U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

December 21, 2001

Patricia Mack Bryan, Esq.
Senate Legal Counsel
Senate Hart Office Building
Washington, D.C. 20510-7250

Re: Federal Election Commission v. National Rifle Association, No. 00-5163 (D.C. Cir.)

Dear Ms. Bryan:

I am writing to advise you that I have determined not to file a petition for a writ of certiorari in the above case.

This case involves payments made by the National Rifle Association (NRA), a nonprofit membership organization, on behalf of a segregated, Political Victory Fund created by the NRA pursuant to Section 441b(b) of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 441b(b). During the 1978, 1980, and 1982 election cycles, the NRA paid more than $37,000 in election-related expenses incurred by that fund for such things as direct mail campaigns for and against candidates. The fund thereafter reimbursed the NRA and reported the payments to the FEC as independent expenditures.

The FEC subsequently brought this enforcement action against the NRA in the District Court for the District of Columbia Circuit, claiming that the NRA had violated Section 441b of the Act, which prohibits corporations from making "a contribution or expenditure in connection with any [federal] election." 2 U.S.C. 441b(a). On cross-motions for summary judgment, the district court held that the NRA violated Section 441b(a), because it made independent expenditures from its own corporate treasury on behalf of the Political Victory Fund for electioneering expenses.

The D.C. Circuit affirmed the district court's decision in substantial part, and vacated in part and remanded. 254 F.3d 173. The court of appeals rejected the NRA's statutory arguments that Section 441b did not apply to the expenditures in question, see id. at 181-187, and most of the NRA's constitutional arguments. The court held that under limits to the valid application of Section 441b established by the Supreme Court in 1986, see FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (MCFL), that section could not constitutionally be applied to the NRA with respect to payments made during one of the years in question (1980), in which "the NRA received only $1000 in corporate contributions." Id. at 192. The court reasoned that, given the "de minimis" nature of the contributions that the NRA received in 1980, for purposes of that year the NRA fell within the category of political organizations discussed in the MCFL decision.

I have decided against seeking certiorari in this case primarily because I do not believe that it meets the principal criteria that the Supreme Court applies in deciding whether to grant certiorari. In particular, the court of appeals' decision does not squarely conflict with the decisions of other courts of appeals on an issue on which the FEC lost.

I also have considered the following factors. This case does not establish a new limitation on the application of Section 441b, but instead involves application to the particular facts in this case of the limitation created more than 15 years ago by the Supreme Court in MCFL. The factual record in this case does not enable the government to make its strongest arguments in challenging the court of appeals' application of MCFL. See 254 F.3d at 191 ("Although the Commission had full discovery, it offers no factual basis for questioning [the NRA's] claims" about the nature of its organization). The court of appeals' decision was unanimous, and the petition for rehearing en banc that was filed by the FEC was denied with no judge voting to grant it. Finally, the FEC substantially prevailed below.

My decision not to seek certiorari in this case is not based on any determination that Section 441b is constitutionally infirm.

A copy of the court of appeals' decision is enclosed. Please let me know if I can be of further assistance in this matter.

Very truly yours,

Theodore B. Olson

Enclosure