UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIRGINIA SOCIETY FOR HUMAN LIFE	)
	) **No. 1252**
Appellee/Cross-Appellant	)
	) **Motion to File Supplemental**
	) **Memorandum**
v.	)
	)
FEDERAL ELECTION COMMISSION,	) **Local Rule 27(e)**
	)
Appellant	)

MOTION TO FILE SUPPLEMENTAL MEMORANDUM

In a letter dated April 23, 2001, the Federal Election Commission directed the Court's attention to *Borg-Warner Protective Services Corp. v. EEOC*, No. 00-5094, 2001 WL 376974 (D.C. Cir. Apr. 17, 2001). Appellee/Cross-Appellant Virginia Society for Human Life ("VSHL") believes that the holding in *Borg-Warner* does not stand for the proposition advanced by the FEC in its letter.

WHEREAS, pursuant to Local Rule 28(e), VSHL respectfully moves the Court for leave to file a short memorandum (attachment 1) in response to the FEC's letter.

Dated: May 1, 2001

Respectfully submitted,

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FEDERAL ELECTION COMMISSION,	) Local Rule 27(e)
	)
Appellant	)

SUPPLEMENTAL MEMORANDUM

Pursuant to Fed. R. App. P. 28(j) and Local Rule 28(e), Plaintiff/Appellee/Cross-Appellant Virginia Society for Human Life, Inc. ("VSHL") submits this supplemental memorandum in response to the Federal Election Commission's recent letter advising the Court of the decision in *Borg-Warner Protective Services Corp. v. EEOC*, No. 00-5094, 2001 WL 376974 (D.C. Cir. Apr. 17, 2001). The holdings in *Borg-Warner* do support the FEC's arguments in this appeal that VSHL lacks standing.

The FEC in its letter claims that *Borg-Warner* supports its argument that *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) "precludes enforcing [11 C.F.R. § 100.22(b)] in this Circuit." As we pointed out in our brief, the premise for the FEC's argument is fatally flawed because the validity of the regulation has never been before this Court. Opening Brief at 24-29.

Moreover, the FEC's letter misstates the holdings in *Borg-Warner*. At issue in *Borg-Warner* was whether an EEOC determination letter or an EEOC "Policy Statement" about arbitration agreements in employment contracts under Title VII caused injury to the plaintiff-

appellant. In the opening part of Section II of the *Borg-Warner* opinion, quoted by the FEC, the D. C. Circuit took "stock of the state of the law." *Borg-Warner*, 2001 WL 376974, at *3. The Court noted that every circuit except the Ninth Circuit had rejected the EEOC's litigation position regarding the legal force of arbitration clauses under Title VII. *Id.* at *4. Notwithstanding this observation, the Court nevertheless considered whether the plaintiff-appellant had standing to raise its specific claims against the determination letter and the Policy Statement.

In Section II-A, the Court held that the plaintiff-appellant lacked standing to challenge the EEOC's determination letter because the letter was not final agency action. *Borg-Warner*, 2001 WL 376974, at *5. That holding did not depend on the previous rulings of the D.C. Circuit or any other court regarding the EEOC's interpretation of Title VII. In contrast, VSHL's challenge to 11 C.F.R. § 100.22(b) and to the FEC's denial of its rulemaking petition are indisputably challenges to final agency actions, as the FEC has conceded. (FEC's Ans. Br. at 47).

In Section II-B, the Court held that the plaintiff-appellant lacked standing in Count II of its complaint to challenge the EEOC's "Policy Statement." The Court concluded that "[t]he EEOC's Policy Statement carries no special weight in the courts: if it has any force, it is derived from the power of the EEOC's reasoning to persuade." *Borg-Warner*, 2001 WL 376974, at *5. In other words, the Court determined that, at most, the Policy Statement was an "interpretive rule" and was not a "legislative rule."

An agency issues an "interpretive rule" when it "simply states what [it] thinks the statute means, and only reminds affected parties of existing duties." *General Motors Corp. v.*

Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (quotation omitted), cert. denied, 471 U.S. 1074 (1985). An agency issues a "legislative rule" when it "intends to create new law, rights or duties." *Id.* Unlike interpretive rules, legislative rules have the force of law and may only be promulgated after notice and comment. *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340 (4th Cir. 1995). *See also United States v. Mitchell* 39 F.3d 465 , 470 (4th Cir. 1994) ("For regulations to have the force and effect of law they must first be 'substantive' or 'legislative-type' rules, as opposed to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice.") (quotations omitted).

The Court in *Borg-Warner* concluded that even in the Ninth Circuit, which is the only circuit in agreement with the EEOC's interpretation of Title VII, the plaintiff-appellant's alleged "harm is not being caused by the EEOC's Policy Statement." *Borg-Warner*, 2001 WL 376974, at *5. In view of the Court's conclusion that the Policy Statement is an interpretive rather than a legislative rule, the Court held that the plaintiff-appellant "is not suffering any legally cognizable injury from the Policy Statement." *Id.* at *6. The Court held that the plaintiff-appellant lacked standing because the Policy Statement did not cause injury in *any* circuit, *including* the Ninth Circuit. Consequently, the Court did "not address any questions of comity between this circuit and the Ninth, or the propriety of a federal court in the District of Columbia enjoining the EEOC from adhering to a litigating position in the Ninth Circuit that the court of appeals for that circuit has sustained." *Id.* Thus, the D.C. Circuit held that the *Borg-Warner* plaintiff-appellant lacked standing because neither of the challenged acts by the EEOC caused an injury. That would have been so even if no court had ever addressed the EEOC's position with respect to arbitration

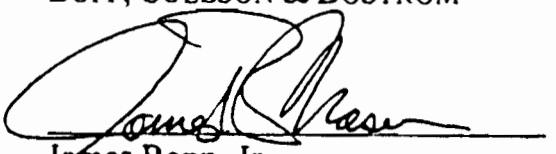
clauses under Title VII. The D.C. Circuit did not hold that the plaintiff-appellant lacked standing because of the law of the forum circuit, as the FEC implies in its letter.

It is undisputed in this appeal that 11 C.F.R. § 100.22(b) is a legislative rule that imposes duties on speakers like VSHL and that it has the force of law. As we said in our brief, VSHL has standing to challenge 11 C.F.R § 100.22(b) because it faces a credible threat of prosecution under the regulation in the Fourth Circuit (where it resides), outside the Fourth Circuit (where it may be found or transacts business), 2 U.S.C. § 437g(a)(6)(A), and in the D.C. Circuit for acts undertaken in Virginia under § 437g(8)(A) and *Chamber of Commerce of the United States v. Federal Election Commission*, 69 F.3d 600, 603 (D.C. Cir. 1995). Opening Brief at 16, *et seq.* *Borg-Warner* is inapposite to the issues in this appeal.

Dated: May 1, 2001

Respectfully submitted,

BOPP, COLESON & BOSTROM



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