ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5422

EMILY's LIST

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant D.C. Cir. R. 28(a)(1), the Federal Election Commission ("the Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici.*** EMILY's List was the plaintiff in the district court and is the appellant in this Court. The Commission was the defendant below and is the appellee in this Court. Amici curiae in the district court were Democracy 21, the Campaign Legal Center, the Center for Responsive Politics, John McCain, Russell Feingold, Christopher Shays, and Martin Meehan. There were no intervenors in the district court. In this Court, the Campaign Legal Center and Democracy 21 are participating as amici curiae.

(B) ***Rulings Under Review.*** EMILY's List appeals the July 31, 2008, judgment of the United States District Court for the District of Columbia (Kollar-Kotelly, J.) for the Commission on cross-motions for summary judgment in this suit challenging three regulations. The court's opinion is reported at 569 F. Supp. 2d 18 (D.D.C. 2008) and is in the Joint Appendix at JA 126-194.

(C) ***Related Cases.*** This case was previously before this Court on an appeal by EMILY's List of the district court's denial of plaintiff's motion for a preliminary injunction. This Court affirmed the denial. *EMILY's List v. FEC,* 362 F. Supp. 2d 43 (D.D.C.), *aff'd,* 170 Fed. Appx. 719 (D.C. Cir. 2005) (No. 05-5160). The Commission knows of no other "related cases" as that term is defined in D.C. Cir. R. 28(a)(1)(C).

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GLOSSARY

ACT (in capitals)	=	America Coming Together
AO	=	Advisory Opinion
AR	=	Certified Administrative Record
APA	=	Administrative Procedure Act
BCRA	=	Bipartisan Campaign Reform Act of 2002
E&J	=	Explanation and Justification
FEC	=	Federal Election Commission
FECA	=	Federal Election Campaign Act of 1971
JA	=	Joint Appendix
MUR	=	Matter Under Review
NPRM	=	Notice of Proposed Rulemaking
OP.	=	District court's opinion in this case
SEF	=	Survival Education Fund
SSF	=	Separate Segregated Fund
WRTL	=	Wisconsin Right to Life

COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 over the claims by EMILY's List that three regulations promulgated by the Federal Election Commission ("the Commission" or "FEC") are facially invalid. This Court has jurisdiction under 28 U.S.C. 1291 of this appeal, filed September 25, 2008, from the July 31, 2008, final judgment of the district court granting the Commission's motion for summary judgment and denying EMILY's List's motion. (JA 125.)[1]

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether regulations simplifying and clarifying how nonconnected federal political committees may "allocate" funds to finance certain activities that influence both federal and nonfederal elections violate the First Amendment on their face. 11 C.F.R. 106.6(c), (f).

2. Whether a regulation clarifying when funds obtained through solicitations are "contributions" under the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. 431-55, facially violates the First Amendment. 11 C.F.R. 100.57.

3. Whether those solicitation and allocation regulations exceed the Commission's statutory authority or are arbitrary and capricious in violation of the Administrative Procedure Act.

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[1] "JA __" references are to the Joint Appendix filed with appellant's brief.

STATUTES AND REGULATIONS

The Addendum to appellant's brief contains relevant statutory and regulatory provisions.

COUNTERSTATEMENT OF THE FACTS

A. The Parties

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret and civilly enforce the Act. *See generally* 2 U.S.C. 437c(b)(1), 437d(a), and 437g. The FEC is empowered to "formulate policy with respect to" the Act, 2 U.S.C. 437c(b)(1), and to promulgate "such rules … as are necessary to carry out the provisions" of the Act. 2 U.S.C. § 437d(a)(8). *See also* 2 U.S.C. 438(a)(8) and (d).

EMILY's List has been registered with the Commission as a multicandidate nonconnected political committee for more than 20 years.[2] *See* 2 U.S.C. 433(a); FEC Statement of Facts ("FEC Stmt.") ¶ 3 (JA 91-92); *EMILY's List v. FEC,*

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[2] The Act defines "political committee" in relevant part as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year…." 2 U.S.C. 431(4)(A). *See also infra* p. 23. A "nonconnected committee" is a political committee that is not a party committee, an authorized committee of a candidate, or a separate segregated fund (SSF) established by a corporation or labor organization. 11 C.F.R. 106.6(a). A "multi-candidate committee" is a political committee that has been registered at least 6 months, has more than 50 contributors and has made contributions to at least 5 candidates for federal office. 2 U.S.C. 441a(a)(4).

569 F. Supp. 2d 18, 23 (D.D.C. 2008) ("Op."); JA 129. Its self-described "organizational purposes" are "to recruit and fund viable pro-choice women candidates; to help them build and run effective campaign organizations; and to mobilize women voters to help elect progressive candidates across the nation." Complaint ¶ 5 (JA 10); *see also* JA 117-124.

EMILY's List has separate bank accounts to fund its federal and nonfederal activities, pursuant to 11 C.F.R. 102.5(a). FEC Stmt. ¶ 4 (JA 92); Op. at JA 129. The federal account can accept only contributions that comply with the Act's source and amount restrictions ("hard money"), that is, contributions of up to $5,000 per year from individuals or other political committees registered with the Commission, but no contributions from corporations, labor unions, or foreign nationals.[3] *See* 2 U.S.C. 441a(a)(1)(C), 441b(a), 441e; 11 C.F.R. 102.5(a)(1), (2). EMILY's List may spend funds from its federal account in connection with federal elections or nonfederal elections. Its nonfederal account can accept donations that do not comply with the Act's source and amount restrictions ("soft money"), but it cannot use those funds in connection with federal elections. Op. at JA 129. EMILY's List has registered its nonfederal account with the Internal Revenue Service. Complaint ¶ 11 (JA 11-12).

[3] The Act defines "contribution" in relevant part as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8).

EMILY's List is one of the top federal political committees in fundraising. It raised more than $25 million in federal funds alone during the 2003-04 election cycle, and it again raised $25 million in the 2005-06 election cycle, a period without a presidential election, when such contributions typically decline substantially. Op. at JA 142; FEC Stmt. ¶¶ 6-7 (JA 92-93); summary report (JA 103). In the latest election cycle, EMILY's List received approximately $25.3 million in federal funds.[4] According to its president, "EMILY's List is the biggest PAC, which means we have the most hard money, so it's not an issue of not having it." FEC Stmt. ¶ 10 (JA 94) (quoting Liz Sidoti, *Bush, Kerry to Pull Ads on Friday*, Associated Press Newswires, June 7, 2004). EMILY's List has stated that it, as "the nation's largest political action committee, continues to be the dominant financial resource for Democratic candidates." FEC Stmt. ¶ 10 (JA 94).

B. Statutory and Regulatory Background

1. Regulation of Solicitations and Allocation of Expenses by Nonconnected Political Committees Prior to the Passage of BCRA

The Commission has long regulated solicitations of contributions and allocation of expenses by political committees to enforce the contribution limitations and prohibitions established by 2 U.S.C. 441a and 441b. Since 1977,

[4] The disclosure reports for 2007 are accessible at http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/330350 and at the same address except the last digits (substitute 399071) for 2008.

the Commission has required political committees to allocate their administrative expenses and the costs of certain activities (such as voter registration) that affect both federal and nonfederal elections between separate federal and nonfederal accounts. *See* 11 C.F.R. 106.1 (1977); FEC Advisory Opinion ("AO") 1978-10. The Commission substantially amended the allocation regulations in 1990. 55 Fed. Reg. 26,058 (1990). Between 1990 and 2004, 11 C.F.R. 106.6(c) permitted nonconnected committees (such as EMILY's List) to allocate administrative expenses and the costs of "generic voter drives" under the "funds expended method." 11 C.F.R. 106.6(c) (2000). These costs were allocated based on a ratio of "Federal expenditures" to "total Federal and non-Federal disbursements" made by the committee during the two-year election cycle. *Id.* The rules required committees to allocate expenditures made on behalf of one or more clearly identified federal and/or nonfederal candidates according to the benefit reasonably expected to be derived by each candidate. 11 C.F.R. 106.1(a) (2000). For publications and broadcast communications, the allocation was determined by the proportion of space or time devoted to each candidate compared to the total devoted to all candidates. *Id.*

2. Bipartisan Campaign Reform Act

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), amended FECA to eliminate allocation for national

political party committees and substitute a different allocation regime for state-level party committees, although it explicitly left determination of the method of allocation to the Commission. 2 U.S.C. 441i(b)(2)(A). The Supreme Court upheld these changes in *McConnell v. FEC*, 540 U.S. 93, 133-189 (2003). BCRA did not directly address allocation by nonconnected political committees under 11 C.F.R. 106.6.

3. The Commission's Rulemaking Regarding Political Committee Status, Expenditures, Contributions, and Allocation

a. The Notice of Proposed Rulemaking

In March 2004, the Commission published a detailed Notice proposing a variety of possible amendments to regulations regarding the definitions of "political committee," "contribution," and "expenditure," and the allocation requirements for nonconnected committees and separate segregated funds ("SSFs"). Political Committee Status, Proposed Rule, 69 Fed. Reg. 11,736 (March 11, 2004) ("Notice") (JA 239-64). The Commission explicitly sought comment on whether to change the allocation regulations for those entities (JA 257):

> Given *McConnell*'s criticism of the Commission's prior allocation rules for political parties, is it appropriate for the regulations to allow political committees to have non-Federal accounts and to allocate their disbursements between their Federal and non-Federal accounts? If an organization's major purpose is to influence Federal elections, should the organization be required to pay for all of its disbursements out of Federal funds and therefore be prohibited from allocating any of its disbursements?

The Notice also invited public comment on a proposal to treat funds received in response to particular types of solicitations as "contributions" under the Act (JA 247).

b. Public Comment and Hearings

The Commission received numerous written comments and held two days of public hearings with 31 witnesses, representing many organizations with a broad range of opinions and concerns about different issues.[5]

A number of commenters supported eliminating allocation and instead requiring the use of 100% federal funds for all expenditures under 11 C.F.R. 106.6, and some suggested abandoning the funds expended method and substituting a simpler system.[6] Others supported using specific percentages as a federal minimum for administrative expenses,[7] or simply urged the Commission to require

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[5] The certified administrative record ("AR") is contained in CD-ROMs filed in the district court. (*See* Certification (JA 67-68).) Unless otherwise noted, references to exhibits in this brief are to the exhibits accompanying the FEC's second motion for summary judgment (D.D.C. Docket Entry 34 (JA 7)). The rulemaking comments and hearing transcripts are also available online in the FEC's "Rulemaking Archive," through portal http://www.fec.gov/law/law_rulemakings.shtml# political_ committee_status.

[6] Comments of Public Citizen, at 12-13 (April 5, 2004) (Exh. 8); Comments of Republican National Committee, at 7-8 (April 5, 2004) (Exh. 9).

[7] Comments of Democracy 21, Campaign Legal Center, Center for Responsive Politics, at 17-19 (April 5, 2004) (Exh. 10).

a "significant minimum hard money share."[8] At least one commenter suggested that costs of public communications should be allocated either 100% federal or 100% nonfederal based upon whether a communication included federal or nonfederal candidates.[9] One commenter argued that some revisions of the funds expended method would be too burdensome to committees because of the reporting and bookkeeping that would be required.[10]

The Commission heard testimony about the complexities of the then-current allocation system and the proposal to move to a flat minimum federal percentage.[11] Witnesses also stated that the allocation system permitted circumvention of the rules in BCRA,[12] and specifically discussed the possibility of a 50% federal

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[8] Comments of Senators McCain and Feingold, Representatives Shays and Meehan, at 3 (April 9, 2004) (Exh. 11).

[9] Comments of Republican National Committee, at 7 (April 5, 2004) (Exh. 9).

[10] Comments of Media Fund, at 20 (April 5, 2004) (Exh. 12).

[11] Transcript of Public Hearing, April 14, 2004 ("Apr. 14 Tr."), at 160 (testimony of Craig Holman) (stating the current allocation ratio was "a mess," and suggesting "it would certainly be a healthier improvement to at least come out with some sort of fixed percentage, that is a clear bright line test of how much illegal money can be used in Federal elections") (Exh. 14).

[12] *E.g.*, Apr. 14 Tr. at 158-59 (testimony of Craig Holman) (stating that nothing in FECA justifies any allocation ratio) (Exh. 14); Transcript of Public Hearing, April 15, 2004 ("Apr. 15 Tr."), at 27-28 (testimony of Lawrence Noble) (stating that the funds expended allocation method allowed a "wholesale evasion of the soft money rules as applied to political organizations") (accessible online; *see supra* n.5).

minimum for allocated expenses.[13] Witnesses also addressed the Commission's proposal that money given in response to solicitations indicating that funds received would be used to support or oppose the election of a federal candidate would be "contributions" under FECA.[14]

EMILY's List did not participate in these Commission hearings or submit any comments before the deadline for making comments. Op. at JA 134; FEC Stmt. ¶ 31 (JA 100).

c. The Final Rules

The Final Rules and accompanying Explanation and Justification ("E&J") were published in the Federal Register in November 2004, with an effective date of January 1, 2005. *See* Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056 (Nov. 23, 2004) ("Final Rules") (JA 282-294).

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[13] *E.g.*, Apr. 15 Tr. at 80-84 (testimony of Robert Bauer, counsel for EMILY's List in this case, representing American Coming Together ("ACT")) (responding to possibility of 50% federal minimum and other allocation proposals) (Exh. 15); *id.* at 80 (testimony of Lawrence Noble) ("We do suggest the 50 percent rule. You might be able to come up with a different line, but you did come up in the proposed rulemaking with one that's 50 percent.") (Exh. 15).

[14] *E.g.*, Apr. 15 Tr. at 207-08 (testimony of Margaret McCormick) ("under the proposed notice of rulemaking, the idea is if you solicit contributions and you say that your solicitation specifically says it will be used to support or defeat a specific candidate, the idea is that the contributions come back in") (Exh. 15).

i. Solicitations

New 11 C.F.R. 100.57 includes a general rule establishing when funds received in response to certain solicitations must be treated as "contributions" under FECA. Final Rules, JA 282. Section 100.57(a) states that all funds received in response to a solicitation are a "contribution" under FECA "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" (emphasis added).

If a solicitation meets the standard in section 100.57(a), but also refers to at least one clearly identified nonfederal candidate, then only 50% of the money received from the solicitation must be treated as contributions under FECA. 11 C.F.R. 100.57(b)(2); Final Rules, JA 284. If a solicitation refers to nonfederal candidates but does not indicate that any funds received will be used to support or oppose the election of a clearly identified federal candidate, then section 100.57(a) does not apply, and none of the funds received are federal contributions under that provision.

ii. Allocation regulations

The Commission also adopted final rules changing the allocation system for nonconnected committees in 11 C.F.R. 106.6. *See* Final Rules, JA 285-89. The Commission explained that a revised allocation method was needed to enhance compliance with FECA and make the system easier for committees to understand

and follow, and for the Commission to administer. *Id.* at JA 286. Revised 11 C.F.R. 106.6(c) replaces the "funds expended" method with a flat 50% federal funds minimum for administrative expenses, generic voter drives, and public communications that refer to a political party without any reference to clearly identified candidates. *See* Final Rules, JA 288. The Commission also promulgated a new provision, 11 C.F.R. 106.6(f), governing certain public communications and voter drives. *See* Final Rules, JA 289. Public communications and voter drives that refer to one or more clearly identified federal candidates, but to no nonfederal candidates, must be financed with 100% federal funds, regardless of whether political parties are also mentioned. 11 C.F.R. 106.6(f)(1). Conversely, public communications and voter drives that refer to a political party and only nonfederal candidates may be financed with 100% nonfederal funds. 11 C.F.R. 106.6(f)(2). Public communications and voter drives that refer to both federal and nonfederal candidates are subject to a time/space allocation between federal and nonfederal accounts, regardless of whether they also mention political parties. 11 C.F.R. 106.6(f)(3). *See* Final Rules, JA 289.

C. Court Proceedings

In a complaint filed in January 2005, EMILY's List alleged that 11 C.F.R. 100.57, 106.6(c), and 106.6(f) exceed the Commission's authority and are arbitrary and capricious, in violation of the Administrative Procedure Act

("APA"), and facially violate the First Amendment. (JA 18-24.) EMILY's List concurrently moved for a preliminary injunction, which the district court denied. *EMILY's List v. FEC*, 362 F. Supp. 2d 43 (D.D.C. 2005). On appeal, this Court affirmed the denial of the motion for a preliminary injunction. *EMILY's List v. FEC*, 170 Fed. Appx. 719 (D.C. Cir. Dec. 22, 2005).

On July 31, 2008, the district court granted summary judgment for the Commission (JA 125). The court first found that EMILY's List had standing under Article III to bring these facial challenges. The court then explained (JA 154-60) that the challenged regulations are contribution limits and therefore reviewed under a lesser level of review than "strict scrutiny." Under that standard, the court concluded (JA 166-71), the regulations at issue foreclose circumvention of contribution limits and serve the important governmental purposes of preventing corruption and the appearance of corruption. The court also found (JA 171-86) that the regulations are "closely drawn" to match these important interests.

The court next analyzed (JA 186-89) whether the regulations exceeded the Commission's authority under FECA. The court concluded that, under *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), the regulations are a permissible interpretation of the Act within the Commission's statutory authority (JA 186-89). Lastly, the court found that the allocation and solicitation regulations are not arbitrary and capricious (JA 189-93).

SUMMARY OF ARGUMENT

EMILY's List, a "nonconnected" federal political committee, challenges the facial validity of three FEC regulations. Two simplify how such a committee may allocate funds to finance particular kinds of activity influencing both federal and nonfederal elections. The third clarifies when funds obtained through solicitations are "contributions" under the Federal Election Campaign Act. The regulations are not overbroad under the First Amendment, do not exceed the Commission's statutory authority, and are not arbitrary and capricious.

The level of constitutional scrutiny for contribution limits applies to all three regulations, and, under that standard, the regulations are facially constitutional. They implement the Act's contribution limits by ensuring that funds raised outside those limits do not finance federal campaign activity, either directly or by circumvention. The regulations thereby promote the important governmental interests that the contribution limits serve — foreclosing corruption and the appearance of corruption.

The regulations are closely drawn to serve those important interests. The allocation rules are tailored to require an appropriate percentage of federal funds to be raised to finance disbursements that influence both federal and nonfederal elections. Moreover, the rules apply only to federal political committees, whose "major purpose" is the nomination or election of federal candidates and whose

expenditures "are, by definition, campaign related." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). One rule thus requires a 50% minimum federal funds allocation for such federal committees' administrative expenses and generic voter drives. The other rule adopts clear, bright-line formulas for candidate-specific public communications and voter drives, but also builds in flexibility by allowing a proportionate allocation between federal and nonfederal funds.

Under the solicitation regulation, receipts are treated as "contributions" only if a solicitation indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate. The regulation is closely drawn to regulate funds that are given to influence federal elections and prevent circumvention of the Act's contribution limits. Solicitors of funds can control whether funds received are "contributions" by communicating support or opposition to the election of federal candidates only, nonfederal candidates only, or both.

All of the regulations are within the Commission's broad statutory authority. The Act says nothing about nonconnected political committees' allocation of funds for mixed federal/nonfederal activity; nor does the Act define when solicitations seek "contributions." The regulations reasonably fill these gaps. Indeed, the Supreme Court has noted that a literal reading of the Act would not allow any allocation for activities that influence both federal and nonfederal elections.

Finally, the regulations are not arbitrary or capricious. Their bright-line standards do not make the regulations unlawfully arbitrary. Funding of mixed purpose campaign activities cannot be divided with scientific precision into exclusively federal and nonfederal components, and the Commission adequately explained the bases for its rules.

ARGUMENT

I. THE COMMISSION'S ALLOCATION REGULATIONS ARE CONSTITUTIONAL ON THEIR FACE

A. Standards of Review

1. Summary Judgment

This Court reviews de novo the district court's ruling on cross motions for summary judgment, *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918 (D.C. Cir. 2008), drawing all inferences from the evidence in favor of the non-movant, and applying the same standards as the district court did. *Flynn v. Dick Corp.*, 481 F.3d 824, 828-29 (D.C. Cir. 2007).

2. Contribution Limits

Since *Buckley v. Valeo*, 424 U.S. 1, 19 (1976), the Supreme Court has subjected limits on campaign contributions to lesser scrutiny than the "strict scrutiny" applicable to restrictions on campaign expenditures. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 134-36 (2003); *FEC v. Beaumont*, 539 U.S. 146, 161 (2002); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). In

these cases, the Court recognized that a contribution limit, unlike an expenditure limit, "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20. "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21; *accord, McConnell,* 540 U.S. at 135.

Moreover, the "overall effect" of dollar limits on contributions is "merely to require candidates and political committees to raise funds from a greater number of persons." *Buckley,* 424 U.S. at 21-22. As a result, the Court has concluded that "contribution limits impose serious burdens on free speech only if they are so low as to 'preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21). These considerations have led the Court to hold that a contribution limit is valid if it satisfies the "lesser demand" of being "closely drawn" to match a "sufficiently important interest." *Shrink Missouri,* 528 U.S. at 387-88; *accord, Beaumont,* 539 U.S. at 162; *see also Buckley*, 424 U.S. at 25.

3. Facial Challenges

The Supreme Court has used various formulations in determining facial overbreadth. *Compare, e.g., Wash. State Grange v. Wash. State Republican Party,*

128 S. Ct. 1184, 1190 (2008) ("plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications") (quoting *United States v. Salerno*, 481 U.S. 739 (1987)) *with New York v. Ferber*, 458 U.S. 747, 769-771 (1982) (plaintiff can succeed if it establishes that a "substantial number" of the challenged law's applications are unconstitutional) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Thus, at a minimum, EMILY's List carries the "heavy burden of proving" that each challenged regulation's "application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (citation omitted).

B. The Lower Level of Scrutiny for Contribution Limits Applies to the Allocation Regulations, 11 C.F.R. 106.6(c), (f)

As the district court properly concluded (JA 154-60), the less rigorous standard of scrutiny for contribution limits applies to the allocation regulations EMILY's List challenges. A successful allocation regime protects the integrity of the Act's contribution limits by ensuring that funds raised outside FECA's requirements are not used to influence federal elections; a flawed regime enables circumvention of FECA by allowing nonfederal funds to finance activities that influence federal elections. *See McConnell*, 540 U.S. at 142, 166-67. Money is fungible, and nonfederal funds are donations that exceed FECA's contribution

limits or come from a source that the statute prohibits. *See* 2 U.S.C. 431(8) (definition of "contribution"); 441a (dollar limits); 441b(a) (source prohibition).

As the Supreme Court explained when it upheld BCRA's restrictions on the solicitation and spending of soft money by political parties — including allocation provisions for state-level political parties — "for purposes of determining the level of scrutiny, it is irrelevant that Congress chose … to regulate contributions on the demand rather than the supply side." *McConnell,* 540 U.S. at 138 (citing *FEC v. Nat'l Right to Work Comm.,* 459 U.S. 197, 206-11 (1982)). The Court further explained that "the relevant inquiry" instead "is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not." *Id.* at 138-39. The Court answered that inquiry in the negative. *Id.* at 139.

Under *McConnell's* analysis regarding the appropriate level of scrutiny, the allocation regulations here are indistinguishable from BCRA's soft money provisions. Rather than limiting the amount of money that political committees like EMILY's List can spend on mixed federal/nonfederal electoral activity, the regulations merely require that a certain percentage of federal dollars be raised to pay for particular activity. As the district court concluded in discussing the relevance of *McConnell,* the "new [allocation] rules do not in fact prevent Plaintiff from engaging in whatever political speech it seeks to undertake," and they do "not

limit [committees'] right to undertake their desired political expression." (JA 155, internal quotation marks and citation omitted.) Rather, they may only "affect the manner in which EMILY's List [and other nonconnected political committees] must fund the speech in which [they] choose[ ] to engage," perhaps by "rais[ing] money from a greater number of donors." *Id.* Thus, the allocation regulations do not "burden[ ] speech in a way that a direct restriction of the contribution itself would not." *McConnell,* 540 U.S. at 139. "That they do so by [restricting the spending of nonfederal funds on certain activities] does not render them expenditure limitations." *Id.* (footnote omitted). *See also* Op. at JA154-57.

Accordingly, EMILY's List is wrong in contending (Br. 17, 20) that for constitutional purposes the allocation regulations "are the functional equivalent of spending limits." As the Supreme Court has long recognized, contribution limits may require organizations to engage in more fundraising to acquire the money they would like to have, but because such limits do not restrict what organizations can spend, these limits are not subject to strict scrutiny.

C. EMILY's List Has Failed to Carry Its Heavy Burden of Showing that the Allocation Regulations Are Facially Overbroad

EMILY's List has conflated two different inquiries: whether the regulations on their face violate the First Amendment, and whether the regulations fail to satisfy *Chevron* review or the APA's arbitrary-and-capricious standard, 5 U.S.C 706(2)(A). We address these separate issues in turn.

1. The Allocation Regulations Serve Compelling Governmental Interests by Preventing Circumvention of the Act's Contribution Limits

Since *Buckley,* the Supreme Court has repeatedly held that contribution restrictions serve the important governmental purposes of preventing corruption and the appearance of corruption, and it has upheld measures intended to foreclose circumvention of those provisions. *See, e.g., Buckley*, 424 U.S. at 26-28, 46-47; *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption."); *Beaumont*, 539 U.S. at 160; *McConnell*, 540 U.S. at 143-45. By ensuring that funds raised outside FECA's requirements do not finance federal campaign activity, allocation systems implement FECA's contribution limits. The district court correctly concluded, therefore, that "[i]n light of FECA's restrictions on the ability of political committees to contribute to candidates, allowing political committees to fund activities intended to influence federal elections with nonfederal funds would directly circumvent FECA's restrictions" (JA 167).

EMILY's List suggests (Br. 26) that nonconnected political committees are immune from corruption or the appearance of corruption and that the potential of such groups to serve as circumvention vehicles is mere speculation. In fact, nonconnected political committees often have close relations with federal candidates, political parties, and officeholders, and, contrary to EMILY's List's

assertion (Br. 26), the record includes evidence of such close relations. EMILY's List itself is perhaps the best example. Its chief of staff, Britt Cocanour, stated that (Decl. ¶¶ 2, 3 (JA 69)) EMILY's List "identifies viable opportunities to elect pro-choice Democratic women," "recruits qualified candidates," "trains them to be effective fundraisers and communicators," and "helps them build and run effective campaign organizations." *See also id.* at ¶ 6 ("Since 1985, EMILY's List has helped to elect sixty-eight Democratic women to Congress, thirteen to the U.S. Senate, eight to governorships, and over 350 to other state and local offices.") (JA 70); *McConnell v. FEC*, 251 F. Supp.2d 176, 550-51, 849 (D.D.C. 2003) (describing EMILY's List's deep involvement in a congressional race in 2000).

The decision in *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), shows that appellant's suggestion is also legally incorrect. The Court there upheld the contribution limits applicable to multicandidate political committees like EMILY's List and explained that those limits were intended in part to prevent circumvention of the aggregate and individual contribution limits. As the Court noted, Congress decided to

> impose more precisely defined limitations on the amount an individual may contribute to a political committee . . . [based] on the following considerations: first, these limits restrict the opportunity to circumvent the [ ] limits on contributions to a candidate; second, these limits serve to assure that candidates' reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear

> to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.

453 U.S. at 199 n.18 (quoting H.R. Conf. Rep. No. 94-1057, pp. 57-58 (1976)). Moreover, political committees could easily circumvent FECA's limits on their contributions to federal candidates, *see* 2 U.S.C. 441a(a)(2)(A), if they could simply label their activities as nonfederal or not in support of identified candidates.

In sum, the allocation regulations help promote a governmental interest that is not only "sufficiently important," *McConnell,* 540 U.S. at 136, but indeed compelling. As the Commission establishes in the next sections, the regulations are "closely drawn" to match that interest. *Id.*

2. The Allocation Regulation Replacing the "Funds Expended" Method Is Closely Drawn to Match Important Governmental Interests

Revised 11 C.F.R. 106.6(c) governs the allocation between federal and nonfederal funds by nonconnected political committees of their administrative expenses,[15] the costs of their "generic voter drives,"[16] and certain public communications that refer to a political party. These disbursements benefit both federal and nonfederal candidates, and thus influence both federal and nonfederal

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[15] Administrative expenses include rent, utilities, office supplies, and salaries not attributable to a clearly identified candidate. 11 C.F.R. 106.6(b)(1)(i).

[16] "Generic voter drives" include voter identification, voter registration, and get-out-the-vote drives that urge the public to support candidates of a particular political party, without mentioning a specific candidate. 11 C.F.R. 106.6(b)(1)(iii).

elections. The revised regulation applies a minimum federal funds rate of 50% to these dual-purpose disbursements. The rate replaces the complex "funds expended" method of calculating a ratio for use of federal and nonfederal funds. Final Rules, JA 282; *see supra* pp. 5, 11. This allocation rule is closely drawn to limit the financing of activities that influence federal elections to federally permissible funds, and thereby serves a compelling anti-corruption purpose.

The 50% minimum percentage faithfully reflects the nature of the organizations regulated. When the Court in *Buckley* analyzed "political committee," the Court narrowed the term to avoid "vagueness problems" to include only those organizations under the control of a candidate or whose "major purpose" is the "nomination or election of a candidate." 424 U.S. at 79. "Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*[17] Moreover, the Commission interprets the major purpose test as limiting the definition of "political committee" to those organizations whose major purpose is *federal* campaign activity. *See* Political

[17] The Supreme Court reaffirmed its "major purpose" test in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6, 262 (1986), and more recently, in *McConnell*, 540 U.S. at 170 n.64, when the Court implicitly endorsed the test in upholding BCRA's regulation of political party activity against a vagueness challenge.

Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5601 (2007).[18]

Thus, because organizations like EMILY's List have registered as federal political committees, their major purpose is necessarily federal campaign activity. "[C]onsistent with that status, political committees should not be permitted to pay for administrative expenses, generic voter drives and public communications that refer to a political party with a greater amount of non-Federal funds than Federal funds" (Final Rules, JA 288). The 50% minimum percentage in section 106.6(c) is also analogous to (though more lenient than) Congress's decision in BCRA to impose a flat 100% federal funds requirement for the wages and salaries of state and local party committee employees who dedicate most of their compensated time to *nonfederal* electoral activities, if they spend 25% or more of their time on federal activities. *See* 2 U.S.C. 431(20)(A)(iv). Expressly deferring to Congress's

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[18] The Commission has long applied the Supreme Court's major purpose test in determining whether an organization is a "political committee" under the Act. *See* Op. at JA 164-65; *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007) (upholding Commission's decision to flesh out the test on a case-by-case basis). EMILY's List errs in claiming (Br. 32-33 n.10) that the Commission's interpretation of the test is inconsistent with the Commission's enforcement practices. Sometimes the administrative respondent explicitly concedes that its major purpose is federal campaign activity or does not dispute its obvious electoral purpose. The administrative Matter Under Review (MUR) singled out by appellant fits within that category. *See* General Counsel's Factual and Legal Analysis in MUR 5492, at 7 n.3 (July 5, 2005) (accessible under the MUR case number at http://eqs.nictusa.com/eqs/searcheqs).

judgment, the Supreme Court upheld the 25% provision as a "prophylactic rule" that prevents circumvention of other provisions. *McConnell*, 540 U.S. at 170-71.

Revised section 106.6(c) is also closely drawn because the Commission reasonably decided that adopting a flat minimum federal rate was the soundest way to save an allocation system that was foundering in its own complexity and causing needless administrative burdens for political committees. "Anecdotal evidence suggested that many committees, including those that allocated, were confused as to how the funds expended ratio should be calculated and adjusted throughout the two-year election cycle," and "audit experience ha[d] also shown that some committees were not properly allocating under the complicated funds expended method" (Final Rules, JA 288). Suggestions for adjusting the funds expended method appeared to increase the complexity of the necessary calculations. Therefore, the Commission embraced instead a workable, easy-to-grasp and easier-to-enforce bright-line minimum flat rate method, and gave committees the option of paying for their administrative expenses and the costs of generic voter drives and certain public communications with a higher percentage of federal funds. "A flat minimum percentage makes the allocation scheme easier to understand and apply, while preserving the overall rationale underlying allocation" (Final Rules, JA 288).

The change in section 106.6(c) will have no significant effect on the vast majority of political committees, a fact further weakening any suggestion that the regulation is unconstitutional in a substantial number of its applications. The Commission had "discovered that very few committees chose to allocate their administrative and generic voter drive expenses under former section 106.6(c)" (Final Rules, JA 288). "Fewer than 2% of all registered nonparty political committees … allocat[ed] administration and generic voter drive expenses under former section 106.6(c)…." *Id.* That means that the remaining committees used only federal funds for such activities. And many of those few committees that had used the funds expended method "already use 50% or more as their Federal allocation ratio" (*id.* at JA 292). EMILY's List itself has consistently allocated its costs on this same 50% basis.[19] Moreover, the Commission concluded (JA 289) that the flat rate would result at most in "only a minimal increase in federal funds expended" even by those few committees that correctly used the funds expended

[19] During the ten years leading up to the promulgation of the allocation regulations at issue here, EMILY's List *never* reported less than a 50% allocation ratio for shared administrative expenses and the costs of generic voter drives or for direct federal candidate support. FEC Stmt. ¶ 11 (JA 94); *EMILY's List,* 362 F. Supp. 2d at 58 (finding that EMILY's List does not dispute these facts). In fact, at the end of the 1995-96 election cycle EMILY's List reported a final allocation ratio of 70% federal candidate support and 30% nonfederal. FEC Stmt. ¶ 11 (JA 95); Schedule H1 (JA 107).

method and consistently came up with a federal funds allocation ratio less than 50%. EMILY's List offered no evidence to controvert this conclusion.

EMILY's List's other criticisms fail to support its facial challenge to section 106.6(c). In particular, the Supreme Court has already rejected the argument that money raised and spent on administrative expenses does not pose a risk of corruption.

> If unlimited contributions for administrative support are permissible, individuals and groups . . . could completely dominate the operations and contribution policies of independent political committees . . . . Moreover, if an individual or association was permitted to fund the entire operation of a political committee, all moneys solicited by that committee could be converted into contributions, the use of which might well be dictated by the committee's main supporter. In this manner, political committees would be able to influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committee's operations would be able to do acting alone. In so doing, they could corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit.

California Medical Ass'n, 453 U.S. at 199 n.19.

EMILY's List also asserts (Br. 32) that the rule's 50% minimum allocation requirement "regulates activity far removed from federal elections for those committees whose federal activities comprise a small portion of their overall efforts." *See also* Br. 38. As the district court noted, however, "EMILY's List does not explain why" such an organization "would be considered to have the 'major purpose' of federal campaign activity, or would not choose to operate as separate federal and nonfederal committees" (JA 176).

Similarly, EMILY's List argues (Br. 32, 41) that the 50% rule unconstitutionally discriminates against nonconnected political committees because state and local political parties may, in certain circumstances, allocate with a lower federal percentage. But an organization like EMILY's List differs in a crucial respect from a state or local party committee. As a *federal* political committee, EMILY's List, by definition, has as its major purpose the nomination or election of *federal* candidates, while a state or local party committee may focus, depending upon the circumstances, on either federal or nonfederal elections. As the Supreme Court has repeatedly held, "differing structures and purposes" of different entities "may require different forms of regulation in order to protect the integrity of the electoral process." *California Medical Ass'n,* 453 U.S. at 201. *Accord, e.g., Nat'l Right to Work,* 459 U.S. at 210.

EMILY's List also argues (Br. 21) that the 50% rule, when applied to the covered public communications, "require[s] an allocating committee to choose between changing its message or effectively capping what it can spend." First, however, the rule does not "cap" how much a committee can spend; the committee's fundraising ability determines the amount. *See Buckley,* 424 U.S. at 21-22 ("raise funds from a greater number of persons"). So the supposed forced choice is a false one. Second, EMILY's List offers (Br. 21) only one unlikely hypothetical communication as support for its word-changing assertion — to

prevent triggering the 50% rule, a political committee would have to avoid stating that "both Democrats and Republicans" support a ballot initiative. EMILY's List has not asked the Commission to opine on whether such a bipartisan mention of political parties would be covered by the regulation.[20]

EMILY's List also presents a few other hypothetical situations, but it cannot meet its heavy burden in a facial challenge by relying on several unlikely or worst-case hypothetical scenarios. It has not established that the "application [of the challenged rules] to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the … [regulations'] plainly legitimate applications.'" *McConnell,* 540 U.S. at 207 (internal citation omitted). "In determining whether a law is facially invalid, [the Court] must be careful not to go beyond the [regulation's] facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange,* 128 S.Ct. at 1190 (citation omitted). *See also City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 57 (D.C. Cir. 1990)

[20] As noted in *McConnell*, "should [an entity] feel that [it] need[s] further guidance, [it is] able to seek advisory opinions for clarification, *see* 2 U.S.C. § 437f(a)(1), and thereby 'remove any doubt there may be as to the meaning of the law.'" 540 U.S. at 170 n.64 (citation omitted). And if the committee were dissatisfied with the Commission's opinion, the committee could bring an as-applied challenge to the regulation.

("Although hypothetical applications of [agency] rules might transgress the statutory provisions upon which petitioner relies, we think it inappropriate to anticipate them in resolving petitioner's facial challenge to the rules."); *Florida League of Prof'l Lobbyists v. Meggs*, 87 F.3d 457, 461 (11th Cir. 1996) ("As for the League's hypothesized, fact-specific worst case scenarios, we also decline to accept the facial challenge based on these perceived problems.").

In sum, the revised regulation, which implements the Act's contribution restrictions, easily satisfies the "less rigorous scrutiny applicable to contribution limits," *McConnell*, 540 U.S. at 141. EMILY's List does not challenge the Commission's authority to require it to allocate at least a portion of these expenditures to its federal account, only the size of the federal allocation the Commission adopted. As with the underlying contribution limits themselves, however, "'[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2000 ceiling might not serve as well as $1000.'" *Buckley*, 424 U.S. at 30 (quoting lower court).

3. The "Candidate-Driven" Regulation for Some Public Communications and Voter Drives Is Closely Drawn to Match Important Governmental Interests

In its new 11 C.F.R. 106.6(f), the Commission promulgated clear, bright-line rules for candidate-specific communications to "enhance compliance with the FECA, to simplify the allocation system, and to make it easier for SSFs and

nonconnected committees to comprehend and for the Commission to administer these requirements." Final Rules, JA 286. The new regulation establishes "candidate-driven allocation rules" (JA 285). Public communications and voter drives referring solely to clearly identified federal candidates must be financed solely with federal funds; those referring solely to clearly identified nonfederal candidates may be financed with nonfederal funds; and those referring to both federal and nonfederal candidates are subject to the time/space method of allocation under 11 C.F.R. 106.1. As the Commission further explained (JA 289), the new rules

> should reduce the burden of compliance on SSFs and nonconnected committees. Incorporation of certain voter drives and public communications into 11 C.F.R. 106.6 provides more specific guidance to committees that conduct such activity. The Commission believes that these final rules best resolve the problems with the former allocation scheme revealed through reviewing past FEC reports and the issues raised by the commenters on the NPRM.

Section 106.6(f) applies only to political committees. As we have explained, the major purpose of those organizations is "the nomination or election of a candidate," and their expenditures thus "are, by definition, campaign related." *McConnell*, 540 U.S. at 170 n.64 (quoting *Buckley*, 424 U.S. at 79). EMILY's List complains (Br. 29) that the provision requires allocation of certain expenditures that "refer to" a clearly identified federal candidate. But because EMILY's List is a federal political committee whose major purpose is the nomination or election of

federal candidates, the Commission acted well within its discretion in concluding that when such a committee's voter drives and public communications refer explicitly to clearly identified federal candidates, they should be financed with federal funds — or, if they also refer to nonfederal candidates, with a proportionate allocation between federal and nonfederal funds. That allocation method is closely tailored because, to the extent that the federal references are a small part of the communication, the federal share of the expenditure would be proportionately small.

The Supreme Court has repeatedly held that different kinds of political entities may be regulated differently, to account for their basic nature and the potential for abuse. *See McConnell*, 540 U.S. at 158; *supra* p.28. Section 106.6(f), regulating nonconnected committees, is less burdensome than the Act's restrictions on other entities. For example, Congress provided in BCRA that national party committees could no longer solicit, receive, or spend *any* nonfederal funds, and the Supreme Court upheld those new restrictions despite the acknowledged role national party committees regularly play in nonfederal elections. *McConnell*, 540 U.S. at 142-61. EMILY's List, in contrast, can still solicit and spend nonfederal funds, subject to certain restrictions to ensure that such funds are not used to influence federal elections. To that end, section 106.6(f) merely requires that nonconnected political committees allocate expenses for public communications

and voter drives that refer to a mixture of clearly identified federal and nonfederal candidates according to the pre-existing time/space method of 11 C.F.R. 106.1.

BCRA also established a new allocation system for *state and local* party committees, which have a vital interest in nonfederal elections — and whose major purpose, unlike that of EMILY's List, is usually not the election of *federal* candidates. As the Supreme Court noted in upholding the allocation requirements for those state-level committees, BCRA "prevents donors from contributing nonfederal funds to state and local party committees to help finance 'Federal election activity.'" *McConnell*, 540 U.S. at 161-62. Moreover, two of the four statutory categories of "Federal election activity" encompass the same kind of voter drive activity included in 11 C.F.R. 106.6(f): voter registration, 2 U.S.C. 431(20)(A)(i), and get-out-the-vote and generic campaign activity in connection with a federal election, 2 U.S.C. 431(20)(A)(ii). These provisions regulate the financing of such activities by state and local parties without regard to whether they involve *any* references to federal candidates. "A campaign need not mention federal candidates to have a direct effect on voting for such a candidate …. [G]eneric campaign activity has a direct effect on federal elections." *McConnell*, 540 U.S. at 168 (citations and internal quotation marks omitted). This reasoning applies with at least as much force to the activities of federal political committees like EMILY's List, which could similarly be attractive vehicles for

circumvention of the FECA's aggregate and individual contribution limits. *See California Med. Ass'n*, 453 U.S. at 197-98.

A recent conciliation agreement between the Commission and America Coming Together ("ACT") confirms the wisdom of the revised allocation rule.[21] *See* FEC News Release, *FEC To Collect $775,000 Civil Penalty From America Coming Together* (Aug. 29, 2007) (News Release) (JA 108-116). Like EMILY's List, ACT is a federal nonconnected political committee that also has a nonfederal account registered with the Internal Revenue Service under section 527 of the Internal Revenue Code. *See* JA 108. The conciliation agreement settles allegations that ACT in the 2004 elections used federal/nonfederal allocation ratios that greatly underrepresented the proportion of its disbursements required to be paid with federal funds. For most of the 2004 election cycle, ACT used an allocation ratio of just 2% federal funds and 98% nonfederal funds for its administrative expenses and generic voter drives. Agreement at 2-3, 6. The Commission concluded that approximately $70 million dollars in disbursements characterized by ACT as "administrative expenses" for door-to-door canvassing, direct mail, and telemarketing were actually attributable to clearly identified federal candidates and thus were required to be paid with 100% federal funds. *Id.* at 7. The Commission further found that another $70 million in voter drive costs

[21] The Agreement is most easily accessible at http://eqs.nictusa.com/eqsdocs/000061A1.pdf.

were directly attributable at least in part to clearly identified federal candidates, and thus should have been paid either with 100% federal funds or allocated between federal and nonfederal candidates based on the time or space devoted to the candidates. *Id.* at 9.

EMILY's List's criticism of the Commission (and the district court) for discussing ACT is misplaced. EMILY's List attempts to impugn the integrity of the nonpartisan Commission with unsupported charges (Br. 7) that it revised the allocation regulations in "a partisan effort to curtail … [ACT's] activity that was thought to be adverse to the reelection of President George W. Bush."[22] But EMILY's List also claims (Br. 26-27), inconsistently, that the Commission's references to ACT in this litigation represent post hoc rationalizations by counsel.[23] Contrary to EMILY's List's assertion (Br. 27), the record includes evidence that the Commission considered ACT's alleged violation during its rulemaking:

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[22] *See, e.g., U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991) ("We generally accord … official conduct a presumption of legitimacy."); *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978) (agency entitled to presumption of regularity in its administrative decisionmaking).

[23] Even if the Commission had no record evidence about ACT, its discussion of ACT (or other alleged violators) would not be impermissibly "post hoc." Appellant's constitutional challenge does not rest on its views of the adequacy of the record but on its legal arguments about the limits the First Amendment places on the Commission's authority. The Commission was not required to anticipate those legal arguments during the rulemaking, and in litigation its defense of the regulation's constitutionality is not limited to the issues raised and answered during that administrative process. *Compare infra* pp. 52-58 (adequacy of Commission's reasoning under APA review).

Commenters alleged that ACT had improperly applied the "funds expended" method, as the district noted. *See* Op. at JA 135 n.7, 168, 188 n.16; *e.g.*, Apr. 15 Tr. at 28 (testimony of Lawrence Noble); Feb. 25, 2004, letter from Democracy 21, et al., to FEC General Counsel (AR Item 1).[24]

Finally, EMILY's List presents several hypothetical examples (Br. 28-29) designed to show that some applications of section 106.6(f) might either be unconstitutional or exceed the Commission's statutory authority. But even the hypothetical communications EMILY's List crafted cannot plausibly be said to have *no* influence on federal elections. The first three examples all involve references to both federal and nonfederal candidates, and all could influence federal elections. Even if a political committee would try to influence a nonfederal election by identifying an out-of-state federal candidate, it is not evident that such a communication would not affect an in-state federal election. Such a communication may well suggest that its audience support a party's full slate of candidates (federal and state) on the basis of their alliance with a prominent out-of-state candidate's policies or the out-of-state candidate's support for the in-state candidates.[25] Moreover, to the extent the federal references are as small a part of

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[24] FECA's confidentiality provision, 2 U.S.C. 437g(a)(12), prohibited the Commission from publicly disclosing and discussing information it gained during its ongoing investigation of ACT.

[25] Political committees like EMILY's List often identify out-of-state federal candidates in their communications, especially when urging people all over the

the communication as EMILY's List implies, the federal share of the expenditure would be proportionately small under the time/space allocation rules of 11 C.F.R. 106.1. One of EMILY's List's hypothetical communications (Br. 29) supports a political party generally, refers to no clearly identified candidates, and is run before an election in which there are no federal candidates on the ballot. The applicable regulation (section 106.6(c), not 106.6(f)) requires that the costs of such a public communication be financed with at least 50% federal funds regardless of when it is run, because undifferentiated support of a political party denotes support of all of its candidates, federal and nonfederal. Such elections are, of course, always held within the two-year federal election cycle. In any event, as explained *supra* pp. 29-30, even if any of EMILY's List's hypothetical examples might present a successful as-applied challenge to the regulation, they do not provide a basis for finding the regulation unconstitutional on its face.

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nation to contribute funds to the political committee's preferred candidates. On appellant's own website, for example, where it solicits contributions to be given directly to a list of "featured candidates," the list of candidates to be supported consists of federal candidates from Missouri, Illinois, and New York — although the page obviously reaches all 50 states. EMILY's List, "Full Candidate Listing," available at https://emilyslist.org/support/candidates/?id=21&tracking_code=WMCCMHPZ (visited February 23, 2009). Moreover, since campaign ads are now routinely posted on the internet, even supposedly local ads are seen outside the immediate broadcast area.

4. Recent Supreme Court Decisions Do Not Support EMILY's List's Facial Challenge

EMILY's List tries to clothe itself in the garb of the successful plaintiffs in *FEC v. Wisconsin Right to Life, Inc.* (*"WRTL"*), 127 S. Ct. 2652 (2007), and *Davis v. FEC,* 128 S. Ct. 2759 (2008), but the suits do not fit because EMILY's List ignores crucial factual and legal differences between those cases and its own.

WRTL is a nonprofit ideological corporation that brought an as-applied challenge to 2 U.S.C. 441b, an expenditure limit, to use its corporate treasury funds to pay for "issue advocacy." In stark contrast, EMILY's List is a federal political committee whose major purpose is federal campaign activity, not a corporation subject to section 441b; it brings a facial challenge to a regulation, not an as-applied challenge concerning particular communications; and it challenges contribution limits, not expenditure limits. In resolving the dispute in *WRTL*, the controlling Justices applied strict scrutiny, with their decision hinging on the distinction between issue advocacy and electoral advocacy and on the different burdens of proof in as-applied and facial challenges. EMILY's List's facial challenge does not concern the distinction between issue and electoral advocacy. Instead, it concerns the intersection of federal and nonfederal electoral activity as relevant to contribution limits for federal political committees.

EMILY's List's reliance on *Davis* also fails. Davis facially challenged the constitutionality of the so-called "Millionaire's Amendment," which, under certain

circumstances, "impose[d] different campaign contribution limits on candidates competing for the same congressional seat." 128 S.Ct. at 2765. Because the asymmetrical contribution limits were triggered by how much candidates spent of their own money on their own campaigns, the Court analyzed the burden as equivalent to an expenditure limit: "*Buckley*'s emphasis on the fundamental nature of the right to spend personal funds for campaign speech is instructive. While BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right." *Id.* at 2771. The Court thus held that the Millionaire's Amendment could not stand unless it satisfied a "compelling" governmental interest. *Id.* at 2772 & n.7. In stark contrast, the allocation regulations that EMILY's List challenges do not function as expenditure limits but rather as protections of FECA's contribution limits; they treat all nonconnected federal political committees alike; and they need only be "closely drawn" to match a "sufficiently important interest." *Shrink Missouri*, 528 U.S. at 387-88; *see supra* pp. 17-19. Finally, in *Davis* the government's long-accepted interest in eliminating corruption or the perception of corruption from large contributions was not present because millionaires cannot corrupt themselves by spending their own money on their own campaigns. The allocation rules at issue here directly address the risk of

corruption inherent in large contributions by preventing contributions above the federal limits from being used to influence federal elections.

II. THE COMMISSION'S SOLICITATION REGULATION IS CONSTITUTIONAL ON ITS FACE

The solicitation regulation, 11 C.F.R. 100.57, clarifies when funds received in response to a solicitation will be considered "contributions" under the Act. *See supra* p. 10.

A. Standards of Review

The standards of review for the solicitation regulation are the same standards applicable to the allocation regulations. *See supra* pp. 15-17.

B. The Lesser Standard for Contribution Restrictions Applies to the Commission's Solicitation Regulation

This Court should apply the lesser scrutiny applicable to contribution limits for two reasons. First, by clarifying when funds received in response to certain solicitations will be deemed "contributions" under FECA, section 100.57 does nothing more than refine the definition of "contribution" itself. Second, in claiming for the first time on appeal that "strict scrutiny" applies, EMILY's List has reversed its legal position. As the district court noted (JA 155), "EMILY's List d[id] not dispute that contribution limits are subject to lesser scrutiny, … and concede[d] that such lesser scrutiny applies to the solicitation regulation it challenges." *See also id.* at JA 167 ("§ 100.57, which all parties agree is a

contribution limit ….”). Appellant has thus waived its argument that a different standard applies. *See, e.g., Trout v. Secretary of Navy,* 540 F.3d 442, 448 (D.C. Cir. 2008) (“[T]his argument was not raised during the proceedings before the district court, and we therefore deem it waived.”).[26]

C. EMILY’s List Has Failed to Carry Its Heavy Burden of Showing that the Solicitation Regulation Is Facially Overbroad

Contrary to EMILY’s List’s repeated mischaracterization of the regulation (*e.g.*, Br. 12, 40), section 100.57(a) treats funds received in response to a public communication as “contributions” *only if* the communication “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). As the Commission explained in its E&J for the rule, communications indicating that funds received will be used for that purpose “plainly seek funds ‘for the purpose of influencing Federal elections’” (JA 283), a key phrase in the Act’s definition of “contribution.” *See* 2 U.S.C. 431(8) (defining “contribution” as “any gift, … money or anything of value made … for the purpose of influencing any election for Federal office”); *Buckley,* 424 U.S. at 78 (construing “contribution” broadly, to include, for example, money “earmarked for political purposes” by the donor). By

[26] If EMILY’s List is relying on *Davis* as an intervening authority, that decision was issued before the district court issued its judgment in this case. In any event, as explained above, the Court analyzed the provision in *Davis* under strict scrutiny because of the “unprecedented penalty” it imposed on a candidate’s speech; the Commission’s solicitation regulation imposes no such burden.

carefully defining which funds received in response to solicitations are "contributions" under the Act and can therefore be limited, the regulation is "closely drawn" to further the compelling governmental interest in preventing corruption from large contributions. EMILY's List presented no evidence to the district court that the solicitation regulation has hurt its fundraising or that of other political committees. *See supra* p. 4. It has thus failed to show that the regulation has prevented it from "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

Under the regulation, if a solicitation indicates that the funds received will be used to support or oppose the election of a federal candidate but does not refer to the election of any nonfederal candidate, all of the funds collected are "contributions." The same result occurs if an otherwise similar solicitation also refers to a political party. 11 C.F.R. 100.57(b)(1). However, "to avoid sweeping too broadly" (Final Rules, JA 282), the regulation includes exceptions to this 100% rule. Most notably, if the solicitation refers to one or more clearly identified *nonfederal* candidate in addition to a federal candidate, "at least … 50%" of the funds received are contributions. 11 C.F.R 100.57(b)(2).

The Commission drew the standard in section 100.57 largely from *FEC v. Survival Education Fund (SEF)*, 65 F.3d 285 (2d Cir. 1995), which construed a statutory provision governing solicitations of contributions under the pre-BCRA

Act. The Second Circuit held that contributions "for the purpose of influencing" a federal election would result from a solicitation that "[left] no doubt" that funds given in response would be used to help defeat a particular candidate in a federal election. *Id.* at 295. The donations made in response to the solicitations at issue there were "contributions" because the text of the mailings "le[ft] no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year." *Id.*

The E&J describes the regulation's operation and provides examples to help nonconnected federal political committees and other solicitors understand the rule (JA 283). AO 2005-13 (JA 299, 303-305), responding to a request by EMILY's List, gives additional examples.[27] Furthermore, the Commission carefully crafted the rule so as to "leave[] the group issuing the communication with complete control over whether its communications will trigger new section 100.57" (Final Rules, JA 283). The Commission stressed that this regulation is based only on the language of the solicitation itself; the Commission will not use any other statements or solicitations by the organization, the timing or targeting of the solicitation, or any other external information to evaluate the solicitation. *Id.* This

[27] EMILY's List quarrels (Br. 34) with the Commission's response to one of the solicitations EMILY's List proposed. The Commission, unlike EMILY's List, did not find the solicitation "at best" ambiguous, and the agency's response does not support the conclusion that section 100.57 is "a trap for the unwary" (Br. 34). Rather, the response shows the utility of the advisory opinion process.

gives groups soliciting funds complete control over the wording of their solicitations, without having to worry about whether factors external to the text of their message will be construed in conjunction with it. If a solicitor wants to ensure that donations received in response to a solicitation are not treated as federal contributions, it can simply omit all statements indicating that the funds received will be used to support or oppose the election of a clearly identified federal candidate. For 50% nonfederal proceeds, the solicitor need only identify one or more nonfederal candidates in addition to indicating support or opposition to the election of an identified federal candidate. A solicitor might also simply use separate communications to raise funds in connection with federal and nonfederal elections.

EMILY's List argues (Br. 33) that section 100.57 is unconstitutional because it would override an express statement in a solicitation that "only one percent of contributions received will be used to support federal candidates — and that the rest will be used to support non-federal candidates." This hypothetical example — supported by no real-world evidence of solicitations specifying a specific, low percentage — is, like the others discussed above, insufficient to meet EMILY's List's burden in this facial challenge. *See supra* pp. 29-30.

EMILY's List claims (Br. 34) that section 100.57 "has caused committees like [itself] to alter their communications," but, other than a declaration describing

EMILY's List's own actions (JA 72), it provided no evidence in this facial challenge that other committees have altered their solicitations or been "chilled" by the regulation. Moreover, to the extent EMILY's List has altered its speech, it has done so to exercise its choice to determine for itself whether the money it receives through its solicitations will be federal or nonfederal funds. In any event, courts have upheld statutory and regulatory provisions requiring persons who engage in electoral activity to include certain language in their communications or, indeed, to write certain communications. Most notably, in *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 406 (D.C. Cir. 1996), this Court upheld an FEC rule directing political committees to make separate follow-up requests for contributor information if the committees wanted to qualify as having made "best efforts" to collect the information. In addition, two courts of appeals have upheld the FECA's "disclaimer" provision, 2 U.S.C. 441d(a), which requires, *inter alia*, that persons who make disbursements to finance a public communication "expressly advocating the election or defeat of a clearly identified candidate, or solicit[ing] any contribution" include in their communication a statement whether the communication has been paid for or authorized by a candidate. *FEC v. Public Citizen*, 268 F.3d 1283 (11th Cir. 2001); *SEF*, 65 F.3d at 295-96. *See also McConnell*, 540 U.S. at 230-31 (upholding BCRA's disclaimer requirements for electioneering communications).

Finally, EMILY's List suggests (Br. 21) that section 100.57 is also unconstitutional because it uses a "nebulous" and "ambiguous" standard that includes the verb "indicates." The constitutional test for vagueness requires, however, only that a provision "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Section 100.57 provides adequate guidance as to what solicitations fall under the rule, and makes it easy for a political committee seriously interested in complying with the regulation to structure its solicitations to control whether funds it receives in response will be federal contributions. Moreover, the Commission's E&J includes instructive examples (JA 283). The regulation is certainly no more vague than the provision in 2 U.S.C. 431(20)(A)(iii) ("promotes, supports, attacks, or opposes") upheld by the Supreme Court in *McConnell*, 540 U.S. at 170 n.64. *See also* Op. at JA 182 ("[T]he Second Circuit clearly did not in *SEF* find the term 'indicates' to be vague"); *id.* at JA 183. If EMILY's List needs further guidance, it can seek an advisory opinion, as it has already done regarding certain solicitations.

In sum, like the allocation regulations that EMILY's List challenges here, the solicitation regulation creates no unconstitutional burden on fundraising or expenditures. Nonconnected political committees like EMILY's List may do as much federal or nonfederal fundraising as they can afford or wish to do. Section

100.57 only helps ensure that funds solicited to support or oppose the election of federal candidates are federal funds. Thus, EMILY's List has failed to "carr[y] [its] heavy burden of proving that" the solicitation regulation is facially overbroad. *McConnell*, 540 U.S. at 207.

III. THE ALLOCATION AND SOLICITATION REGULATIONS ARE LAWFUL UNDER THE FECA AND THE APA

A. The Challenged Regulations Are Permissible Under *Chevron*

The familiar two-step test of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984), determines whether an agency's regulation is a valid interpretation of the underlying statute. *Chevron* "is principally concerned with whether an agency has authority to act under a statute." *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995) (citing *Chevron*, 467 U.S. at 842-45). Thus, a reviewing court's "inquiry under *Chevron* is rooted in statutory analysis and is focused on discerning the boundaries of Congress' delegation of authority to the agency; and as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference." *Id.* *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (Commission "is precisely the type of agency to which deference should presumptively be afforded."); *accord, United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) ("[T]he FEC's express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC … to resolve any

ambiguities in statutory language. For these reasons, the FEC's interpretation of the Act should be accorded considerable deference.'" (Citation omitted.)).

Under *Chevron*, the Court "first ask[s] 'whether Congress has directly spoken to the precise question at issue,' in which case [the Court] 'must give effect to the unambiguously expressed intent of Congress.'" *Rhinelander Paper Co. v. FERC*, 405 F.3d 1, 6 (D.C. Cir. 2005) (internal citations omitted). Here, FECA is silent concerning allocation of nonparty political committees' mixed federal/nonfederal activities.[28] As the district court found (JA 188), "Congress has not addressed — in either FECA or BCRA — allocation by nonconnected political committees." Therefore, the allocation regulations pass *Chevron* step one. Likewise, although FECA includes a definition of "contribution," 2 U.S.C. 431(8), it does not specify which kinds of solicitations generate "contributions." Thus, in the face of that congressional silence, the solicitation regulation also passes *Chevron* step one.

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[28] Significantly, BCRA expressly "gives the FEC responsibility for setting the allocation ratio" under that regime. *McConnell*, 540 U.S. at 163 n.58. Although *McConnell* distinguished political parties from independent groups when it addressed BCRA's soft money restrictions — including the new allocation system for mixed federal/nonfederal activities by state and local party organizations — *McConnell* never suggested that there is any broad statutory barrier that would prevent the Commission from adjusting the regulations governing allocation and solicitation by federal nonparty political committees. Contrary to EMILY's List's unsupported suggestions (Br. 36, 37), nothing in the Act or its legislative history indicates that Congress intended by its silence to restrict the Commission's discretion to determine allocation ratios for such committees.

If, as here, "the 'statute is silent or ambiguous with respect to the specific issue,' … [the Court] move[s] to the second step and defer[s] to the agency's interpretation as long as it is 'based on a permissible construction of the statute.'" *Rhinelander Paper Co.*, 405 F.3d 1 at 6 (internal citations omitted). When the Supreme Court in *McConnell* discussed the exploding use of soft money just before the enactment of BCRA, the Court explained that, "concerning the treatment of contributions intended [to be spent on activities] to influence both federal and state elections," a "literal reading of FECA's definition of 'contribution' would have *required such activities to be funded with hard money*." 540 U.S. at 123 (emphasis added). The Court thus made clear that the statutory language does not require *any* allocation to a soft money account for mixed spending that influences both federal and state elections. After all, an expenditure that influences federal elections does not lose that effect even if it also influences state elections. *See id.* at 166. Therefore, the use of an allocation formula — *any* allocation formula — by a nonconnected federal political committee for expenses that may influence both federal and nonfederal elections is a permissive administrative construction, not a statutory entitlement.[29]

[29] Years ago, *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987), similarly held that, although the Commission may permit allocation of mixed expenditures for certain electoral activities, the Commission could just as well "conclude that *no* method of allocation will effectuate the Congressional goal that *all* moneys spent by [the party committees at issue for those activities] … be 'hard

Especially because the major purpose of federal political committees such as EMILY's List, like a national party committee, is to influence federal elections, the Supreme Court's reasoning in *McConnell* applies with full force to the allocation regulations challenged here. *See* Op. at JA 188. Thus, these allocation regulations are well within the permissible range of statutory interpretation; they reasonably reflect the mixed nature of some federal political committees' activities, while still ensuring that organizations whose major purpose is federal campaign activity pay for at least 50% of certain expenses with money raised within the federal contribution limits.

Similarly, the solicitation regulation fills a gap by providing additional clarification about whether funds received in response to different kinds of solicitations will be considered "contributions" under the Act — a subject plainly within the Commission's statutory authority. If a specific solicitation identifies only *federal* candidates in discussing its purpose *and* indicates that money raised will be used to support or oppose their election, the Commission acted within its authority to treat the proceeds as "contributions" under the Act. Because it is

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money' under the FECA." *Id*. at 1395-96 (emphases in original). EMILY's List strains (Br. 39 n.11) to escape the reasoning of *Common Cause.* Contrary to EMILY's List's assertion, the district court did not interpret the case as "stand[ing] for the proposition that the Commission may pass whatever allocation rules it wishes." The plain language of the decision supports the Commission's regulatory discretion to end allocation for mixed federal/nonfederal electoral activity if the allocation proves to be impractical. *See Common Cause*, 692 F. Supp. at 1396.

reasonable for the Commission to find that funds received in response to such a solicitation are "for the purpose of influencing" federal elections, section 100.57 easily satisfies *Chevron* step two. Moreover, the regulation provides flexibility by lowering the percentage of the receipts deemed to be contributions when a solicitation refers to one or more clearly identified nonfederal candidates in addition to one or more clearly identified federal candidates. 11 C.F.R. 100.57(b)(2). Section 100.57 permits some federal political committees to control whether they solicit federal or nonfederal funds or both, but ensures that the Act's contribution limits are not easily circumvented.

"[U]nder *Chevron*, courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views." *FEC v. National Rifle Ass'n*, 254 F.3d 173, 187 (D.C. Cir. 2001) (internal quotation marks and citation omitted). So, for example, even if the former "funds expended" allocation regulation was also reasonable, EMILY's List's apparent preference for that regulation cannot trump the Commission's decision to adopt a different reasonable regulation that it believes better implements the Act. EMILY's List's criticisms thus reflect little more than a policy dispute about how best to allocate expenses and fundraising receipts for activities that influence both federal and nonfederal elections but cannot be readily divided with scientific precision. In sum, as the district court stated (JA 188,

quoting *Chevron*, 467 U.S. at 843), the allocation and solicitation regulations are "'based on a permissible construction of the statute.'"[30]

B. The Regulations Satisfy APA Requirements

A court may set aside a regulation under the APA only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). This standard is "highly deferential" and "presumes the validity of agency action." *Cellco Partnership v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). Thus, "the party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers For Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc).

Under this standard, "[a] court cannot substitute its judgment for that of an agency … and must affirm if a rational basis for the agency's decision exists." *Appeal of Bolden*, 848 F.2d 201, 205 (D.C. Cir. 1988). Where the statute simply

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[30] Defendants in federal vote-buying prosecutions have raised — unsuccessfully — arguments similar to those EMILY's List raises here. For example, in *United States v. Slone*, 411 F.3d 643 (6th Cir. 2005), the defendant appealed his conviction for vote buying in a federal election by claiming that he was buying votes only regarding a candidate for county office, although federal offices were also on the ballot. The defendant argued that the federal vote-buying statute is unconstitutional because it exceeds Congress's enumerated powers by affecting local elections. *Id.* at 644. The Sixth Circuit held that the statute "applies to all elections in which a federal candidate is on the ballot, and the government need not prove that the defendant intended to affect the federal component of the election by his corrupt practices." *Id.* at 648. Citing *McConnell*, 540 U.S. at 187, the court stated, "When the purity of the process is compromised in part, the corruption affects the integrity of the whole." *Id.* at 650.

authorizes the agency to "make ... such rules [...] as [are] necessary to carry out the provisions of this Act," as does 2 U.S.C. 437d(a)(8), the "validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) (citation omitted). *See also Republican Nat'l Comm.,* 76 F.3d at 407 (arbitrary-and-capricious standard is "satisfied if the agency enables us to see what major issues of policy were ventilated … and why the agency reacted to them as it did") (internal quotation marks omitted).

The revised allocation regulations are reasonable. As the Commission noted (JA 288), "[n]either FECA nor any court decision dictates how the Commission should determine appropriate allocation ratios." *See also* Final Rules, JA 289. The bright lines that the Commission drew in the allocation regulations do not make the regulations unlawfully "arbitrary." *See Matthews v. Diaz,* 426 U.S. 67, 83 (1976) ("it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences…."); *American Federation of Government Employees v. OPM*, 821 F.2d 761, 777 (D.C. Cir. 1987) ("The lines drawn … may well be, in one sense, 'arbitrary' without being 'capricious'"); s*ee also WorldCom, Inc. v. FCC*, 238 F.3d 449, 461-62 (D.C. Cir. 2001); *Walsh v. Brady*, 927 F.2d 1229, 1233 (D.C. Cir. 1991) ("Of course, a clever lawyer can

imagine anomalous applications of any regulation. But the … [agency] had to draw a line between expenses that are allowed … and those that are not.").

The federal flat minimum of 50% in section 106.6(c) for administrative expenses and generic voter drives that cannot be divided with scientific precision into exclusively federal and nonfederal components reasonably reflects the dual nature of the disbursements. Likewise, the "candidate-driven allocation rules" (Final Rules, JA 285) in section 106.6(f) for certain public communications and voter drives reasonably reflects the focus of these activities. The historical prevalence of a 50% or higher ratio (*see supra* p. 26) reflects both the major purpose of federal political committees and the fact that even though federal elections occur biennially, many political committees begin preparing for them during the preceding "off" year. (Indeed, appellant's name makes that very point; "EMILY" is an acronym for "Early Money Is Like Yeast.") These circumstances are more than sufficient to establish that the Commission's "line[s] of demarcation [are] … within a zone of reasonableness, as distinct from the question of whether the line drawn by the Commission is precisely right." *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002) (internal quotation marks and citations omitted).

EMILY's List errs in contending (Br. 26-27, 43-44) that the Commission was required to provide a new record of corruption to justify each adjustment of

the allocation rules — indeed, each hypothetical application that EMILY's List can imagine. As we explained above, long-established legal authority has concluded that political committees like EMILY's List are properly subject to the Act's contribution limits because of the potential for corruption stemming from circumvention. As we also explained, the entire allocation system implements the contribution restrictions that have been held to serve an anti-corruption purpose. "[A] regulation is reasonably related to the purposes of the legislation to which it relates if the regulation serves to prevent circumvention of the statute and is not inconsistent with the statutory provisions." *Carpenter v. Secretary of Veterans Affairs*, 343 F.3d 1347, 1352 (Fed. Cir. 2003). "Moreover, it is unnecessary for an agency to prove that circumvention has occurred in the past in order to sustain an anti-circumvention regulation as reasonable; a regulation can be justified by a reasonable expectation that it will prevent circumvention of statutory policy in the future." *Id.* at 1353.

In addition, contrary to EMILY's List's contention (Br. 26), the Commission properly "ma[d]e ease of administration and enforceability a consideration in setting its standard," *WorldCom*, 238 F.3d at 459. For example, in *Republican Nat'l Comm.*, 76 F.3d at 406, this Court upheld a regulation adopted to enhance compliance, and noted that, "[f]inding that political committees were not collecting sufficient data, the Commission concluded that an uncluttered follow-up request

[to donors] would yield more information." Similarly here, the Commission explained that, in promulgating the allocation regulations, it sought to "enhance compliance with the FECA," as well as to create a system that is easier for political committees to understand and for the Commission to administer (JA 286).

The solicitation regulation also satisfies APA review. EMILY's List asserts (Br. 42-43) that the 50% figure for solicitations that indicate that funds received will support both federal and nonfederal candidates is arbitrary and capricious. As explained *supra* pp. 53-54, however, in the absence of an available scientifically precise calculation, an agency's line drawing is not arbitrary and capricious. More generally, for substantially the same reasons that the solicitation regulation satisfies the First Amendment, *see supra* pp. 41-47, the regulation reasonably accommodates the needs of political committees while preventing circumvention of the Act. EMILY's List also asserts (Br. 40, 42) that section 100.57 is arbitrary and capricious because it would trump express statements in solicitations that a low percentage of funds received would be used to support or oppose the election of federal candidates. But as the Commission explained in discussing the First Amendment challenge to section 100.57, an unsupported worst-case hypothetical

example does not establish that the regulation is beyond the Commission's authority to promulgate or is arbitrary and capricious. *See supra* p. 44.[31]

Finally, EMILY's List argues (Br. 43-44) that the allocation and solicitation regulations violate the APA because the Commission did not include constitutional justifications for those rules in its E&J. EMILY's List apparently relies on both the arbitrary-and-capricious standard in section 706(2)(A) and the requirement in 5 U.S.C. 553(c) that an agency "incorporate in the rules adopted a concise general statement of their basis and purpose." This Court, however, has explained that "[w]e do not expect the agency to discuss every item or opinion included in the submissions made to it in informal rulemaking. We do expect that … [section 553] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

As the Commission has shown, its Final Rules discuss pertinent facts — for example, the Commission's experience in the past ten years with the "funds expended" allocation formula — and give the agency's policy reasons for adopting

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[31] Moreover, because EMILY's List chose not to participate in the rulemaking, it failed to suggest to the Commission at the appropriate time that express statements in solicitations about low allocation percentages should be given controlling weight. *See Clinton Memorial Hospital v. Shalala*, 10 F.3d 854, 859 (D.C. Cir. 1993) ("[N]o one proposed … the use of other criteria…. The absence of any alternative proposals colors our assessment of the Secretary's explanation.").

the regulations, including why it changed the allocation formulas. The Final Rules summarize the views of the commenters and explain that the Commission took those views into account. *See, e.g.*, JA 283-84 (solicitation regulation), JA 286 (allocation regulations). During the rulemaking, no commenters "ventilated" constitutional objections to the allocation and solicitation regulations. EMILY's List cites *no* authority that section 553(c) or 706(2) requires an agency to present a constitutional justification in its explanatory statement when no commenters raised constitutional objections. *See Reytblatt v. NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997) ("The basis and purpose statement is inextricably intertwined with the receipt of comments."). In any event, the long history of the Commission's allocation rules leaves no doubt that they are designed to prevent corruption and circumvention of the Act's contribution limits. *See McConnell*, 540 U.S. at 122-126; JA 257 (Commission Notice of Proposed Rulemaking acknowledging *McConnell's* criticism of certain prior allocation rules).

CONCLUSION

Although EMILY's List invokes both the First Amendment and the APA to challenge the three regulations, its challenge ultimately rests on its disagreement with the Commission's policy choices. In promulgating these regulations, the Commission has ensured that a political committee engaged in mixed federal and nonfederal electoral activity satisfies the requirement that only federally

permissible funds finance federal campaign activity. Like Congress, the Commission "has a fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes." *McConnell,* 540 U.S. at 187. The regulations are closely drawn to support that compelling governmental interest while accommodating the need for workable, understandable rules. This Court should affirm the district court's grant of summary judgment to the Commission and its denial of summary judgment to EMILY's List.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a) and D.C. Circuit Rule 32(a), I hereby certify that this brief contains 13,947 words, excluding the parts exempted by the rules, and has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point typeface.

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Attorney

February 25, 2009

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMILY's LIST,	)	
	)	
Plaintiff-Appellant,	)	No. 08-5422
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant-Appellee.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2009, I caused to be served by hand delivery two copies of the Federal Election Commission's brief in this case on the following counsel for appellant EMILY's List:

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