-based 501(c)(4) organization, violated various provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). Specifically, the complaint alleges that ICC made prohibited corporate expenditures for a series of recorded telephone calls that constituted express advocacy, and may have been required to report the cost of the calls as independent expenditures. In its response, ICC argues that the calls did not contain express advocacy, and therefore the group was not required to report any independent expenditures. Response at 3.

The complaint identifies two recorded phone calls ICC made to citizens in Colorado in late October 2008.<sup>1</sup> Complaint at 1. The scripts for the calls, provided in ICC's response, are as follows:

**"Carmody Call"**

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.

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<sup>1</sup> ICC's Response states that the calls were delivered to members of the public in November 2008, just before the election. *See* Response Exhibit A.

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.

**"Beauvrez Call"**

Hello, this is Bob Beauvrez. And, no, I'm not one of those politicians calling to tell you how to vote. You'll figure that out on your own.

I know that there are a whole host of issues you'll consider when deciding for whom to vote, including who best represents your values. What's difficult is finding really honest information about the candidates and the issues most important to you – like the five non-negotiables: sanctity of human life, embryonic stem-cell research, human cloning, homosexual marriage, and human cloning.

I recently learned through the Solidarity Institute at catholicism.net that Bob Schaffer is in agreement with Catholic doctrine on all five of these issues while Mark Udall is opposed to every single one.

We're the Informed Catholic Citizens, and our only objective is to make sure you have all the information you need to decide who you'll be voting for in this election. Thank you for listening.

### **III. ANALYSIS**

The Commission: (1) finds no reason to believe that ICC violated 2 U.S.C. § 441b; (2) finds reason to believe that ICC violated 2 U.S.C. § 434(c) by failing to disclose its independent expenditure; (3) finds reason to believe that ICC violated 2 U.S.C. § 434(g) by failing to file a 24-hour notice of its independent expenditure; and (4) finds reason to believe that ICC violated 2 U.S.C. § 441d(a) by failing to include the required disclaimer.

**A. Corporate Expenditures**

In *Citizens United v. FEC*, the Supreme Court struck down as unconstitutional the Act's prohibition on corporate financing of independent expenditures. See 130 S.Ct. 876, 913 (2010). Thus, it is permissible for corporations to use general treasury funds for this purpose.

Accordingly, the Commission finds no reason to believe that Informed Catholic Citizens violated 2 U.S.C. § 441b by making a prohibited corporate expenditure in connection with the recorded telephone calls.

**B. Independent Expenditure Reporting**

Under the Act, every person other than a political committee who makes independent expenditures in excess of \$250 must file a report that discloses information on its expenditures and identify each person who made a contribution in excess of \$200 for the purpose of furthering an independent expenditure. See 2 U.S.C. § 434(c). The Act defines an independent expenditure as any expenditure that expressly advocates the election or defeat of a clearly identified candidate and is not made in concert with a candidate, a political party committee, or their respective agents. 2 U.S.C. § 431(17).

Under the Commission's regulations, 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!'" 11 C.F.R. § 100.22(a). The Supreme Court has held that express advocacy also encompasses communications that contain "in effect an explicit directive" to vote for or against a candidate. *MCFL*, 479 U.S. at 249. The fact that a message is "marginally less direct than 'Vote for Smith' does not change its essential nature." *Id.* ICC

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1 argues that "express advocacy" must be read narrowly in accordance with the approach in  
2 *Buckley v. Valeo*, 424 U.S. 1 (1976). Response at 3.

3 The Carmody Call contains express advocacy under 11 C.F.R. § 100.22(a) consistent  
4 with Supreme Court and Commission precedent. This call is similar to the newsletter at issue in  
5 *MCFL* and the "Conscience" pamphlet in MUR 5634 (Sierra Club). In *MCFL*, the Supreme  
6 Court found that a newsletter which listed candidates for state and federal office and identified  
7 their issue positions as supporting or opposing issues such as abortion, along with the phrases  
8 "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," "VOTE PRO-LIFE," and the  
9 disclaimer "This special election edition does not represent an endorsement of any particular  
10 candidate," constituted express advocacy. *MCFL*, 479 U.S. at 238. The Court reasoned that the  
11 newsletter "cannot be regarded as a mere discussion of public issues that by their nature raise the  
12 names of certain politicians. Rather, it provides an explicit directive: vote for these (named)  
13 candidates." *Id.*

14 In MUR 5634, the Commission found that the "Conscience" pamphlet, which compared  
15 President Bush's and Senator Kerry's environmental records and contained the phrases "LET  
16 YOUR CONSCIENCE BE YOUR GUIDE" and "LET YOUR VOTE BE YOUR VOICE"  
17 contained express advocacy under section 100.22(a) because it provided "in effect" an explicit  
18 directive to vote for the candidates whose positions were in accord with the organization. See  
19 MUR 5634 Factual and Legal Analysis at 4. The Commission found probable cause to believe  
20 that the Sierra Club violated 2 U.S.C. § 441b(a) based on the "Conscience" pamphlet and entered  
21 into a conciliation agreement with the organization. See Certifications dated July 19, 2006 and  
22 November 13, 2006. In the same matter, the Office of General Counsel recommended, and the  
23 Commission found, no reason to believe that the Sierra Club violated the Act in connection with

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1 three other pamphlets. Two of the pamphlets did not contain express advocacy because a  
2 reasonable interpretation was that readers were simply being directed to contact current federal  
3 officeholders. MUR 5634 First General Counsel's Report at 5. A fourth pamphlet, "Dirt,"  
4 which contained narratives comparing the environmental records of Present Bush and Senator  
5 Kerry, did not contain express advocacy because it was consistent with the Commission's voter  
6 guide regulations and encouraged readers to obtain additional information about the candidates  
7 from other sources before deciding for whom to vote. *Id.* at 8.

8 The Carmody Call uses the word "vote" three times, starting in the first sentence after the  
9 greeting. The Carmody Call is express advocacy under section 100.22(a) because it sets out  
10 John McCain's and Barack Obama's respective positions on the subject of abortion and then  
11 directs listeners to "vote like life depended on it – because it does," which has no other  
12 reasonable meaning than to encourage the election of John McCain and the defeat of Barack  
13 Obama. This conclusion is consistent with the Supreme Court's decision in *MCFL* in that the  
14 Carmody Call's call to action to "vote like life depended on it – because it does" is an  
15 unambiguous reference to John McCain's "record of supporting life," providing "in effect" an  
16 explicit directive to vote for John McCain and against Barack Obama. The Carmody Call's call  
17 to action is ~~also~~ similar to that in the MUR 5634 "Conscience" pamphlet, "LET YOUR VOTE  
18 BE YOUR VOICE."

19 Although the available information does not indicate the cost or dissemination of the  
20 Carmody Call, a press account cited in the Complaint regarding the Beauprez Call stated that  
21 ICC "blanket[ed] the state with recorded phone calls." Mike Riley, Beauprez Robo-Calls Target  
22 Udall on Values, Denver Post, October 23, 2008. ICC's response did not provide any  
23 information regarding the cost or dissemination of the calls. The fact that the Carmody Call

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1 concerned the Presidential election also suggests that a large number of calls were made, and  
2 past matters involving robocalls often involved costs well over \$1,000. *See* MUR 6125  
3 (McClintock) (Campaign in California's 4<sup>th</sup> Congressional District spent \$7,799 for robocalls in  
4 2008); MUR 5819 (U.S. Chamber of Commerce) (Chamber of Commerce spent \$2,474 for  
5 approximately 50,000 calls regarding the 2006 Senate race in Hawaii); MUR 5588 (Arizona  
6 Republican Party) (State party committee spent \$41,626 for state-wide calls regarding the 2004  
7 Presidential election).

8 In sum, it appears that at least one of the ICC recorded calls – the Carmody Call –  
9 contained express advocacy under 11 C.F.R. § 100.22(a).<sup>2</sup> *See also* 11 C.F.R. § 100.22(b)  
10 (express advocacy includes communications that contain an “electoral portion” that is  
11 “unmistakable, unambiguous, and suggestive of only one meaning” and about which “reasonable  
12 minds could not differ as to whether it encourages actions to elect or defeat” a candidate).  
13 Because the Carmody Call contained express advocacy and ICC likely spent over \$250 on the  
14 call, ICC was subject to the independent expenditure reporting requirements of section 434(c) of  
15 the Act. Accordingly, the Commission finds reason to believe that ICC violated 2 U.S.C.  
16 § 434(c).

<sup>2</sup> The Beauprez Call presents a closer judgment. There are several characteristics of the Beauprez Call that bring it close to the definition of express advocacy under 11 C.F.R. § 100.22(b): the call references voting three times and was made in close proximity to the election; it references the Catholic Church's positions on five policy issues and then states that “Bob Schaffer is in agreement with Catholic doctrine on all five of these issues while Mark Udall is opposed to every single one;” and it indicates that the ICC's goal is to inform listeners to aid in their voting decision. This can be viewed as a directive to vote for the candidate in agreement with Catholic Doctrine, Bob Schaffer. However, because the Beauprez Call contains a comparison of the candidates' views on policy issues, reasonable minds could view the call as educating listeners about the positions of the candidates, similar to the MUR 5634 “Dirt” pamphlet, which the Commission concluded was more akin to a voter guide under 11 C.F.R. § 114.4(c)(5)(i).



**C. 24-Hour Independent Expenditure Reporting**

Under the Act, a person that makes independent expenditures aggregating \$1,000 or more after the 20<sup>th</sup> day, but more than 24 hours, before the date of an election must file a report describing the expenditures within 24 hours. 2 U.S.C. § 434(g)(1).

ICC's activity appears to date from November 2008; therefore, it is likely that the calls were made within 20 days of the election. It is also likely that ICC spent over \$1,000 in connection with the Carmody Call. Accordingly, the Commission finds reason to believe that Informed Catholic Citizens violated 2 U.S.C. § 434(g) by failing to report the cost of the call as an independent expenditure.

**D. Required Disclaimers**

The Act requires that persons making disbursements for communications containing express advocacy provide a disclaimer as specified in the statute and regulations. 2 U.S.C. § 441d. More specifically, communications that are not authorized by a candidate are required to clearly state the name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication and state that the communication was not authorized by any candidate or the candidate's committee. 2 U.S.C. § 441d(a)(3).

The Carmody Call required a disclaimer because it contained express advocacy. It appears that the Carmody Call was sufficiently widespread to have constituted 500 calls of an identical or substantially similar nature. *See supra* p. 5-6. The Carmody Call did not contain the full required disclaimer, as it did not clearly state the address, telephone number, or website address of ICC and did not state that the communication was not authorized by any candidate or candidate's committee. Accordingly, the Commission finds reason to believe that Informed

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- 1 Catholic Citizens violated 2 U.S.C. § 441d(a) by failing to include the required disclaimer on a**
- 2 communication containing express advocacy.**

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