

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

CIVIL ACTION NO. 05-00049-CKK

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff EMILY's List, through undersigned counsel, respectfully moves this Court for a summary judgment pursuant to Fed. R. Civ. P. 56 holding unlawful and setting aside Title 11 C.F.R. §§ 100.57 and 106.6 as "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law"; "in excess of 'the Commission's] statutory jurisdiction, authority, [and] limitations"; as having been promulgated "without observance of procedure required by law"; and as violating the First Amendment to the United States Constitution.

A memorandum of points and authorities, Plaintiff's Statement of Material Facts as to Which There Is No Genuine Dispute, and a Proposed Order are submitted herewith.

Plaintiff requests oral argument on this motion.

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Robert F. Bauer (D.C. Bar No. 938902)
Ezra W. Reese (D.C. Bar No. 487760)
Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011
(202) 628-6600

Attorneys for EMILY's List

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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Plaintiff EMILY's List submits this memorandum of points and authorities in support of its Motion for Summary Judgment

I. INTRODUCTION

This case involves regulations promulgated by the Federal Election Commission ("FEC" or "the Commission"), effective January 1, 2005, which unlawfully cripple the capacity of political organizations to engage in state and local political activity by purporting to treat it as federal election activity sharply constrained by the Federal Election Campaign Act. Under these new rules, a mere "reference" to a federal officeholder, or to a political party, results automatically in arbitrary and severe restrictions on the financing of a political organization's public communications and voter drives. The new rules also impose onerous restrictions on the manner in which committees like EMILY's List ("EMILY's List" or "the Committee") may allocate between federal ("hard") and nonfederal ("soft") accounts their administrative and generic voter contact activities that do not entail the advocacy of any

particular candidate's election or defeat. Moreover, they dramatically expand the class of funds received by EMILY's List that must be treated as contributions under federal law.

By law these restrictions were designed only to limit the financing of efforts to influence a federal election, but the new rules expand them well beyond this purpose. These restrictions apply regardless of an organization's actual or apparent purpose to influence the outcome of a federal election.

The effect of these new rules is to severely limit the ability of EMILY's List, one of the nation's largest political organizations, to finance a range of activities to influence the outcome of state and local elections. The Committee now faces a critical shortage in seeking to raise funds for and influence the outcome of statewide nonfederal races for Governor and other statewide offices, and for seats in state legislatures around the country. Because of the Commission's new and unlawfully promulgated rules, the Committee's funding of these races will be dictated not by the laws of the states in which these elections are held, but instead by a scheme of restricted campaign financing well outside of the federal statutory scheme, which was intended to apply only to bona fide federal election activity. This scheme is all the more onerous in the coming election cycle, in which there is no presidential election and the focus of EMILY's List will be proportionally much more nonfederal than it was in the 2003-04 cycle.

An examination of the FEC's rulemaking history makes clear that the rules were originally intended to settle partisan complaints about very different organizations, ones prominent in last year's presidential election. These included so-called nonfederal "section 527" organizations which, unlike EMILY's List, are not "political committees" registered with and reporting to the FEC.¹ These organizations were alleged to have impermissibly financed, using "soft money," those presidential election-related activities. EMILY's List,

¹ Section 527 refers to section 527 of the Internal Revenue Code.

however, does not share these organizations' purposes or operating history. Nonetheless, operating under intense partisan pressure and a self-imposed election year deadline, the FEC produced rules that ironically bound political organizations like EMILY's List, and left the original target of unregulated section 527 organizations untouched. Those rules also ranged well beyond registered political committees alleged to be concerned exclusively with the 2004 Presidential elections, and restricted the activities of national committees, like EMILY's List, that maintain robust programs influencing state and local elections.

No doubt as a byproduct of the intense political pressures under which the FEC produced these rules, they were promulgated in violation of fundamental requirements for providing affected parties with opportunity for notice and comment as required by law. The Commission approved the new rules on October 28, 2004 and published in the Federal Register on November 23. Until that time, the Commission had considered, along with proposals to address section 527 organizations, a variety of possible changes in the allocation rules. None of these included anything like the mere "refer[ence]" rule and other aspects of the financing restrictions that the Commission finally adopted. And, when announcing the final rules, the Commission changed its justification for the rules, offering an explanation of its purposes wholly at variance with statements made in the notice of proposed rulemaking ("NPRM"), in public hearings and in the public statements of its Commissioners.

The challenged regulations were codified as a new regulatory section, 11 C.F.R. § 100.57 (hereinafter the "solicitation regulations"), and as an amendment to 11 C.F.R. § 106.6 (hereinafter the "allocation regulations"). This motion for summary judgment challenges these regulations for exceeding the statutory authority of the regulating agency; for being promulgated following insufficient notice; for being arbitrary and capricious; and for violating the First Amendment of the United States Constitution. By regulating nonfederal as well as federal elections, lobbying as well as electoral activity, and nonfederal as well as federal contributions, the rules adopted by the Commission vastly exceed its

statutory authority. Because the final rules differed radically from the proposed rules, and because the final rules were not a "logical outgrowth" of the proposed rules, notice was not sufficient under the Administrative Procedure Act. Because they contain arbitrary fifty percent minimums that apply in all circumstances, and because the FEC failed to articulate a rationale for the rules that explains how they diminish corruption or the appearance of corruption, the rules are arbitrary, capricious and contrary to law. Finally, because they are not narrowly tailored, do not rely on sufficient evidence, and are vague and overbroad, the rules violate the First Amendment of the United States Constitution.

II. STATEMENT OF FACTS

A. Description of EMILY's List

EMILY's List is a political organization whose purpose is to recruit and fund viable women candidates; to help them build and run effective campaign organizations; and to mobilize women voters to help elect progressive candidates across the country. EMILY's List is a nonconnected committee² that is registered with, and reports to, the Commission. Accordingly, it maintains a federal account that accepts only funds from sources and in amounts permissible under federal campaign law: \$5,000 a year from federally permissible sources, such as individuals or FEC-registered political action committees. *See* 2 U.S.C. § 441a(a).

EMILY's List also raises and disburses funds for the purpose of influencing state and local elections. For this purpose, it maintains a nonfederal account. This account accepts funds from sources, and in amounts, not permissible under federal campaign finance law. EMILY's List reports its nonfederal receipts and disbursements to the Internal Revenue

² A "nonconnected committee" is a political committee that is not affiliated with a political party or candidate, and that is not a separate segregated fund of any entity. *See* 11 C.F.R. § 104.10.

Service ("IRS") in accordance with I.R.C. § 527(j). All of EMILY's List's disclosure reports, whether to the FEC or the IRS, are publicly available on those agencies' respective websites.

Since its organization twenty years ago, EMILY's List has helped to elect sixty Democratic women to Congress, eleven to the U.S. Senate, seven to governorships, and 215 to other state and local offices. As the numbers indicate, the largest number of those successfully supported by EMILY's List have been candidates for state and local office. These numbers represent only the successful candidates actively supported by the Committee. Thousands more—including many more statewide and state legislative candidates—have received funds, advice and other forms of lawful support from EMILY's List.

In the 2005-2006 election cycle, the proportion of EMILY's List's time, energy and funds committed to nonfederal elections will increase dramatically. With no presidential election in 2006, and thirty-four gubernatorial elections over the next two years, the Committee will focus more on gubernatorial and state legislative races, and other nonfederal candidates. In 2005, for instance, EMILY's List plans to assist state legislative candidates up for election in Virginia and New Jersey: there are no regularly scheduled federal elections in 2005, anywhere in the country.

B. "Allocation" under the Former Regulatory Scheme

Like other national political organizations, EMILY's List conducts a number of activities, such as voter identification, voter registration, get-out-the-vote and generic voter mobilization activities, which affect both federal and nonfederal elections. In addition, EMILY's List has certain fixed administrative and overhead costs, such as rent, salaries, supplies, and the like. For many years, the FEC provided for an "allocation" procedure to ensure that a political committee paid for those particular expenses attributable to federal elections with federal funds, and those particular expenses attributed to state and local elections with state funds. Fixed overhead costs were paid with both federal and state funds,

on a ratio approximating the level of federal versus nonfederal activities undertaken by the committee. *See* 11 C.F.R. § 106.6 (2004).

For example, until the adoption of the new rules effective January 1, 2005, the regulation governing the allocation of administrative and generic voter drives expenses was based on the "funds expended" method. Purely federal activity was paid for out of the federal account; purely nonfederal activity was paid for out of the nonfederal account. Payment for administrative expenses and for generic voter drives – that is, voter drives that did not refer to particular candidates – were made using funds from *both* accounts. In this last case, political committees paid the costs on the basis of the ratio of its direct support of federal candidates to its direct support of all candidates, federal and nonfederal. The rule called for precision in calculating and adjusting this ratio during an election cycle, requiring political committees to revise the ratio as required by its actual record of supporting both federal and nonfederal candidates.

The result of this allocation scheme was that the payment of generic expenses such as communications urging party-wide support and administrative expenses – activities designed to further the overall goal of an organization – reflected the share of that organization's goal devoted to federal elections. Organizations that focused overwhelmingly on federal elections paid for these activities almost entirely with federal funds. And organizations such as EMILY's List, which spend at least as much time and money on nonfederal elections as on federal elections, paid for these activities with a mix of funds that reflected the organization's actual dual purpose.

C. Federal Election Commission Solicitation and Allocation Rulemaking

The FEC did not reconsider the rules as applied to EMILY's List because of any suggestion that they did not fulfill their intended purpose, or because of any allegation that EMILY's List did not or could not comply with its terms. Instead, the changes in the rules emerged incongruously out of a proceeding established to address an altogether and unrelated

issue: organizations alleged to have been established to influence only the 2004 Presidential election and using soft money for this purpose.

The first step toward the rulemaking occurred with the filing of an advisory opinion request with the FEC, aiming to place restriction on a specific political committee, America Coming Together ("ACT"), that was operating as a multiple-purpose political committee but was alleged by some to have been created solely to oppose President Bush's candidacy for reelection in 2004. The opinion request aimed at ACT was filed by a new, paper organization named Americans For a Better Country ("ABC") that had neither raised nor spent any funds – and has not to this day – but represented supporters of President Bush's reelection.

On February 19, 2004, the Commission issued Advisory Opinion 2003-37. In this opinion, the Commission attempted – without a rulemaking – to restructure the allocation formulas, requiring allocating committees to pay entirely with federal funds for any public communication that "promotes, supports, attacks, or opposes" federal candidates. The Commission also built this requirement into the formulas for calculating allocations, so that any communication of this kind – promoting, supporting, attacking or opposing a federal candidate – would be included in the tally of "direct" federal candidate support used to determine the federal share of allocated expenses. The Commission's Office of General Counsel later described this advisory opinion as a "substantial reinterpretation of the 'allocation' rules" that "looks an awful lot like a regulation." *See* FEC Agenda Doc. No. 04-48, at 7 (May 11, 2004).

On March 11, the Commission issued a wide-ranging proposal of new regulations. *See* Political Committee Status, 69 Fed. Reg. 11,736 (proposed Mar. 11, 2004). While the regulations addressed a variety of topics, they were structured along two primary lines meant to address the concerns raised about the two types of organizations under attack in the presidential election. First, the regulations targeted section 527 organizations unregistered

with the FEC. Second, the regulations addressed "allocating committees": entities like EMILY's List that were registered with the Commission, but that had nonfederal accounts as well.

The proposed rules, through a revised definition of the FECA term "political committee," *see* 2 U.S.C. § 431(4)(A), required all section 527 organizations that were considered to participate in federal elections in any manner to register with and report to the Commission. The proposed rules also codified the changes to the allocation system first addressed in Advisory Opinion 2003-37, including inclusion of the "promotes, supports, attacks, or opposes" standard. The proposed rules further treated as federal contributions those funds received in response to a fundraising solicitation expressly advocating the election or defeat of federal candidates.

The Commission set what the FEC's General Counsel aptly described as "a highly accelerated schedule for this important and far-reaching rulemaking, targeting approval of final rules just two months after publication of the NPRM." FEC Agenda Doc. No. 04-48, at 4. Comments were due by April 9, and public hearings with thirty-one witnesses were held on April 14 and 15. Nonetheless, the rules created such controversy throughout the political and nonprofit communities that even with fewer than 30 days to address the "important and far-reaching rulemaking," more than 100,000 comments were submitted, "far exceeding the number of comments received in connection with any of the rulemakings to implement BCRA." *Id.* at 8. This was the first and last noticed opportunity for members of the public to comment on the rulemaking. The only portions of the proposed rules that received significant comment were those targeting section 527 organizations that did not register and report with the FEC, both because that was both the impetus and focus of the proceeding, and because the new allocation regulations tracked changes already present in Advisory Opinion 2003-37.

The General Counsel submitted draft final rules to the FEC on August 12, and submitted amendments to those draft final rules on August 18. *See* FEC Agenda Doc. No. 04-75 (Aug. 12, 2004), FEC Agenda Doc. No. 04-75-C (Aug. 18, 2004). On August 17, EMILY's List, among others, wrote a letter to the Commission noting that "the new proposed rules . . . provide for substantially different allocation rules for separate segregated funds and non-connected committees." The letter requested that the FEC publish the draft final rules for new comment, due to the magnitude of the changes, and postpone consideration of them until afterward. The FEC did not respond to this letter. During the Commission meeting of August 19, Commissioner McDonald called for the new draft rules to be submitted for a sixty-day comment period. This motion failed by a 3-3 vote. *See* FEC Agenda Doc. No. 04-77, at 8 (Sept. 9, 2004) (minutes of Aug. 19, 2004 meeting).

The final rules, approved on October 28, did not include a revised definition of "political committee." Instead, the final rules created an allocation system totally unlike that contained in Advisory Opinion 2003-37 and the proposed rules. The new rules focused not on whether communications "promoted, supported, attacked, or opposed" candidates, but whether they *referred to* candidates at all. In addition, the allocation system for administrative expenses and voter drives was reduced to a system of arbitrary threshold amounts. For example, a public communication that referred to a political party, but to no clearly identified candidates at all, had to be financed with no less than fifty percent federally regulated funds. The new rules took no account of a political committee's operating history or actual record of involvement in supporting federal and nonfederal candidates. Far from a "refinement" in the allocation rules as originally suggested in the agency's NPRM, 69 Fed. Reg. at 11,736, the final rule effected a radical change, replacing "allocation" with arbitrary minimums based on mere reference to a federal candidate. The final rules also contained a new definition of "contribution" unlike that contained in the proposed rules; the new section

100.57 defined contributions as funds received in response to a solicitation that "indicates that" any portion of the funds will be used to "support or oppose" federal candidates.

The final rules, with explanation and justification and several additional amendments, were approved on October 28, 2004, and published on November 23, 2004. *See* FEC Agenda Doc. No. 04-102, at 3-5 (Nov. 18, 2004) (minutes of Oct. 28, 2004 meeting); Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056 (Nov. 23, 2004).

III. ARGUMENT

A. The Regulations Exceed the Statutory Authority of the Commission

The Administrative Procedure Act ("APA"), §§ 553-706, forbids federal agencies from promulgating regulations "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Deference to an administrative agency's interpretation is only appropriate when "Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) (citation omitted); *see also Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("[T]he agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue.") (emphasis in original). Courts must vacate "administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984).

The regulatory authority of the Commission is granted at 2 U.S.C. § 438(a)(8), which permits it to "prescribe rules, regulations, and forms to carry out the provisions of [the Federal Election Campaign Act]." Thus, the Commission has authority only to effectuate the provisions of federal campaign finance law. The definitions of "contribution" and

"expenditure" only apply to "anything of value" made "by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i), (9)(A)(i). The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.*, regulates contributions and expenditures by political committees. But FECA does not define every payment made to or by a political committee as a contribution or expenditure. The FEC's new regulations far exceed FECA's limited grant of authority

1. The Mere "Reference" Rule Exceeds the Statutory Authority of the Commission

The final rules apply severe financing restrictions on the basis of a mere "reference" to a federal candidate or to a political party. *See* 11 C.F.R. § 106.6(f). The rules require that communications that merely reference a clearly identified federal candidate must be paid for with at least some federal funds, and with entirely federal funds if no clearly identified nonfederal candidate are mentioned. *See id.* This is a course that Congress rejected when developing FECA and its subsequent amendments. Congress focused the statutory scheme instead on expenditures "for the purpose of influencing" a federal election. *See* 2 U.S.C. § 431(8)(A)(i), (9)(A)(i).

That the FEC has transgressed the boundaries of its statutory authority is apparent from Congress' recent enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81. Congress changed the allocation rules for political party committees, concluding that the mixed-purpose allocation rules then in place for political parties allowed for too much nonfederal financing. *See* 2 U.S.C. § 441i(a); *McConnell v. FEC*, 540 U.S. 93, 132-34, 142 (2003). But in overriding those rules for national, state and local parties, Congress again rejected the step adopted by the FEC and under challenge here.

In the case of national parties, Congress imposed the most severe restriction: because of the unique relationship between national parties and federal officeholders who had

solicited large soft money donations for their parties, Congress elected to limit national party financing to federally regulated sources and amounts. *See* 2 U.S.C. § 441i(a); *McConnell*, 540 U.S. at 145-51, 154-55. Congress chose a more complicated and varied scheme for the regulation of state and local parties: it restricted some activities to federal funding, allowed fully nonfederal or soft money financing for others, and adopted, for still other activities, a program of allocation. *See* 2 U.S.C. § 441i(b); *McConnell*, 540 U.S. at 161-64. In none of these cases did Congress permit regulation based on simple "references" in public communications to candidates or parties.

Of particular significance is Congress' choice of means to address the state and local parties' financing of so-called "issue advertisements." Those ads – a foundational concern of the 2002 amendments – name particular candidates, praising or criticizing them on issues, but do not expressly advocate their election or defeat. *Id.* at 126, 132. Even though Congress placed great weight on evidence that these types of ads were typically a "sham," constructed in fact to influence the election or defeat of named candidates, it declined to base any financing restrictions on these ads' "reference" to candidates or parties. Rather, Congress required that these ads be funded under federal restrictions if and only if they "supported, promoted, attacked or opposed" a federal candidate. *See* 2 U.S.C. § 431(20)(A)(iii); *McConnell*, 540 U.S. at 169-70. In other words, Congress tied the restriction to a standard plainly requiring that the ad was paid for the purpose of influencing a federal election, even if the boundaries of this standard are less than clear.

In contrast, Congress declined to address allocation by non-party entities like EMILY's List. In doing so, Congress accepted the longstanding allocation regime set forth in 11 C.F.R. Part 106 for those entities. BCRA's legislative history reflects no concern whatsoever that the FEC's regulation apparatus for their allocation – intact since 1990 – posed any public policy concern. While that does not necessarily preclude the FEC from adjusting those rules, the FEC must respect the boundaries FECA establishes concerning

what conduct by non-candidate non-party entities can be compelled to be funded by a federal political committee. Regulating mere references to federal candidates in the communication of allocating committees goes well beyond a statutory basis for FEC regulation. When applied beyond the sphere of federal election activity, such as to the state and local election activity vital to EMILY's List, these restrictions at issue contravene the statute and exceed the Commission's authority.

EMILY's List, like other nonconnected political committees subject to the new rules, is not a political party committee, and is not controlled by officeholders or candidates. It is not subject to BCRA's revisions to the allocation requirements for national, state, and local political party committees. Yet the FEC has imposed upon its activities financing restrictions beyond the permitted statutory range, and even more onerous than even those Congress dictated for state and local parties, which are presumed to be under the control of candidates. Under the new rule, the mere "reference" to a federal candidate triggers far-reaching—in practical effect, incapacitating—restrictions on EMILY's List's ability to finance activities influencing state and local elections.

Indeed, in only one circumstance does FECA predicate federal funding of a mere "reference" to a federal candidate: it barred corporations and labor unions from spending their treasury money on broadcast advertisements – "electioneering communications – that "refers to a clearly identified" federal candidate. *See* 2 U.S.C. § 434(f)(3)(A)(i). Congress imposed this requirement in BCRA to expand the reach of the long-standing prohibition on corporate and union expenditures "in connection with" a federal election. *See id.* § 441b(a); *McConnell*, 540 U.S. at 204 n.87, 206. But now—and for the first time ever—the FEC on its own initiative has proposed to restrict in the same way a far more sweeping category of communications: public communications by independent, non-party organizations, irrespective of whether they take corporate or union funds.

The unlawful, extra-statutory acts of the Commission do not represent only theoretical infringements on the legal rights of EMILY's List. They pose direct threats to its ability to function, as it has for years, in lawfully influencing the course of state and local elections. By the mere "reference" to a federal candidate, or to a political party, EMILY's List communications become immediately subject to the broad financing restrictions that apply under federal law to efforts to "influence federal elections." Some examples of the consequences of these restrictions include:

- A communication that promotes a gubernatorial candidate, by citing his support of an incumbent President's social or fiscal policies, must be paid in part with federal funds if the President is running for reelection.
- A communication promoting the candidacy of a gubernatorial candidate, in part on the basis of his support for the "McCain-Feingold" legislation, must be paid in part with federal funds, as a federal election activity, if either Senator McCain or Senator Feingold is running for reelection, even if the communication is made thousands of miles away from their states.
- A communication in support of a state legislative candidate must be paid in part with federal funds if the communication mentions endorsement of the candidate by a federal officeholder who is running for reelection.
- A communication raising funds for a political committee's program to support generally state and local candidates must be paid entirely with federal funds, as a federal election activity, if it refers to a federal candidate who has endorsed the program or otherwise vouched publicly for its effectiveness.
- A communication supporting a political party generally and that refers to no candidates, that is run before an election in which there are no federal candidates on the ballot, must be paid for with fifty percent federal funds.

In all these cases, and others, the simple reference to a federal candidate converts the communication into federal election activity subject to significant financing restrictions. The outcome does not depend on the actual purpose of the communication, the actual history and current operations of the political organization, or on any other contested factor.

A further comparison to FECA's restrictions on "electioneering communications," which does incorporate a "reference" standard, demonstrates the departure of the FEC's rules from the limited and careful FECA scheme. The "electioneering communication" definition contains three important restrictions on its application. First, it applies only to television, radio and satellite broadcasts. Second, it applies only to the time periods thirty days before a primary, or sixty days before a general election, in which the referenced candidate is running for election. Third, it applies only where at least 50,000 persons in the candidate's electorate can receive it. *See* 2 U.S.C. § 434(f)(3)(A)(i).

The "electioneering communication" definition cannot serve as a statutory basis for the FEC's solicitation and allocation regulations for nonconnected committees; this section of FECA is a specific statutory provision barring only certain activity by corporations and labor unions, or certain uses of corporate or labor funds. *See* 2 U.S.C. § 441b(b)(2). Furthermore, corporations and labor unions not only may make no contribution or expenditure "for the purpose of influencing" federal elections, but are statutory barred from making contributions or expenditures "in connection with" federal elections. *See id.* § 441b(a). These two statutory provisions hold corporations and labor unions to a much stricter standard than political organizations. Only for these types of entities, and only with the above temporal and geographic caveats, did Congress believe it appropriate to apply the mere "reference" standard.

Congress' amendment of FECA to add this federal funds restriction was one of BCRA's most controversial and bitterly contested provisions. Yet the FEC now, by

regulation, has purported to impose a much farther-reaching restriction of the same kind. This is a patently *ultra vires* action without basis in FECA itself.

The Commission interprets the opinion in *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987), as holding that the FEC has the power under the FECA to require that allocating committees spend only federal funds, even for purely state and local activity, and that any allocation scheme short of requiring one hundred percent federal funds is therefore permissible. Though the *Common Cause* decision is not binding upon this Court, this reading of that opinion is in error. That decision stands for the proposition that the FECA does not purport to regulate state elections.

It is true that the *Common Cause* court, when requiring the FEC to promulgate rules to address state political party allocation, noted that "it is possible that the Commission may conclude that *no* method of allocation will effectuate the Congressional goal that *all* monies spent by state political committees on those activities permitted in the 1979 amendments be 'hard money' under the FECA." *Id.* at 1396. The issue in the case was the allocation of funds for volunteer activities, voter registration, and get-out-the-vote activities affecting both federal and state elections. In context, it is clear that the court was describing allocations between federal and nonfederal funds for activities that affected both federal and nonfederal elections, not activities purely affecting state elections. Similarly, when the *McConnell* court was decrying the FEC's allocation regime, it did so only in the context of "mixed-purpose activities." 540 U.S. at 123.

Indeed, the *Common Cause* court considered whether the FECA regulated funds spent by dual-purpose entities on activities that influenced only state elections. The *Common Cause* court expressly rejected the plaintiff's claim that state election activities conducted by allocating committees are regulated by the FECA, and held that "the FECA regulates federal elections only." 692 F. Supp. at 3695. It cited the House Report on the 1979 amendments, which noted that slate cards featuring both federal and state candidates may be paid for with

a mix of federal and state funds. *Id.* And it noted that "Nothing in the language of the amendments suggests that they reach beyond federal elections and into the realm of state elections." *Id.*

To be sure, the court did hold out the possibility that the FEC could make a finding that no allocation scheme can meet the requirements of the statutes. This statement was only noting the possibility that allocation may prove unworkable in practice – not giving permission to the FEC, on a regulatory whim, to require wholly state activities to be financed with federal funds. Besides, the Commission has made no such finding that no allocation system can effectively meet the statutory requirements. And while such an argument might be possible to make with regard to activities that influence both federal and state elections, it would be nonsensical to make such an argument with regard to activities that are entirely nonfederal. The mere "reference" rule applies not just to activities that are of mixed character, but also, as described above, to activities that are purely nonfederal, and that do not influence federal elections. To require any use of federal funds for purely state activity – and to require, in some circumstances, that only federal funds be used – is, as the *Common Cause* court noted, beyond the statutory bounds of the FECA.

2. The "Minimum Percentages" Rule for Administrative Costs Exceeds the Statutory Authority of the Commission

The final rule requires that political organizations like EMILY's List must pay for their administrative costs with federal funding at a level of no less than fifty percent of the total cost, without regard to the actual stake of the organization in federal elections. *See* 11 C.F.R. § 106.6(c). If, under this rule, EMILY's List supports just one federal candidate or allocates just one percent of its total budget to the entire class of federal candidates supported in an election cycle, the result is the same: it must pay for no less than fifty percent of its administrative costs with federal funding.

This arbitrary minimum also exceeds the Commission's statutory authority to promulgate regulations in aid of enforcement of the law. Under the rules previously in effect – the "funds expended" method – organizations paid the "federal share" of administrative costs in proportion to their actual financial commitment to federal elections. *See* 11 C.F.R. § 106.6 (2004). The new "allocation" rule does not deserve the name. It is not shaped by any notion of proportionality but instead places a heavy burden on political committees – the payment of fifty percent of administrative costs with federal funds – regardless of whether they support only a single federal candidate and one hundred nonfederal candidates, or contribute \$1,000.01 dollars to one federal candidate plus \$100,000 to nonfederal candidates, or devote a million dollars to federal election activity and \$2,000 to nonfederal activity. All organizations that register with the FEC as political committees – which they must do if they raise or spend over \$1,000 to influence federal elections, *see* 2 U.S.C. § 431(4)(A) – are considered to be identical under the FEC's new regulations. A multi-million-dollar state political committee that spends \$1,000.01 on a billboard supporting a federal candidate as its only federal activity now must use federal funds to pay for fifty percent of all its administrative expenses, even though only a tiny fraction of its administrative activity can fairly be attributed to influencing federal elections.

As a result, the Commission has federalized the funding and reporting of a large portion of such a committee's nonfederal receipts and disbursements, which are not made for the purpose of influencing federal elections. FECA provides no statutory authority for this regulatory adventure.

3. The Solicitation Restrictions Imposed By the New Rule Impermissibly Burden Fundraising for State and Local Election Purposes

The new rules also inject federal financing restrictions into fundraising for state and local elections. One such rule provides that a political committee like EMILY's List must treat as federally limited "contributions" any gift or donation

[M]ade by any person in response to any communication . . . if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

11 C.F.R. § 100.57(a). If EMILY's List now refers to a federal candidate in a communication designed to raise monies for its state and local election program, it risks a Commission finding that its communication "indicates" that some portion of the monies received may be used to "support or oppose" the federal candidate. The rule does not define the term "indicate"; rather, the Commission has simply offered vague "examples" of one possible application in the Explanation and Justification issued with the adopted final rule. 69 Fed. Reg. at 68,057.³ The Commission's guidance is also ambiguous, if not hopelessly confusing; it states that the new rule "requires an examination of only the text of the communication" and that it "turns on the plain meaning of the words used," but it also stresses that its application is not "limited to solicitations that use specific words or phrases." *Id.*

While the application of the rule is highly uncertain, there is no doubt about its intended and actual effect: to limit the use of "references" to federal candidates in solicitations for state and local election purposes, and to impair fundraising messages that discuss federal officeholders who make and execute government policy. Any such references, if the Commission concludes that they "indicate" somehow that the funds will be used, to any extent, to "support or oppose" a federal candidate, will transform funds received into federally regulated "contributions." This means that if EMILY's List receives a contribution permissible under state law, but contrary to the applicable limits and source restrictions of federal law, the Committee must refund all or part of it to the donor. *See* 69 Fed. Reg. at 68, 058-59. Moreover, having received "contributions" in excess of federal limits – because the Committee's intention was to raise and spend them for state and local

³ One such example reads: "Senator Jane Doe voted against a tax package that would have helped working families. Your generous gift will enable us to *make sure Californians remember in November.*" *Id.* (emphasis in original). The Commission states that the regulation "turns on the plain meaning of the words used in the communication and does not encompass implied meanings or understandings," and that the regulation "does not depend on reference to external events." *Id.* The Commission does not state why this language functions to "indicate" the use of the funds, only that—in its view—it does.

election activity – the Committee faces liability under FECA for receiving illegal contributions. *See* 2 U.S.C. § 437g.

These results follow under the rule even if the Commission finds that the solicitation indicated that only a "portion" of the funds received would be used to support a federal candidate. *See* 11 C.F.R. § 100.57(a). Moreover, even if the Committee were also to name nonfederal candidates, the mention of a single federal candidate – even one mention – would require that at least fifty percent of the funds received be treated as federal contributions. *See id.* § 100.57(b). A solicitation that states outright that only one percent of contributions received will be used to support federal candidates – and the rest will be used to support non-federal candidates – will still trigger the fifty percent minimum. *See* 69 Fed. Reg. at 68,057.

FECA only grants the Commission the authority to regulate contributions insofar as they are made "for the purpose of influencing" federal elections. 2 U.S.C. § 431(8)(A)(i). "Donations made solely for the purpose of influencing state or local elections are therefore unaffected by FECA's requirements and prohibitions." *McConnell*, 540 U.S. at 122. The solicitation regulation regulates much more than that, deeming as "contributions" all funds received in response to a solicitation that "indicates" that "any portion" of the funds will be used for federal purposes. If a solicitation specifies that only a small percentage of funds received will be used for federal purposes, under the statutory definition, only a portion of the funds received are contributions; under the regulation, at least fifty percent and as much as one hundred percent are contributions, depending on whether nonfederal candidates are also referenced. The result is a broad overreaching of the Commission's authority to regulate funds solicited and donated for plainly nonfederal purposes.

B. The Commission's Regulations Were Not Preceded By Adequate Notice

The final rules published on November 23, 2004, deviate from the scheme articulated in the March 11 NPRM to such an extent that the legally required notice and opportunity to comment was not provided to the public. The most important element of the adopted rules – the determination that a mere reference to a federal candidate could subject a communication to FEC regulation – was never even suggested in the March 11 NPRM. Moreover, the

overall content and structure of the final rules depart substantially from that proposed in March. Despite EMILY's List's and others' specific requests for an opportunity to comment on the radically different final proposed rules immediately after they were disclosed, the FEC afforded no such opportunity. Because these final rules violate the notice-and-comment provisions of the APA, implementation of the rules must be enjoined pending an opportunity for comment on the novel regulatory scheme laid out in the November 23 publication.

1. The Overall Scheme of the Final Rules So Departed from the NPRM That the Original Notice Did Not Adequately Frame the Subject for Discussion

The NPRM was an extraordinary document, proposing regulations that were radically different from the regulations in place at the time. In the proposed rules, the Commission put the regulated community on notice that it was considering action on a variety of fronts. The regulated community and others responded with over 100,000 comments.

While the proposed regulations did alter the text of the allocation regulations, the stated goal was to codify the changes already enacted by the FEC in Advisory Opinion 2003-37. The proposed allocation regulations mirrored the standards of that advisory opinion, including its focus on whether a communication "promotes, supports, attacks, or opposes" a clearly identified federal candidate. The proposed allocation revisions, like the rule following Advisory Opinion 2003-37, also retained the "funds expended" system, but applied the "promotes, supports, attacks, or opposes" system to determine what would count as a federal expenditure when calculating the allocation ratio.

The NPRM was primarily concerned not with allocation, but with the definition of "political committee." The primary goal of the proposed rules was to classify some section 527 organizations that were not registered with the FEC as "political committees," thus requiring that they register with and report to the FEC, and bringing them squarely within the ambit of federal election law. EMILY's List, and all other allocating committees, were already registered with the FEC, and they were already classified as political committees. To

EMILY's List, this portion of the NPRM was therefore irrelevant. The only significant change imposed on the allocation rules was to write into the regulations the changes already made by the Commission in Advisory Opinion 2003-37.

When the draft final rules were released, they were unrecognizable as outgrowths of the NPRM. With the exception of the solicitation regulation, the final rules did not contain any further regulation of unregistered organizations. The FEC ignored the primary thrust of the NPRM, and instead focused on the regulation of allocating committees like EMILY's List. More surprising still were the fundamental changes made in the approach of the allocation regulations. Instead of merely modifying the calculation of the allocation ratio, the final rules discarded it. Instead of using the "promotes, supports, attacks, or opposes" standard, the final rules depended instead on whether communications "refer to" federal candidates.

Recognizing the extent of the changes in the final rules, EMILY's List submitted a request to the FEC to open up a new comment period so that the regulated community could have a meaningful opportunity to comment. Though three Commissioners recognized the magnitude of the changes and argued for a new sixty-day comment period, that proposal ultimately failed. EMILY's List was never afforded an opportunity to comment.

The various ways in which the NPRM failed to meet the legal requirements of the APA are detailed below. Together, they create a tapestry of an agency action that emphasized haste in a politically charged atmosphere over thoughtful and considered action. The FEC never put the regulated community on notice that the drastic changes made were even being considered by the FEC, much less a realistic possibility. And when the full extent of the changes were revealed, the FEC refused to cure its mistake and allow more time for comment – even though it ultimately did not approve the final rules until over 60 days after they were first released by the FEC's General Counsel, leaving ample time for a further comment period should the FEC have wished to permit it.

The FEC failed to frame the proposed rules in such a way as to put interested parties on notice. This failure is a violation of the notice-and-comment requirement of the APA.

2. There Was No Notice in the NPRM That Final Rules Modifying the Allocation Rules for Political Committees Would Rely On Evidence of Administrative Convenience

Because the NPRM focused so heavily on the definition of "political committee" and the implementation of a "promotes, supports, attacks, or opposes" standard, it contained no explanation of why the Commission was considering altering the allocation regulations. Specifically, the NPRM contained no mention of any data on which the Commission was relying, and no mention of any goal of administrative convenience for the regulated community.

When the final rules were issued, the Commission explained that its purpose was to make it easier for committees to conform to the rules. After decrying the "confusion and administrative burden associated with the funds expended method," the Commission asserted that it "seeks to simplify, not further complicate, the allocation system. Thus, the Commission is not retaining the funds expended method in any form." 69 Fed. Reg. at 68,062.

The explanation described much evidence regarding the administrative difficulties of the former system. The Commission referred to its examination of "public disclosure reports . . . over the past ten years" and its derived conclusions that "most SSFs and nonconnected committees do not allocate under section 106.6(c)"; the "[a]necdotal evidence suggested that many committees . . . were confused as to how the funds expended ratio should be calculated and adjusted throughout the two-year election cycle"; a "review of past reports . . . showed that almost half of [allocating] committees were already paying for these expenses with at least fifty percent federal funds under the former system"; and a finding that "the actual dollar amounts of non-Federal funds that were spent in past cycles on administrative and

generic voter drive expenses under former section 106.6(c) . . . is relatively low." See 69 Fed. Reg. at 68,062.

An agency cannot rest a rule on data "that, [in] critical degree, is known only to the agency." *Cnty. Nutrition Inst. v. Block*, 749 F.2d 50, 57 (D.C. Cir. 1984) (quoting *Portland Cement Ass'n v. Ruckelhaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974)). "Integral to the notice requirement is the agency's duty 'to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.'" *Solite Corp. v. U.S. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (quoting *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982)). Moreover, agencies cannot fail to "identify the . . . methodology used" in developing regulatory standards. *Portland Cement Ass'n*, 486 F.2d at 392, *quoted in Int'l Fabricare Inst. v. U.S. E.P.A.*, 972 F.2d 384, 99 (D.C. Cir. 1992).

Here, the Commission disclosed no data regarding administrative convenience in the NPRM. There was no notice provided in the NPRM that this evidence or subject would be considered, and no opportunity for commenters to challenge the Commission's assertion that a replacement of the funds expended method with a flat system would be easier for committees to administer. While the raw data the FEC relied upon was publicly available in unorganized form, there was no simple way to compile that data and determine how committees were allocating funds. More importantly, the requirement for disclosing the evidence relied upon is not merely to make that evidence public, but to permit the public to comment upon and challenge that evidence. Here, the NPRM did not put the public on notice that this evidence was being considered.

Furthermore, the FEC did not disclose the underlying problem and rationale that led it to shape the final rule – the administrative convenience of the regulated community. Indeed,

because the NPRM did not suggest the possibility of abandoning the funds expended method in its entirety, the public could not have deduced this administrative convenience concern. Thus, commenters could not have properly addressed the Commission's methodology and whether or not the regulation served the goals articulated by the Commission in its explanation and justification of the final rules. Because evidence relied upon by the Commission was not referred to in the NPRM, and because the underlying "methodology used" was not disclosed, *Portland Cement Ass'n*, 486 F.2d at 392, the NPRM did not provide adequate notice under the APA for the fifty percent minimum federal threshold.

3. There Was No Meaningful Connection between the Proposed and Final Rules

An agency's final rules need not precisely mirror a proposal presented in the NPRM. *See, e.g., Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000); *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985). However, the notice-and-comment provision does require that the final rule be sufficiently tied to a noticed proposal that interested parties are given a meaningful opportunity to comment on the issues and likely regulatory approach. *Id.* at 338.

Courts usually articulate the standard of meaningful notice by observing that a final rule must be a "logical outgrowth" of the proposals submitted to the public. *See id.* The NPRM notice must be sufficient for interested parties to realize, at the time of comment, that the final rule actually adopted is a likely potential outcome. As the D.C. Circuit noted in the context of a final EPA rule: "The rule, seen with the benefit of hindsight, makes some sense But the test, imperfectly captured in the phrase 'logical outgrowth,' is whether [a commenter], ex ante, should have anticipated that such a requirement might be imposed." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548-49 (D.C. Cir. 1983); *see also Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985).

The D.C. Circuit places particular emphasis on whether the framing of the proposed rule provides adequate notice to interested parties of the crux of the final regulation:

An agency adopting final rules that differ from its proposed rules is required to renote when the changes are so major *that the original notice did not adequately frame the subjects for discussion*. The purpose of the new notice is to allow interested parties a fair opportunity to comment upon the final rules in their altered form.

Conn. Light & Power Co, 673 F.2d at 533 (emphasis added); *see also Omnipoint Corp. v. FCC*, 78 F.3d 620, 632 (D.C. Cir. 1996); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979). The D.C. Circuit also demands that the notice of the intended regulation be fairly specific, to allow for informed comment; a general notice of change in particular regulatory provisions is insufficient. In *Small Refiner*, the court found the "purported notice . . . too general to be adequate. Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking." 705 F.2d at 549; *see also Debraun v. Meissner*, 958 F. Supp. 227, 231-32 (E.D. Pa. 1997).

a) There Was No Notice in the NPRM That Final Rules Modifying the Allocation Rules for Political Committees Would Depend On the Overbroad "Mere Reference" Standard Actually Adopted

The NPRM included a proposal to amend 11 C.F.R. § 106.6 by changing how committees must allocate funds for communications that refer to either federal or nonfederal candidates. *See* 69 Fed. Reg. at 11,753. The proposal, though exceedingly complicated, essentially required that those communications – or those portions of communications – that "promote, support, attack, or oppose a clearly identified Federal candidate" be paid for using entirely federal funds. This language tracked that of Advisory Opinion 2003-37. *See* 69 Fed. Reg. at 11,755. Every portion of the proposed rule used this "PSAO" standard. The PSAO language is taken from 2 U.S.C. § 431(20)(A)(iii), which was added by BCRA and applies only to state and local party committees. Leaving aside the question of the Commission's

authority to apply one portion of FECA in regulations implementing a different portion, nowhere in the NPRM did the Commission contemplate any standard but the PSAO for determining whether a particular communication should be paid for using federal funds.

The final rules amending 11 C.F.R. § 106.6 are radically different. They eschew the PSAO standard and instead predicate a federal funds requirement on whether communications "refer to" a clearly identified federal candidate. The Commission gave no notice that it was contemplating this far broader "refer to" standard.

The Commission all but concedes the inadequacy of its notice. As mentioned above, the NPRM was driven by proposed changes to the definition of "political committee" and the adoption of a PSAO standard for certain expenditures. Given those broad and unquestionably important regulatory proposals, the Commission admits that "[l]ittle attention was focused on allocation issues during the public comment period." 69 Fed. Reg. at 68,061.

The difference between the proposed and the final rules is immense. The proposed rules, though dangerously vague, were designed to regulate only those communications whose purpose was to influence federal elections. The final rule is far broader. For instance, the Commission has indicated that the inclusion of a federal candidate's name as a sponsor of legislation – such as "the McCain-Feingold bill" – is enough to count as a communication that "refers to a clearly identified candidate for Federal office." *See* Electioneering Communications, 67 Fed. Reg. 65,190, 65,200 (Oct. 23, 2002). The final rules would require that a communication that criticizes a gubernatorial candidate for supporting the "McCain-Feingold" legislation be paid for in part using federal funds. This result could not have been foreseen by readers of the NPRM.

Because the Commission's NPRM gave no notice at all of the use of its far-reaching "refer to" standard, the final rules are in violation of the APA.

b) There Was No Notice That Communications That Promoted a Political Party and a Federal Candidate May Not Be Allocated

The proposed rules expressly considered political communications that promoted both a political party and a federal candidate, and considered them apart from those communications that promoted a federal candidate without promoting a political party more broadly. The NPRM proposed that communications promoting political parties be allocated using the "funds expended" method, reflecting the parties' role in both federal and nonfederal elections, while communications promoting clearly identified federal candidates be paid for using federal funds only. *See* 69 Fed. Reg. at 11,755. Nowhere did the NPRM hint that the Commission may require that such communications be paid for entirely with federal funds.

Under the final rules, it is irrelevant whether such communications refer to a political party. Communications that refer to a federal candidate and no nonfederal candidate must be paid for with federal funds alone; communications that refer to a nonfederal and no federal candidate may be paid for using nonfederal funds. *See* 11 C.F.R. § 106.6(f).

This result is dramatically different from the NPRM. A communication during 2004 such as "Vote for George Bush and the Republican Ticket" would, under the NPRM, be paid for using at least some nonfederal funds; but under the final rules, that communication could not be paid for using any nonfederal funds. This standard is not mentioned in or considered by the NPRM, and constitutes a dramatic change for organizations like EMILY's List that routinely include party-wide support in their communications. The final rule is therefore in violation of the APA.

c) There Was No Notice in the NPRM That Final Rules Modifying the Allocation Rules for Political Committees Would Require a Fifty Percent Minimum Federal Share for Administrative Expenses and Generic Voter Drives

The proposed rules did consider a minimum federal percentage for calculating "funds expended," for the purpose of allocating funds for administrative and voter drive expenses.

The proposed rules contained two alternatives; one permitted state-by-state flexibility, while the other did not. Both proposals used the allocation ratios for state political party committees under 11 C.F.R. § 106.7(d)(3), which range from a fifteen to thirty-six percent federal portion. Both proposals also retained the "funds expended" method to increase the federal allocation ratio beyond any minimum threshold.

The Commission warned that it "is considering other minimum Federal percentages as alternatives to those presented in the proposed rules." *See* 69 Fed. Reg. at 11,754. The stated alternatives included a twenty-five percent minimum for committees that conduct operations in fewer than ten states, and a fifty percent minimum for committees that conduct operations in ten or more states. *See id.* The NPRM also asked, "what should the minimum Federal percentage be?" *Id.*

The final rules require a uniform fifty percent minimum federal percentage for administrative expenses and communications that do not reference a federal or nonfederal candidate. *See* 11 C.F.R. § 106.6(c). This amount is not targeted to the number of states in which committees operate; it applies to all allocating committees, no matter their size or their amount of nonfederal activity. Instead of a minimum threshold governing the funds expended method, the funds expended method is abandoned in its entirety. *See* 69 Fed. Reg. at 68,067-68.

There was no notice in the NPRM that the Commission was considering a fifty percent minimum for all committees, or that it was considering repealing the funds expended method for calculating allocation ratios. While it did indicate that it might consider such a number for committees that operate in ten or more states, it never considered a wider scope for such an extreme minimum federal percentage. *See* Fed. Reg. at 11,754. A reader of the NPRM would have logically believed that for smaller committees especially, the minimum number could only rise to thirty-six percent, and then only for elections with both presidential and Senate candidates on the ballot.

While the Commission did indicate that it would consider other numbers, that generalization fails to provide adequate notice under *Small Refiner*, 705 F.2d at 549. The NPRM did not provide sufficient notice under the APA.

d) There Was Inadequate Notice in the NPRM That the Definition of "Contribution" Would Depend On the Overbroad "Indicates" Standard Actually Adopted

The NPRM also considered potential changes to the definition of "contribution" at 11 C.F.R. Part 100, Subpart B. Two alternatives were presented: the first tied the definition to an altered definition of "expenditures," and the second tied the definition to solicitations containing "express advocacy" of a clearly identified federal candidate. *See* 69 Fed. Reg. at 11,743. The NPRM also broadly asked: "Should the new rule use a standard other than express advocacy, such as a solicitation that promotes, supports, attacks, or opposes a Federal candidate, or indicates that funds received in response thereto will be used to promote, support, attack, or oppose a clearly identified Federal candidate?" *Id.* at 11,743.

In sharp contrast, the final section 100.57 treats funds received as contributions "if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a). The rule also provides that if no nonfederal candidates are referred to, all of the funds received are federal contributions; if the solicitation also refers to clearly identified nonfederal candidates, at least fifty percent of the funds received are contributions. *Id.* The FEC admitted in the Explanation and Justification of the final rules that "the NPRM . . . took a different approach." *Id.* at 68,057.

The final rule departs too far from the proposed rule and the NPRM's comments. The NPRM did not contain any suggestion of a minimum amount of funds received that would be federal contributions for solicitations supporting or opposing federal candidates. As stated, under the final rule, a solicitation that indicates that only one percent of contributions received will be used to support federal candidates – and the rest will be used to support

nonfederal candidates – will still trigger the fifty percent minimum contribution level. Such a minimum federal percentage for section 100.57 was not even considered in the NPRM.

Finally, the NPRM did not provide notice that once a solicitation falls under section 100.57, for any funds received to be considered nonfederal funds a clearly identified candidate must be referred to. This is a serious impediment to solicitations, because nonfederal candidates are often not as well-known by the audience of a solicitation; indeed, early in an election cycle, specific nonfederal candidates may not even have announced their candidacies. For instance, a solicitation might request funds to be used to support "George Bush and state legislative candidates in Alabama." The Commission has indicated in Advisory Opinion 2004-33 that such language would not be considered as referring to clearly identified nonfederal candidates. *See* FEC Advisory Opinion 2004-33 (Sept. 10, 2004). The final rule thus requires solicitations to name individual nonfederal candidates that will be supported. This result could not have been deduced from the NPRM.

For the above reasons, the Commission did not provide adequate notice under the APA for the final section 100.57.

C. The Regulations Are Arbitrary and Capricious

An agency's rulemaking must be vacated if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As part of this task, a court must determine whether "the agency . . . articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Mich. Consol. Gas Co. v. FERC*, 883 F.2d 117, 121 (D.C. Cir. 1989) (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 29 (1983)). "[A]n agency's action is arbitrary and capricious [if] the agency has not considered certain relevant factors or articulated any rationale for its choice." *Republican Nat'l Committee v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996).

1. The Fifty Percent Federal Minimum for Administrative and Voter Drive Expenses Is Arbitrary and Capricious

As noted above, the final regulations require that fifty percent of all administrative and voter drive expenses be paid for with federal funds; this minimum threshold amount entirely replaces the funds expended method. This application of a universal threshold to all allocating committees is arbitrary and capricious.

The Commission reported, in its explanation of the final rules, that a "flat 50% allocation minimum recognizes that SSFs and nonconnected committees can be 'dual purpose' in that they engage in both Federal and non-Federal election activities. . . . However, the 50% figure also recognizes that some Federal SSFs and nonconnected committees conduct a significant amount of non-Federal activity in addition to their Federal spending." 69 Fed. Reg. at 68,062. That explanation demonstrates the arbitrary nature of the Commission's decision.

The Commission crudely decided that because these committees had a "dual purpose," a fifty percent minimum is appropriate. That decision was, simply put, an illogical one: the appropriate level of federal funding has nothing to do with how many different roles a committee has, and everything to do with their relative importance to the organization. Allocating committees differ in their ratio of federal to nonfederal activity. Some large committees may only dabble in nonfederal activity; for those organizations, a fifty percent minimum would be far too low. Others, such as EMILY's List, have a much higher level of nonfederal activity, especially in non-presidential election years. Some committees' federal activity may barely reach above the \$1,000 minimum threshold for filing with the Commission. For those organizations, imposing a fifty percent federal minimum on all administrative and voter drive expenses is completely arbitrary.⁴

⁴ While it is true that fixed ratios apply to state political party committees, and did apply to national political party committees before the passage of BCRA, political parties are an entirely different type of

The Commission's decision is even more capricious than if the rule had been adopted in a vacuum, because it supplants the "funds expended" method of calculating allocation ratios. This method was designed to ensure that a nonconnected committee's allocation ratio for administrative expenses reflected the actual behavior of the organization. This system flexibly accommodates both differences committee to committee and from cycle to cycle. It accommodated organizations that only dabble in federal elections, those that only tread lightly in nonfederal elections, and those – such as EMILY's List – with an active commitment to both. To replace this system with a one-size-fits-all minimum percentage is arbitrary and capricious.

2. The Solicitation Regulation Is Arbitrary and Capricious

As described earlier, the solicitation regulation provides that all funds received are "contributions" if given in response to a solicitation indicating that "any portion" of the funds will be used to support or oppose federal candidates. This is true even if the solicitation indicates that some or most of the funds will be used for other purposes, including the election or defeat of unspecified nonfederal candidates. This regulation is arbitrary and capricious.

The Commission explained, in the explanation and justification of the final rules, why it believed at least some funds should be defined as "contributions" in response to such a solicitation. However, there was no "rational basis" for the agency's decision to deem all such funds received to be contributions. *See Env'tl. Defense Fund, Inc. v. Costle*, 657 F.2d

organization from nonconnected committees. Political parties are responsible for all candidates running in their state, including federal and nonfederal candidates; the Commission's decision to apply fixed ratios depending on the ratio of federal to nonfederal elections may make administrative sense. And even then, the ratio changes depending on the composition of the ballot from election to election, reflecting flexibility not found in the new allocation rule. *See* 11 C.F.R. § 106.7(d).

By contrast, nonconnected committees pick and choose what elections to support or oppose; application of a fixed ratio is nonsensical. Some committees may focus on a higher ratio of federal elections and ignore nonfederal races that are less well-publicized. Other committees, such as EMILY's List, have a strong commitment to supporting nonfederal candidates, especially in non-presidential election cycles.

275, 283 (D.C. Cir. 1981). No explanation was proffered as to why a solicitation's specific explanation of how it will use the funds it receives should not trump the presumption that all funds are donated and will be used for the purpose of influencing a federal election.

The solicitation regulation also states that funds received in response to solicitations that indicate that funds will be used to support both clearly identified federal and nonfederal candidates will be at least fifty percent federal contributions. Even if a solicitation states how funds will be used, the regulation imposes its own arbitrary threshold amount of federal contributions. The Commission does not explain, in the explanation and justification of the final rules or elsewhere, why this uniform level was chosen, even if the solicitation explicitly provides otherwise. No rationalization is given for this arbitrary system. The rule is therefore arbitrary and capricious.

3. The Regulations Fail to Consider the Necessary Goals of Preventing Corruption and the Appearance of Corruption

The only constitutionally permissible purpose relied upon by the Supreme Court when approving campaign finance reform measures is to "prevent the corruption or the appearance of corruption." *McConnell*, 540 U.S. at 100-01. Yet the Commission never considered the effect of the final rules, if any, on corruption or the appearance of corruption. This failure renders the regulations arbitrary and capricious. Under *State Farm*, agencies must consider all "relevant factors." 463 U.S. at 43. In the realm of FEC action, failure to consider the effect of regulations on fulfilling the primary purpose of FECA – preventing corruption and the appearance of corruption – constitutes arbitrary and capricious action. *See Shays v. FEC*, 337 F. Supp. 2d 28, 87 (D.D.C. 2004).

In the publication of the final rules, the Commission only discussed corruption in the context of the definition of "political committee," regulations not ultimately adopted. The final rules contain no explanation of their effect on stemming corruption. The solicitation regulation's explanation focused on the Commission's belief that it had the power to act; the

allocation regulation's explanation focused on administrative convenience. In neither case did the Commission consider the impact on the only recognized constitutionally permissible goal of campaign finance reform. Because the Commission did not "consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, the regulations are arbitrary and capricious.

D. The Regulations Violate the First Amendment to the United States Constitution

1. The Regulations Are Not Narrowly Tailored to Serve an Overriding State Interest

The First Amendment to the United States Constitution prohibits the government from restricting the types and amounts of funds used to create political speech or otherwise influence federal elections unless the restrictions are meant to prevent the actual or apparent corruption of elected officials. *See McConnell*, 540 U.S. at 93; *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985); *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). A primary purpose of the First Amendment "was to protect the free discussion of governmental affairs . . . of course include[ing] discussion of candidates." *Id.* at 14 (internal quotation marks and citations omitted). "When a law burdens core political speech, we apply 'exacting scrutiny' and we uphold the restriction only when it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 334-35 (1995).

The Commission's regulations are in violation the First Amendment. First and foremost, they are not narrowly tailored to prevent corruption or the appearance of corruption. By regulating communications that merely "refer to" a federal or nonfederal candidate, the regulations go far beyond the governmental intrusions approved in *Buckley* and its progeny. The new regulations apply specifically to independent communications, even those not made for the purpose of influencing an election, and thus pose little or no risk of corruption or the appearance of corruption. The fifty percent federal minimum for administrative expenses also regulates activity far removed from federal elections, for those

allocating committees whose federal activities comprise a small portion of their overall electoral efforts.

These regulations impose severe restrictions on the ability of EMILY's List to engage in political speech. If it is forced to obey the restrictions of federal instead of state law, even when it is engaged solely in state activities, it may be able to raise and spend much less money in support of, or in opposition to, candidates. And because the regulations turn on a reference to federal candidates, EMILY's List may be required to remove such references if it cannot raise sufficient funds under federal election law restrictions. Such restrictions are a substantial and immediate burden upon EMILY's List.

Because of the substantial burden on Plaintiff's speech, the regulations require a strong connection to corruption or the appearance of corruption. No such argument has been made by the Commission. It is nonsensical to argue that a donor would attempt to curry favor with a candidate running for Congress in one state by paying for a mail piece in another state entirely, in which that candidate endorses a state candidate. It is specious to argue that a mere "reference" to a candidate, even in the state in which she is running, is so beneficial to that candidate that corruption may only be checked by requiring that some or all of the funds used be federally regulated.

The Commission has also offered no rationale why the solicitation restriction is necessary to stem corruption or the appearance of corruption. The solicitation restriction of section 100.57 prevents donors to a committee from deciding on their own whether their funds will go to support federal or state candidates. Indeed, the restriction appears to increase the potential for corruption of federal candidates, if anything; funds treated as federal despite the donor's intent can and will be used to influence federal elections, even if the donor does not wish to curry favor with federal candidates at all. The Commission does have an interest in ensuring that organizations not be able to raise funds that will be used in part to support federal candidates and classifying none of the resulting contributions as

federal funds; the result in that case would be a circumvention of the FECA. But this regulation overrules even explicit explanation on the fundraising materials as to how the funds will be used. There is no corruption or circumvention rationale for this severe restriction on fundraising.

Even if the regulations could be connected to corruption or the appearance of corruption, the Commission has produced no evidence to this point. Such a demonstration requires actual evidence, not merely an assertion of a "hypothetical possibility" of corruption. *Nat'l Conservative Political Action Comm.*, 470 U.S. at 498; *see also United States v. Nat'l Treas. Employees Union*, 513 U.S. 454, 475-76 (1995). In *McConnell*, the Supreme Court had before it extensive findings by Congress of the nature of the problems with political parties and addressed by BCRA. *See* 540 U.S. at 146. Moreover, the Court specifically distinguished the opportunity for corruption involving parties from independent groups unable to sell access to officeholders. *See id.* at 188. Here, the Commission has no evidence before it that allocating committees are a source of corruption of officials, or the appearance of corruption.

McConnell does not support the Commission restrictions at issue here. *McConnell* upheld a scheme of regulation focused on political party committees and justified by an extensive empirical record of corruption or the appearance of corruption entailed in the sale "access" to federal officeholders. Moreover, the Supreme Court repeatedly called attention to Congress's care in crafting BCRA; the governmental interest in preventing corruption was strong; the regulated entities were in a "unique position" to harm that interest; and the consequent restrictions were closely tailored. Only under these circumstances was the burden on First Amendment rights justified. *McConnell*, 540 U.S. at 144-45, 154-55, 156 n.51, 164-65.

EMILY's List is not a party committee, and there is no suggestion that it is controlled, much less closely coordinates its actions with, federal officeholders. There is no empirical

record supporting a concern with corruption effected through the activities of political committees like Emily's List that maintain robust programs in nonfederal elections. Indeed, more generally, as the *McConnell* Court noted, there are "salient differences" between political parties' ability to sell access to officeholders and the inability of independent committees to do so, that leave political parties in a "unique position" to foster corruption or the appearance of corruption. *McConnell*, 540 U.S. at 144-45, 154-55, 156 n.51, 164-65, 188. As the Court explained:

Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group.

Id.

Nonetheless the FEC's regulations impair EMILY's List's ability to speak publicly, and to associate with others for lawful nonfederal purposes, without regard to its mandate to regulate communication "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i), (9)(A)(i). BCRA's carefully documented and tailored restrictions on parties are utterly unlike the careless, undocumented and broad-brush restrictions on independent speakers at issue here.

2. The Solicitation Regulation Is Unconstitutionally Vague and Overbroad

In addition, the "indicates that" standard of the new section 100.57 is vague and overbroad. *See City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The phrase "indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate" is undefined, and the Commission's examples in its explanation of the final rules only exacerbate the confusion. *See* 69 Fed. Reg. at 68,057. The Supreme Court has noted that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be

