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CONCURRING OPINION IN ADVISORY OPINION 2005-10

OF

**VICE CHAIRMAN MICHAEL E. TONER
AND COMMISSIONER DAVID M. MASON**

We joined the Commission's ruling today because the activities presented by the requestors do not implicate the ban on soft-money fundraising under Section 441i(e).

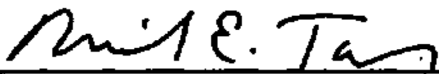
The threshold legal question in deciding whether Section 441i(e)'s fundraising restrictions apply is whether the activities in question are in connection with an election. Sections 441i(e)(1)(A) & (B) prohibit Federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending funds outside the prohibitions and limitations of the Act, but only in connection with an election for Federal *office* or in connection with any election other than an election for federal *office*. Both statutory provisions are expressly limited to elections for office. The plain meaning of the statute is that the soft-money ban applies to federal and non-federal elections for public office, but does not apply to non-candidate political activity, such as ballot initiatives and referenda. Any other interpretation would render the statutory reference to "office" in Sections 441i(e)(1)(A) & (B) a nullity. Commission regulations likewise define election as limited to candidate elections. *See* 11 C.F.R. §100.2(a) (defining election as the "process by which individuals...seek nomination for election, or election, to Federal office"). In light of the foregoing, ballot initiatives and referenda are not elections for office as a matter of law under Section 441i(e) and, therefore, the statute's soft-money fundraising restrictions do not apply to ballot measure activities.

Furthermore, the legislative history supports this interpretation of Section 441i(e). In debating the Bipartisan Campaign Reform Act of 2002 ("BCRA"), not a single Member of Congress, including the legislation's sponsors, indicated that the soft-money ban would apply to initiatives and referenda. Moreover, Members of Congress who voted for BCRA, including House Minority Leader Nancy Pelosi (D-CA), filed comments in this proceeding indicating that it was not their understanding that 441i(e)'s soft money restrictions would apply beyond candidate elections to ballot measure activities.

The Supreme Court has historically applied strict scrutiny to restrictions on the financing of ballot initiatives and referenda and has determined that the same potential for corruption that exists with respect to candidate elections for public office does not exist with respect to ballot measure activities. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (holding that "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections...is not present in a popular vote on a public issue"); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981) (holding that in contrast to contributions made to candidates, "there is no risk of corruption...[from] contributions to committees favoring or opposing ballot measures"). In light of the Supreme Court's admonition that the danger of corruption, or the appearance of corruption, is not present in ballot initiatives and referenda, applying Section 441i(e) to such activities serves no justifiable policy rationale and would serve only to federalize purely state and local activity.

The upshot of today's decision is that initiatives and referenda are not in connection with an election for office under Section 441i(e) as a matter of law and therefore the statute's soft-money fundraising restrictions do not apply to ballot measure activities; there is no other plausible statutory basis for today's ruling. At the very least, Section 441i(e)'s fundraising restrictions do not apply to referenda and initiatives where, as here, no federal candidate appears on the ballot along with the referendum or initiative, and no ballot measure organization is established, financed, maintained or controlled by any federal candidate. Either way, today's ruling will significantly broaden the ability of federal candidates and officeholders across the country to raise funds outside the source prohibitions and limitations of federal law in connection with initiatives and referenda.

August 29, 2005



Michael E. Toner, Vice Chairman

David M. Mason, Commissioner