

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civ. No. 05-0049 (CKK)

**REPLY TO DEFENDANT'S OPPOSITION TO THE APPLICATION FOR A  
PRELIMINARY INJUNCTION**

The defense offered by the Federal Election Commission ("FEC" or "the Commission") of its challenged rules can be boiled down to two basic points:

- (1) Having established jurisdiction over a "political committee," the FEC may regulate that committee as it pleases, and indeed need refrain from regulation only at its option, as a matter of "administrative grace," Opp. at 16.
- (2) Even if the Commission unlawfully adopted the rules, EMILY's List cannot show that it will be irreparably harmed by the Commission's illegal conduct. See, e.g., Opp. at 39-42.

The Government embroiders these claims with the extraordinary suggestion that because EMILY's List, a successful political committee, has the resources to survive this regulatory assault, it cannot complain about the violation. In other words, the FEC believes that its conduct

is acceptable because this particular political committee presumably can afford the additional costs, in federally restricted funds, that will result from the agency's unconstitutional and unlawful conduct.

The FEC's astonishing line of argument ignores entirely that as an independent political organization, with established interests in state and local elections as well as in federal ones, EMILY's List possesses core rights of speech and association that the FEC may not infringe without regard to constitutional limits. As this Court recognized in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (Kollar-Kotelly, J.), the FEC may fashion only rules that are closely drawn to protect against corruption or its appearance in federal elections. This is precisely what the FEC has failed to do in promulgating rules that restrict, in sweeping fashion, an independent committee's longstanding efforts to elect women candidates to nonfederal offices. The harm to EMILY's List here is fundamental, far-reaching and constitutional in character, and irreparable in its effect.

Even if the FEC had revised its allocation rules within constitutional boundaries, it would still have been required, like any administrative agency, to avoid arbitrary and capricious conduct, and to supply adequate notice in writing of the proposed rules. The FEC is not excused from these legal obligations simply because EMILY's List is subject to FEC jurisdiction for some purposes. Nor is the FEC excused from these obligations because it thinks EMILY's List can bear the unlawful burden it now imposes.

## DISCUSSION

### **I. The Commission Disregards the First Amendment Burden of the New Regulations**

#### **A. The Regulations Impermissibly Restrict Areas of Core First Amendment Protection**

The Commission's new regulations are not merely technical adjustments to accounting formulas. They impose direct restrictions on protected speech and activity in which EMILY's List has engaged for over twenty years. They tell EMILY's List not only how it may raise money to support women candidates for state and local office, but what it may say while doing so.

The Commission concedes frankly that the new rules restrict EMILY's List's communications with voters to influence state and local elections. If EMILY's List is uncomfortable with the FEC's restrictions, it can simply "adjust the wording of its solicitations," Opp. at 30. If EMILY's List wants to critique an incumbent president's policies, "the reference . . . could easily be reworded to refer to 'the Administration's policies' rather than using the name of the incumbent running for re-election," Opp. at 21 (emphasis added).

For a group engaged in core political speech, such choices are not trivial. They are a substantial and immediate burden. An example is a mailing to voters in State X on behalf of a statewide candidate, which features an endorsement by a nationally recognized federal candidate running for reelection in State Y. This reference to the federal candidate would also be the basis for an application of financing restrictions, even though the mailing reaches no one eligible to vote for the federal candidate. The FEC does not bother to address these problems seriously, except to claim wide latitude to do with political committees what it pleases.

#### **B. McConnell Does Not Create a Constitutional Basis for the Regulations**

Despite the Commission's claim to the contrary, McConnell v. FEC, 124 S. Ct. 619 (2003), does not support the FEC restrictions at issue here. McConnell upheld the Bipartisan Campaign Reform Act of 2002 – an Act of Congress that was focused on political party

committees, corporations and labor unions; and that was conspicuously silent on the subject of independent committees like EMILY's List. Congress supported the law with an extensive, empirical record of corruption through the sale of "access" to federal officeholders through large party contributions. See id. at 661, 667, 668 n.51, 672.

When it upheld the bulk of BCRA, the Supreme Court repeatedly called attention to Congress's care in crafting the law, saying that it had adjusted the laws incrementally to address well-established threats of corruption or its appearance. See id. at 645. In McConnell, according to the Court, 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.

The rules now before this Court are altogether different. EMILY's List is not a party committee, nor is it controlled by federal candidates. There is no record whatsoever to suggest that corruption might somehow result from its robust programs to support women candidates in state and local elections. Indeed, 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 underscore why political parties are in a unique position to foster corruption or its appearance. 124 S. Ct. at 686. 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 has impaired EMILY's List's ability to speak publicly, and to associate with others for lawful nonfederal speech and programs, 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.

**C. The Balance of Harms Favors EMILY's List, Which Has Established Irreparable Harm**

The Commission argues that even if its regulations are illegal, it should nonetheless prevail because EMILY's List has not proven irreparable harm. Opp. at 39. This requires the Court to accept the premise that no First Amendment interests are at stake here, and that EMILY's List may be regulated by the Government no differently than, for example, a gas pipeline company. See Opp. at 13, 39-40 (citing Wisconsin Gas Co. v. FERC, 758 F.2d 669 (D.C. Cir. 1985)).

If EMILY's List shows a likelihood of success on the merits of a First Amendment violation, it shows irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976).<sup>1</sup> At stake here is not a temporary financial inconvenience that can be remedied through later payments; rather, it is an unconstitutional burden on the ability of EMILY's List to communicate political messages and to associate with others in lawful political activity.<sup>2</sup> Once the constitutional damage is done, it cannot be remedied.<sup>3</sup>

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<sup>1</sup> See also Green Party v. New York State Bd. of Elections, 389 F.3d 411, 418 (2d Cir. 2004) ("Finally, where a First Amendment right has been violated, the irreparable harm requirement for the issuance of a preliminary injunction has been satisfied."); Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004); Newsom ex rel. Newsom v. Albemarle County School Bd., 354 F.3d 249, 261 (4th Cir. 2003); Ingebretsen on Behalf of Ingebretsen v. Jackson Public School Dist., 88 F.3d 274, 280 (5th Cir. 1996); ACLU of Kentucky v. McCreary County, 354 F.3d 438, 445 (6th Cir. 2003); Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 507 (7th Cir. 1998); Marcus v. Iowa Public Television, 97 F.3d 1137, 1140 (8th Cir. 1996).

<sup>2</sup> Although the FEC claims that its standards are sufficiently clear to "leave[] the group issuing the communication with complete control over whether its communications will trigger" the new regulations, Opp. at 28, even its brief betrays confusion regarding the appropriate standard. Although the text of 11 C.F.R. § 100.57 states that it covers any solicitation that "indicates that any portion of funds received will be used to support or oppose the election of a clearly identified Federal candidate," 11 C.F.R. § 100.57(a) (emphasis added), the FEC claims in its Opposition that the regulation only embraces

Nor does the Commission cite any valid authority for its contention that EMILY's List must submit affidavits or documentary evidence to prove injury. The court in Wisconsin Gas merely said that a court must be able to evaluate whether harm is likely. As discussed above, EMILY's List has demonstrated that irreparable harm is likely, especially since First Amendment interests are at stake. Wisconsin Gas involved no constitutional violations; it cannot be read to require affidavits to establish the likelihood of a First Amendment violation. See 758 F.2d 669.

Finally, the Commission's asserted harm to the public and the regulated community is specious. Political committees have operated under the same basic allocation regime for nearly thirty years. The rules for such committees are clear and familiar. There can be no harm in leaving this regime in place, at least until the dispute over new, expansive, vague, and hastily considered rules has been resolved. There is far more harm to the public and the regulated community in allowing these unconstitutional rules to govern committee activity during the current election cycle, while this case waits to be decided on the merits.

## II. The Regulations Are Arbitrary and Capricious

The Commission makes much ado about the "highly deferential" Chevron standard applied to judicial review of agency action. Opp. at 13-14. However, the Commission does little to explain how it did anything other than pluck convenient numbers out of thin air.

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solicitations that "state that the funds received will be" so used, Opp. at 28. These are different standards. They show the uncertainty about what the FEC might deem to be an "indication" of electoral opposition or support. Surely this uncertainty has the potential to chill EMILY's List's protected speech, as the committee tries to decipher what it is allowed to say.

<sup>3</sup> The cases cited by the Commission for the proposition that EMILY's List must further prove tangible harm simply do not apply here. Wisconsin Gas Co. addressed regulations on gas transit fees imposed on a gas pipeline; no constitutional violations whatsoever were asserted. 758 F.2d at 669. NTEU v. United States, 927 F.2d 1253 (D.C. Cir. 1991), concerned alleged First Amendment violations, but the court found that no First Amendment interests were actually threatened at the time preliminary relief was sought. Similarly, Wagner v. Taylor, 836 F.2d 566 (D.C. Cir. 1987), recognized the obvious: mere assertion of a First Amendment violation does not suffice if the court has no reason to believe that the plaintiff could succeed on the merits of the First Amendment claim. None of these cases suggest that harm over and above a First Amendment violation be proven to justify a preliminary injunction.

The arbitrary nature of the regulations is made evident – and pernicious – by the Commission's contention that a 50% federal-funds minimum is justified solely because the Commission could just as easily have allowed *no* non-federal funds at all. Opp. at 16. The argument is, apparently, that since the entire allocation regime is a result of "administrative grace", any allocation formula is thereby, *ipso facto*, valid. *Id.* By this logic, the FEC could have promulgated, without further explanation, a fixed 50% minimum – or 30%, or 70%, or 61.3%.

This is not reasoned agency decision-making. Even if the Commission had the authority to impose a fixed minimum federal-funds threshold,<sup>4</sup> its choice of that threshold would have to bear some considered relationship to the overall goals of the statute. Shays v. FEC, 337 F. Supp. 2d 28, 53-54 (D.D.C. 2004) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider [or] entirely failed to consider an important aspect of the problem . . .") (emphasis added) (citing Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983)); 337 F. Supp. 2d at 92, 128.

For nearly thirty years, the FEC tried to make its allocation rules correspond to the actual, proportionate effect of a committee's activities on federal and nonfederal elections. See, e.g., Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26,058, 26,064 (1990) (citing Advisory Opinion Request 1976-72). Its last major overhaul of the allocation rules was "the result of a long and complex rulemaking process" that included the sending of questionnaires to 110 Democratic and Republican state political parties

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<sup>4</sup> As EMILY's List noted in footnote 2 of its Memorandum of Points and Authorities, the fact that fixed ratios apply to state political party committees, and once applied to national party committees, is not relevant here. Those committees are focused on all candidates running in their jurisdiction, and the allocation ratio changes depending on the percentage of federal and state candidates on the ballot. The regulations at issue here apply to nonconnected committees, each of which chooses the extent to which it will support state and local candidates. Such variance is singularly unsuited to a fixed-minimum allocation ratio.

and to the chief fundraisers of the major political parties during the previous election. See id. at 26,058. The Commission made no such effort here. It did not consider the relative importance of state and local election activity to a particular allocating committee, it did not identify the particular potential for corruption that its minimum addressed, nor did it consider the relative merits of other fixed ratios.

The absence of Commission efforts to tailor its allocation ratios to actual committee activity is a strong sign that it exceeded its statutory authority. The Commission's authority derives solely from the FECA. What the FECA does not regulate, the Commission cannot either. The FECA says nothing about the state and local election activities of independent committees. The task of regulating these activities falls to the local jurisdictions in which these committees are active. Thus, it is not correct to treat the nonfederal affiliate of a federal political committee as subsumed within that committee, and allow that affiliate to function solely through "administrative grace." The Commission can only require the entity under its jurisdiction – the federal account – to pay for the activities that are fairly attributable to it. The new rules make no effort to stay within these bounds.

The arbitrariness of the new rules is demonstrated further by the Commission's unconvincing rationale for them. The Commission says that it wrote new rules because the old ones had been "a source of confusion" for committees like EMILY's List, and that the new ones would "make it easier" for the committees. Opp. at 23. Yet the sole comment cited by the FEC from the rulemaking on this point came not from the committees that are now supposedly benefiting from this act of administrative solicitude, but instead from the representative of a public interest group. See Opp. at 9 n.13. There is not a single statement from an allocating committee calling for even the consideration of such a "bright-line rule" to simplify or ease the burdens of compliance. This justification for the new allocation regime is, plainly and simply, a post hoc rationalization.

Amici Curiae expose this rationalization for what it is. They present an altogether different, more candid account of the Commission rulemaking. They describe the new rules as motivated by controversy over "527" activity related to the 2004 Presidential campaign, by a committee called America Coming Together ("ACT") and others. Memo. of Amici Curiae at 3. This controversy has nothing to do with EMILY's List, which stands accused of none of the so-called "evasion" that Amici repeatedly impute to ACT. See id. Perceiving this problem, Amici flail about in search of some connection, and try to find it in such facts as the involvement in ACT of EMILY's List's president, and the two committees' engagement for various purposes of the same counsel. This sort of argument does not need, nor does it merit, an extended response. It is not a legal argument.

It is clear what the FEC has done. By treating all allocating committees as homogenous organizations that spend precisely the same proportion of funds on federal and state activity, the Commission is now regulating committees that focus on state and local elections in a manner well beyond the scope of its statutory authority. To do so, it has provided justifications which range from misleading (the claim that it need not promulgate any allocation regulations) to disingenuous (the supposed desire amongst the regulated community for simplicity) to irrelevant (the fact that some committees already use a fifty percent allocation ratio).

The brief filed by Amici shows why these feeble justifications were necessary. The FEC's rules were not the product of reasoned decision-making. They were a hasty attempt, in a politically charged season, to address a Presidential campaign finance controversy. EMILY's List, which was not involved in this controversy, happened to be in the way. And because none of the agency's asserted justifications are directly related to the goals of its governing statute, the FEC has entirely failed to satisfy the requirements of a properly considered and explained rulemaking. For these reasons, among others, the regulations are arbitrary and capricious.

### III. The NPRM Did Not Give the Regulated Community an Adequate Opportunity to Respond

The Commission defends the adequacy of its notice of rulemaking on two primary grounds: that because EMILY's List did not submit comments, it has no right to complain; and that the notice was so broad in scope that EMILY's List had reason to anticipate the final regulations.<sup>5</sup> As the context makes clear, however, both contentions actually show why notice was not reasonably adequate.

The FEC announced this rulemaking on an extraordinarily hurried schedule in the middle of an election year. It focused on two extremely far-reaching changes: a new definition of "political committees" regulated by the Commission, and a new "promote, support, attack, or oppose" standard for regulating expenditures and allocation. Commenters reasonably concentrated on these immense revisions of the basic regulatory structure, which would have fundamentally altered the operation of the FECA.

Neither sweeping change appeared in any fashion in the final regulations. The provisions actually adopted in the final regulations were either entirely absent from the NPRM (e.g., regulation of public communications that refer to a clearly identified federal candidate), present in only the most general fashion (e.g., an unspecified fixed allocation ratio), or buried deep in an entirely different discussion (e.g., the "promote, support, attack, or oppose" standard for solicitations).

The practical effect was a bait-and-switch. Two broad structural changes were proposed, but several provisions concerning completely different portions of the regulatory scheme were

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<sup>5</sup> The Commission also contends that EMILY's List had actual notice of the rulemaking due to the fact that EMILY's List and America Coming Together – which submitted comments in the rulemaking – share the same president and the same lead counsel. Opp. at 10 n.15, 33 n. 26. This is has nothing to do with the issue at hand. EMILY's List acknowledges that it was aware that a rulemaking was underway, but contends that it, like other members of the regulated community, could not reasonably have anticipated the final rules from the promulgated notice, because those rules differed so drastically in character from those originally proposed.

adopted. These final provisions were not an outgrowth of the initial proposals that any reasonable commenter would have anticipated. See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983). When the Commission finally indicated how the rules were actually likely to take shape – on August 12, only after the comment period had closed – EMILY's List immediately petitioned for time to comment. The petition was denied, leaving EMILY's List without any reasonable opportunity to comment on the regulation.

### CONCLUSION

For these reasons, EMILY's List respectfully requests the Court to grant its application for a preliminary injunction.

Respectfully submitted,



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