UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 05-00049-CKK

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff EMILY's List, through undersigned counsel, respectfully moves this Court for a summary judgment pursuant to Fed. R. Civ. P. 56 holding unlawful and setting aside Title 11 C.F.R. §§ 100.57 and 106.6 as violating the First Amendment to the United States Constitution; as "in excess of 'the Commission's statutory jurisdiction, authority, [and] limitations"; and as arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law."

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

Plaintiff requests oral argument on this motion.

Dated September 14, 2007

_____/s/_____
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

This case involves regulations promulgated by the Federal Election Commission ("FEC" or "the Commission"), effective January 1, 2005, which unlawfully cripple the capacity of political organizations to engage in state and local political activity by purporting to treat it as federal election activity sharply constrained by the Federal Election Campaign Act. The rules were originally intended to settle partisan complaints about very different organizations, ones prominent in the last presidential election. These included so-called "section 527" organizations that, unlike EMILY's List, are not "political committees" registered with and reporting to the FEC but were alleged to have impermissibly financed, using "soft money," those presidential election-related activities. EMILY's List, however, does not share these organizations' purpose or operating history and maintains robust programs influencing state and local elections.

Nevertheless, under these new rules, a mere "reference" to a federal officeholder, or to a political party, results automatically in arbitrary and severe restrictions on the financing of a political organization's public communications and voter drives. The new rules also impose onerous restrictions on the manner in which committees like EMILY's List may allocate between federal ("hard") and nonfederal ("soft") accounts their administrative and generic voter contact activities, in support of both their federal and nonfederal election programs, that do not entail the advocacy of any particular candidate's election or defeat. Moreover, they dramatically expand the class of funds received by EMILY's List that must be treated as contributions under federal law.

By law these restrictions were designed only to limit the financing of efforts to influence a federal election, but the new rules expand them well beyond this purpose. These

restrictions apply regardless of an organization's actual or apparent purpose to influence the outcome of a federal election.

The effect of these new rules is to severely and unconstitutionally limit the ability of EMILY's List, one of the nation's largest political organizations, to finance a range of activities to influence the outcome of state and local elections. EMILY's List faces grave impediments in raising funds for and influencing the outcome of statewide nonfederal races for Governor and other statewide offices, and for seats in state legislatures around the country. Because of the Commission's new and unlawfully and unconstitutionally promulgated rules, EMILY's List's funding of these races will be dictated not by the laws of the states in which these elections are held, but instead by a scheme of restricted campaign financing well outside of the federal statutory scheme, which was intended to apply only to bona fide federal election activity.

This motion for summary judgment challenges these regulations for, *inter alia*, violating the First Amendment, and while EMILY's List pressed this claim in the first two rounds of briefings in this case, its constitutional arguments have been dramatically and decisively reinforced by the Supreme Court in the *Wisconsin Right to Life* decision. In that case, and as discussed at length below, the Court established the proper constitutional framework for determining where the Commission's authority to regulate federal election activity ends, and where other political activity outside its jurisdiction – activity such as legislative issue advertising and nonfederal elections activity – begins. In addition, Plaintiff will show that the regulations in question exceed the statutory authority of the regulating agency, and are arbitrary and capricious.

II. STATEMENT OF FACTS

A. Description of EMILY's List

EMILY's List is a political organization whose purpose is to recruit and fund viable women candidates for local, state and federal office; to help them build and run effective campaign organizations; and to mobilize women voters to help elect progressive candidates across the country. EMILY's List identifies viable opportunities to elect pro-choice Democratic women to local, state and federal office, recruits qualified candidates, trains them to be effective fundraisers and communicators, and works with them throughout the campaign to make sure that they are executing winning strategies. EMILY's List also works through its Women Vote! Program to mobilize women voters for local, state and federal elections through broadcast advertising, web sites, direct mail and personal voter contact. (B. Cocanour Aff. ¶¶ 2-4).

EMILY's List was founded in 1985. At that time, no Democratic woman had ever been elected to the U.S. Senate in her own right, no woman had ever been elected governor of a large state, and the number of Democratic women in the U.S. House had declined to twelve. 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. (*Id.* ¶¶ 5-6).

The federal account of EMILY's List is a nonconnected political committee that is registered with, and reports to, the Federal Election Commission. For the purpose of raising and disbursing funds for nonfederal elections, EMILY's List also maintains a nonfederal account. This account accepts funds from sources, and in amounts, that the states authorize for use in supporting local and state candidates, but that may not be permissible under federal campaign finance law for the support of federal candidates. (*Id.* ¶¶ 7-9). EMILY's List reports its nonfederal receipts and disbursements to the Internal Revenue Service in

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

B. "Allocation" under the Former Regulatory Scheme

Like other national political organizations, EMILY's List conducts a number of activities, such as voter identification, voter registration, get-out-the-vote and generic voter mobilization activities, which affect both federal and nonfederal elections. In addition, EMILY's List has certain fixed administrative and overhead costs, such as rent, salaries, supplies, and the like. For many years, the FEC provided for an "allocation" procedure to ensure that a political committee paid for those particular expenses attributable to federal elections with federal funds, and those particular expenses attributed to state and local elections with state funds. Fixed overhead costs were paid with both federal and state funds, on a ratio approximating the level of federal versus nonfederal activities undertaken by the committee. *See* 11 C.F.R. § 106.6 (2004).

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

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

C. Federal Election Commission Solicitation and Allocation Rulemaking

The FEC did not reconsider the rules as applied to EMILY's List because of any suggestion that they did not fulfill their intended purpose, or because of any allegation that EMILY's List did not or could not comply with its terms. Instead, the changes in the rules emerged incongruously out of a proceeding established to address an altogether and unrelated issue: organizations alleged to have been established to influence only the 2004 Presidential election and using soft money for this purpose.

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

On February 19, 2004, the Commission issued Advisory Opinion 2003-37. In this opinion, the Commission attempted – without a rulemaking – to restructure the allocation

formulas, requiring allocating committees to pay entirely with federal funds for any public communication that "promotes, supports, attacks, or opposes" federal candidates. The Commission also built this requirement into the formulas for calculating allocations, so that any communication of this kind – promoting, supporting, attacking or opposing a federal candidate – would be included in the tally of "direct" federal candidate support used to determine the federal share of allocated expenses. (Adv. Op. 2003-37 (Feb. 19, 2004), *attached as* Attachment C). The Commission's Office of General Counsel later described this advisory opinion as a "substantial reinterpretation of the 'allocation' rules." *See* FEC Agenda Doc. No. 04-48, at 7 (May 11, 2004).

On March 11, the Commission issued a wide-ranging proposal of new regulations. *See* Political Committee Status, 69 Fed. Reg. 11,736 (proposed Mar. 11, 2004). While the regulations addressed a variety of topics, they were structured along two primary lines meant to address the concerns raised about the two types of organizations under attack in the presidential election. First, the regulations targeted section 527 organizations unregistered with the FEC. Second, the regulations addressed "allocating committees": entities like EMILY's List that were registered with the Commission, but that had nonfederal accounts as well.

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

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

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

examination concluded that very few committees choose to allocate at all. *See id.* at 68,062. The final rules also contained a new definition of "contribution" unlike that contained in the proposed rules; the new section 100.57 defined contributions as funds received in response to a solicitation that "indicates that" any portion of the funds will be used to "support or oppose" federal candidates.

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

D. Summary of New Regulations

The new regulations, found at 11 C.F.R. §§ 100.57 and 106.6, have three new features challenged here. The first is that the regulations impose a minimum 50 percent allocation ratio. Administrative expenses, and generic communications such as voter drives and communications that refer to a political party but not to any candidates, must be paid for with at least 50 percent federal funds. *See id.* § 106.6(b)(1). Unlike the previous regulations, this allocation ratio does not depend on the relative federal activity of an organization. A political committee that spends 99 percent of its funds in state and local races must use 50 percent federal funds for its administrative and generic expenses.

The second feature is the mere "reference" rule. Communications that refer to clearly identified federal candidates, and do not refer to clearly identified nonfederal candidates, must be paid for using 100 percent federal funds. *See id.* § 106.6(b)(f)(1). Using entirely federal funds is required even if the communication is only made outside of the referenced candidate's election district. It is required even if the communication is made years before the referenced candidate is up for election. It is required no matter how small the amount of

space or time devoted to the federal candidate. And it is true even if nonfederal candidates are mentioned, so long as none are individually clearly identified in a communication, such as touting all Democratic candidates or Democratic members of the state assembly.

The third new feature is found at 11 C.F.R. § 100.57. This is an entirely new regulation, and requires that organizations treat funds received as contributions under federal law, with all of the attendant source prohibitions and contribution restrictions, if the solicitation prompting the donation "indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." *Id.* § 100.57(a). If the solicitation refers to a nonfederal as well as a federal candidate, at least 50 percent of the funds received must be treated as federal contributions; if the solicitation does not refer to a clearly identified nonfederal candidate, 100 percent of the funds received are federal contributions. *See id.* § 100.57(b). This regulation trumps even clear language in the solicitation itself stating that a smaller percentage of funds will be used for federal election purposes. *See* 69 Fed. Reg. at 68,057. The result of the regulation is that a political committee may be required to refuse to accept, or to return, funds it could otherwise accept under state law for use in local and state elections. *See id.* at 68,058-59.

III. Standing

To achieve Article III standing, a plaintiff must show (1) injury in fact, (2) fairly traceable to the defendant's challenged action, and (3) redressable by a favorable court decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Injury is presumed when a First Amendment violation is found. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."), *quoted in Nat'l Treasury Employees Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991).

The Supreme Court has articulated the grounds for a facial challenge, such as that present by the petitioner here, in these terms:

> Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court-those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."

Board of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987).

EMILY's List has been directly injured in at least two general ways by the regulations at issue. First, it has been forced to alter its communications – both its solicitations and its expenditures to influence elections – under the FEC's new regulations. Second, it is required to pay for its administrative expenses with a higher percentage of federal funds, resulting in fewer funds available for other political speech.

A. Communications

EMILY's List has drawn national attention for its success in electing clearly identified federal candidates. These victories have been a powerful inducement in branding EMILY's List as an effective political organization. The national reputation of EMILY's List encourages persons to donate to its nonfederal programs, because donors are confident that if EMILY's List has succeeded with the election of federal candidates in high-profile national elections, it possesses the skills and resources required for success in local and state elections as well. EMILY's List has also found that the use of the names, association with EMILY's List and endorsements of certain well-known federal candidates and officeholders are uniquely effective at raising funds for EMILY's List and its efforts on behalf of federal and nonfederal candidates. These candidates and officeholders have "superstar" status: the use of their names, and their endorsement of EMILY's List's goals, carry power well beyond their

home states. (B. Cocanour Aff. ¶¶ 17-18). Nonfederal candidates generally do not have the national name recognition that is so important to EMILY's List's efforts.

Under these new rules, EMILY's List must treat as a federal contribution the funds received in response to a communication that indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate. This regulation permits some funds to be treated as nonfederal contributions only if a non-federal candidate is also clearly identified, and in no case may more than fifty percent of the funds received be treated as nonfederal. Before these regulations, EMILY's List has made solicitations to raise funds for its nonfederal programs that refer to clearly identified federal candidates, and that do not refer to any clearly identified nonfederal candidates. EMILY's List did deposit some funds received as a result of these solicitations in nonfederal accounts.. (*Id.* ¶¶ 19-20).

As a result of the new regulations, EMILY's List has altered its solicitations in order to be able to accept nonfederal funds as a result of a solicitation. It has either eliminated references to clearly identified candidates in solicitations, especially "superstar" federal candidates, or if it seeks to use some portion of the funds received for its local and state elections activity, it has been compelled to add references to clearly identified nonfederal candidates. For instance, Attachment A is a solicitation sent by EMILY's List. In its final form, it included a reference to Arizona Governor Janet Napolitano. This reference was included solely so that some funds could be treated as nonfederal contributions, for use in local and state elections. Prior to the enactment of the new regulations, EMILY's List would ask for contributions by referencing its work on gubernatorial and state legislative races, but it would not commonly reference any clearly identified nonfederal candidates but would in appropriate cases determine that a reference to a federal officeholder, also a candidate, would most effectively persuade the intended target audience. EMILY's List has begun to include

references to clearly identified nonfederal candidates in its solicitations, solely to be able to treat some funds received as nonfederal contributions under the new regulations, for use in its activities in local and state elections. (*Id.* ¶¶ 21-23; *See* Attachment A).

The regulations also affect how EMILY's List pays for its communications, and as a result requires it to avoid references to federal candidates so as to preserve federal funds for use in direct federal candidate support. EMILY's List has, in the past, paid for public communications that refer to federal candidates, the purpose of which is not to support or oppose federal candidates; for reasons relating to the choice of the most effective message, these communications have not often referred to any clearly identified non-federal candidates. The new regulations require that communications that merely refer to a clearly identified federal candidate must be paid for with at least some federal funds, and with entirely federal funds if no clearly identified nonfederal candidate are mentioned—regardless of the purpose of the communications and specifically, its relationship to the nonfederal program. As a result, even in communications that are not made for the purpose of influencing federal elections, EMILY's List is forced to cease to either include references to federal candidates, or else to pay for the communications with federal funds. (B. Cocanour Aff. ¶¶ 24-25).

For example, Attachment B contains five advertisements supporting two ballot initiatives in Missouri that were paid for and distributed by EMILY's List. None of these advertisements contain, in their final form, a reference to a clearly identified federal candidate. EMILY's List would have preferred to include a reference to a clearly identified federal candidate in these advertisements to endorse the ballot initiatives while continuing to pay for them with nonfederal funds. EMILY's List's communication would have included a federal candidate in the state of Missouri, or a "superstar" federal candidate outside the state. Ballot initiatives very often present questions of national scope, and endorsements by a

national spokespeople such as federal-level officeholders or candidates are more effective in raising funds for or delivering persuasive messages about those initiatives. These communications would not have the purpose of influencing those candidates' elections. Yet the new regulations would have required the advertisements for this ballot initiative to be paid with entirely federal funds if they included a reference to a clearly identified federal candidate, even though the advertisements would remain focused on the ballot initiative.

As a result, EMILY's List declined to include such references. Because of these rules, EMILY's List is prohibited from spending nonfederal funds to influence nonfederal elections or ballot initiatives conducted and financed under state law, if it chooses to include references to federal candidates in its communications. (*Id.* ¶¶ 26-30; *See* Attachment B).

To avoid the peculiar stringency of these regulations, on August 18, 2005, EMILY's List submitted an Advisory Opinion Request to the FEC asking, *inter alia*, whether a fundraising solicitation to raise money to support state legislative candidates of state legislative candidates, referring to Senator Debbie Stabenow but not to any clearly identified non-federal candidates, would have to be paid for using entirely federal funds. EMILY's List was proposing to include her in a public communication distributed outside her state, for "the purpose of stressing the importance of successes for women in State elective office." (*See* FEC Adv. Op. Request 2005-13 (Aug. 18, 2005), *attached at* Attachment D). "The communication will not be distributed in the Senator's home state of Michigan, will not reference the Senator's candidacy for re-election, and will not solicit funds for her campaign." (Adv. Op. 2005-13 (Oct. 20, 2005), *attached as* Attachment E). The FEC concluded that the communication must be paid for using entirely federal funds "[r]egardless of its context." (*Id.*). EMILY's List also proposed to fund a communication solely on a ballot initiative, including in it an appeal to Democrats. The FEC ruled that this communication would

trigger a 50% federal financing requirement. It held: "A discussion of a State legislative initiative or referendum does not alter the application of these rules." (*Id.*).

EMILY's List also asked whether three solicitations, all of which refer to Senator Stabenow but not to any clearly identified non-federal candidates, would require that the funds received in response be treated as federal contributions. The FEC ruled that two of the three communications did require that all of the funds received in response be treated as federal contributions, including a solicitation containing only this statement: "We are asking for your support, so that EMILY's List can support candidates, who, like me, could never succeed as women in politics without the combined commitment of all [of] us." (*Id.*)

In sum, because of these regulations, EMILY's List is now required to either avoid references to federal candidates that it would otherwise include, or add references to nonfederal candidates that it would otherwise avoid, in its political and fundraising communications. There is no question that a set of regulations affecting the text of Plaintiff's political speech has caused it injury sufficient to confer standing.

B. Administrative Ratio

These rules also prevent EMILY's List from spending a higher proportion of nonfederal funds on activities which exclusively or predominantly reflect nonfederal electoral purposes. For example, among EMILY's List's administrative expenses is a program called Campaign Corps, which trains young people in campaign skills and assists in placing them on campaigns. Campaign Corps is a unique grassroots program dedicated to politically empowering young people. Each year, EMILY's List trains talented individuals just out of college at an intense week-long Campaign School and then places them on campaigns for the last 3 months of the campaign. In odd-numbered years such as 2007, there are no regularly scheduled federal races on the ballot; therefore, the vast majority of the students are placed on campaigns for state and local office in New Jersey and Virginia, which

hold elections in these years. In even years, graduates are placed with both federal and nonfederal campaigns. During the 2006 election cycle, 77% of the graduates trained by the program ultimately worked on nonfederal races. (B. Cocanour Aff. ¶¶ 10-13).

These new rules require EMILY's List to pay at least half of the expenses of the Campaign Corps with funds from EMILY's List's federal account. Were it not for these rules, EMILY's List would pay for this expense with a higher proportion of nonfederal funds, to reflect its predominantly nonfederal purpose. EMILY's List will continue to sponsor the Campaign Corps during the 2007-2008 electoral cycle. (*Id.* ¶¶ 14-16).

IV. THE REGULATIONS VIOLATE THE FIRST AMENDMENT

Emily's List has set out a clear constitutional claim, based on its activities in nonfederal elections over a twenty year period. It is unable, without risking enforcement action by the FEC, to conduct those nonfederal activities without complying with draconian federal financing rules. Thus, if EMILY's List adopts a budget committing the majority of its funds to nonfederal elections, it must still pay 50% of its costs of administration under federal rules. If its public communications in a state feature an appeal by a national officeholder for the support of nonspecific nonfederal candidates, or a vote for or against a ballot initiative, and the officeholder is a federal candidate, the communication must be financed with 100% federally restricted funds. Similar payment is required if the candidate, not speaking through the communication, is the subject of a mere "reference" in the text.

This same stringent financing requirement applies even if EMILY's List raises funds in these circumstances with a stated commitment that its purpose is solely to conduct these nonfederal activities, not to support federal candidates. And these same rules force restricted federal financing on nonfederal activities consisting of support of state ballot initiatives, not only of nonfederal candidates for office.

In this respect, EMILY's List, because it supports federal candidates, must compete with other nonfederal organizations at a disadvantage, and it is constrained in providing nonfederal candidates with the support authorized by the states within which they seek election to public office. To this, the FEC answers that there is no constitutional harm, resting its entire case on reading of the latitude afforded its enforcement activities by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003).

The Commission relies specifically on the argument used to defend the "electioneering communication" provision. The electioneering communications restriction of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, made it a federal crime for a corporation or labor union, or any organization using corporate or labor union funds, to broadcast a communication on television or radio that refers to a clearly identified candidate, that can be received by 50,000 or more persons in the state or district in which the candidate is running, and that is broadcast within 30 days before a primary election or convention, or 60 days before the general election. *See* 2 U.S.C. §§ 434(f)(3), 441b(b)(2); 11 C.F.R. § 100.29.

As a result of an as applied challenge to this regime by a section 501(c)(4) nonprofit corporation, and subsequent to the initiation of this action and this Court's ruling on the application of preliminary injunctive relief, the Supreme Court sharply limited the scope of this provision. In the plurality opinion, the Court found that only electioneering communication advertisements that are "the functional equivalent of express advocacy" may be banned. *See FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2667 (2007) . The Court defined this term as including ads only if they are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." In explaining why the ads at issue did not meet that standard, the Court noted that they "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to

contact public officials with respect to the matter"; that they "do not mention an election, candidacy, political party, or challenger"; and that "they do not take a position on a candidate's character, qualifications, or fitness for office." *Id.*

The Court, when upholding the plaintiff's as-applied challenge in *WRTL*, warned against an "expansive definition" to ensure against circumvention: "the desire for a bright line rule . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *Id.* at 2672 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986)). The Court also warned that the federal government's interest in combating corruption does not "extend[] beyond campaign speech." *Id.* The Court specifically rejected the unqualified application of the "reference" standard, which would have treated as federal election-related – and thus fully governed by federal law – any communication that merely "referred" to a federal candidate.

Throughout this litigation, the FEC has built its case on just the argument it made, and that the Court in *WRTL* rejected, in defense of the electioneering communication restriction. The Commission's previous reliance on this now-discredited defense could not have been clearer or more pointed. For example, the agency complained to this Court that:

> [Emily's List's] arguments are largely a rehash of those rejected by the Supreme Court when it upheld BCRA's regulation of electioneering communications. Indeed as plaintiff concedes, Congress employed just such a "refer to" standard in its definition of electioneering communications. . . . In *McConnell*, the Court noted that the bright-line definition of "electioneering communication" in BCRA might well regulate some "genuine issue ads" because its only content requirement was that the communication "refer" to a clearly identified candidate. But the Court did not find that to be an unconstitutional burden, in part because corporations and unions who wished to run genuine issue ads in the period before an election could still do so in the future "by simply avoiding any specific reference to federal candidates . . . ."

(Def.'s Previous Mot. for Summ. J. 23). This was the Commission's reading of the "import of *McConnell*," (*Id.* 18), on which it depended heavily in defending the "reference" standard,

and the Supreme Court has now ended all doubt in *WRTL* that the agency was simply wrong. That the FEC has misread *McConnell* in its treatment of the electioneering communication provision is now beyond question, in the wake of the Court's holding in *WRTL*. There the Court found the agency's interpretation of *McConnell* erroneous in reasoning and unconstitutional in its consequences. Most significantly, the errant constitutional framework adopted in the case is the same one – a "rehash" – of the one the FEC has used for purpose of disputing Plaintiff's claim.

The entire defense the FEC constructed on the shaky misconstruction of *McConnell* has collapsed. In sum, *WRTL* shows that *McConnell* is not an independent source of authority for regulating mere "references" to candidates, and that the State's interest in regulating "federal" campaign finance is not virtually unlimited because a political organization, engaged in nonfederal activities, also conducts federal activities at other times, in other places. Moreover, the Court in *WRTL* fundamentally rejects a law enforcement concern with circumvention as an excuse for disregarding the rights EMILY's List seeks to exercise under state law, in support of nonfederal candidates, or other nonfederal activities such as state ballot initiatives or referenda.

A. Section 106.6 Is Subject to Strict Scrutiny

The First Amendment to the United States Constitution prohibits the government from regulating political speech unless that regulation is "narrowly tailored to further a compelling interest." *WRTL*, 127 S. Ct. at 2671; *see McConnell*, 540 U.S. at 205; *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976). While the regulation of contributions is subject to a lesser standard, *McConnell*, 540 U.S. at 138, the regulation of expenditures has always been subject to strict scrutiny.

Section 106.6, regulating what funds EMILY's List must use when communicating with the public, must be examined under strict scrutiny; after *WRTL*, there is no longer any

doubt regarding this standard. Indeed, EMILY's List is in an identical position to the plaintiff in that case: Wisconsin Right to Life, Inc., like EMILY's List, had a federally-registered political committee into which it deposited only contributions permissible under federal law, and from which it made independent expenditures to influence federal elections. *See WRTL*, 127 S. Ct. at 2697 (Souter, J., dissenting). The law was clear that it could make the advertisement in question through this account, but it sought the right to do so using funds that were unregulated by the FEC, for purposes it considered unrelated to federal elections. The Supreme Court considered its request under the strict scrutiny standard. *See WRTL*, 127 S. Ct. at 2664.

By contrast, when the *McConnell* Court considered the ban on the use of nonfederal money by political party committees, it did so under the more relaxed standard under which contribution limits are judged; but in that case, it was only passing judgment on the use of such money in connection with *federal* elections, and so the ban on nonfederal funds acted only as a contribution limit. The Court noted with approval that the law was structured "in such a way as to free individual, corporate, and union donations to state committees for *nonfederal* elections from federal source and amount restrictions." *McConnell*, 540 U.S. at 139 n.41 (emphasis in original). And while *McConnell* did also uphold a complete ban on the use of nonfederal funds by national party committees and federal candidates, that statutory prohibition was a judgment by Congress that national party committees and federal candidates generally had no business dabbling in nonfederal elections at all; national party committees could use their state affiliates for that purpose, and federal candidates were given permission to raise nonfederal funds if they were themselves state candidates. *See* 2 U.S.C. § 441i(e)(2).

Finally, even under a more forgiving standard, the FEC cannot meet the burden of proving that the mere "reference" rules are "closely drawn means of countering both

corruption and the appearance of corruption." *Id.* at 167. In the wake of *WRTL*'s repeated warnings against excessive regulation to prevent distant threats of circumvention, the FEC need not merely assert an interest in circumvention; it must be able to show both the danger of corruption and the narrowness of the rules preventing it. This it cannot do.

B. The FEC Relies Mistakenly on *McConnell*, Misreading It for the Authority to Make Its 2004 Rules

The FEC has always conceded that BCRA did not mandate the promulgation of the rules at issue. BCRA, it grants, "did not directly address allocation." (Def.'s Previous Mot. for Summ. J. 6). Nor, the FEC concedes, does the previous statutory scheme "nor any court decision dictate[] how the Commission should determine appropriate allocation ratios." *See* 69 Fed. Reg. at 68,062. The authority it needs, then, is authority it proposes to find in the Supreme Court's decision upholding BCRA. Most generally, the Commission takes heart from the Court's criticism of the allocation regime in effect for years and brought into question by political party activity that is the main target of BCRA regulatory reform.

Here, too, the FEC must concede ground, admitting that EMILY's List is not a party committee, controlled by federal candidates and officeholders, and that BCRA did not direct revision of the allocation rules for non-connected committees. Unlike party committees, those non-connected organizations are not, as a class, connected officially to or operating under the control of elected officials who are candidates – or of candidates who aspire to be elected officials. And as the FEC admits, "very few committees chose to allocate their administrative and generic voter drive expenses." *Id.*

For this reason, the concern with corruption, or its appearance, on which the regulation of federal campaign finance depends, is attenuated.

So unlike Congress's determination on the basis of a compelling record supported by a defined interest to revise (and in the case of national party committees, to eliminate) the allocation formulas for party committees, the FEC is proceeding on its own, with *McConnell*

as its guide. It is conjuring its authority out of the text of *McConnell*. It maintains before this Court, citing both *McConnell* and one District Court opinion issued years ago, *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987), that it could do as it wishes with the allocation formula of any registered committee – even dispensing any allocation and requiring nonfederal activities to be funded only under federal financing rules. It appeals to its authority to shut off avenues of circumvention of the financing restrictions of federal law.

It is precisely this voracious assumption of authority to combat "circumvention" that the Supreme Court turned down in *WRTL*. Indeed, the Court did so twice, in the first and second phases of the FEC's failed attempt to subject constitutionally protected issue advertising to campaign finance controls. The FEC first read *McConnell* to prohibit any as-applied challenge to the electioneering communications. *See Wis. Right to Life, Inc., v. FEC*, 546 U.S. 410 (2006). Rebuffed by the Court, the FEC attempted to show that it could enforce the provision against ads where the content might be free of express advocacy or election-specific content, but where, from "context," the intent of advertiser and the effect of the ad could be construed to one of influencing an election. Once the again, the Court rejected the FEC's analysis.

C. The Constitutional Position Urged by the FEC in this Case is the Same, In All Material Respects, As the One Rejected by the *WRTL* Court.

WRTL presented the question of how far, in the regulation of federal campaign finance, the statute could reach into – and restrict – activities that were not conducted for the purpose of influencing federal elections. In the case before the Court, the activity in question was grassroots lobbying, also known as issue advertising, paid for by corporations or unions. The Court was called on to distinguish these activities from those conducted to influence elections, even where the activities outside the range of regulation could have some effect on federal elections.

This question is the same question, on different facts and involving a different sphere of activity outside the scope of constitutional federal regulation, presented by EMILY's List in this case. The activities at issue are also ones outside the reach of the statute: nonfederal activities, conducted by a nonconnected committee active in both federal and nonfederal elections. The 2004 regulations propose to bring these activities largely within the sweep of the federal elections, and the mechanisms it elects are much the same those before *WRTL*: the mere "reference" in communications to federal candidates, and the conduct by that same organization of federal election related activities deemed somehow sufficient to submit even an organization's nonfederal activities to federal financing rules.

In both cases, the FEC chose what the Court terms, disapprovingly, the "greater-includes-the-lesser approach." *WRTL*, 127 S. Ct. at 2671. In *WRTL*, this was the approach by which the Commission's authority to regulate campaign-related "express advocacy" speech covered other forms of corporate speech with a potential impact on voter choice. In this case, because the FEC has wide authority to regulate campaign finance, it presumes that its authority is sufficiently expansive to severely restrict activities in elections otherwise outside its jurisdiction to protect its federal interest. Having established that its regulation of federal election activity by political committees would survive strict scrutiny, the agency concludes that the same relaxed standard can be applied down the line, to guard against subversion of its federal enforcement mandate.

The Commission believes that the fact that EMILY's List is a federally registered political committee removes virtually all limits from its enforcement program. This is clearly what it believes, because this is what it says, drawing on the authority of a district court opinion, *Common Cause v. FEC*, for the proposition that it could "conclude that *no* method of allocation will effectuate the Congressional goal." 692 F. Supp. At 1395-96. Even if the court in *Common Cause* did mean that the FEC could impose a requirement of 100% federal

funds to be used on administrative expenses – an interpretation not at all clear, as explained in section V, below – this is just the "greater-includes-the-lesser approach," the "prophylaxis-upon-prophylaxis approach," that the Court in *WRTL* disallowed as a constitutional foundation for agency action. *See WRTL*, 127 S. Ct. at 2671-2. In the particulars, as well as in theory, the FEC is proceeding in this case as it did pursuant to its mistaken reading of *McConnell*, now exposed by the Court's decision in *WRTL*.

D. The FEC's Mechanisms for Implementing its Anti-Circumvention Approach Cannot be Reconciled with the Constitutional Limits Set by *WRTL*

The FEC's misapplication of *McConnell*, by which it justifies the limits placed on EMILY's List's nonfederal activities, is nowhere more evidently at odds with *WRTL*'s teaching than in its choice of mechanisms for reaching nonfederal activity. The FEC could, of course, regulate reasonably in aid of enforcement of federal contribution limits. For years the agency had enforced allocation plans intended to tailor the restrictions on nonfederal activities to the legitimate federal interest of the regulated committee. But after the enactment of BCRA, not at congressional direction but on a flawed understanding of *McConnell*, the FEC selected specific mechanisms of precisely the kind that characterizes the constitutionally impermissible course disallowed by *WRTL*.

1. The FEC allocation rules govern nonfederal activity on the basis of "references" to federal candidates—an approach specifically rejected by *WRTL*

The allocation rules adopted by the FEC in 2004 hinge the requirement of federal funding on a mere reference to a clearly identified candidate for federal office. The Commission has declined to elect a standard of "express advocacy" as the triggering mechanism. It also rejected, through it considered, the standard which would have looked to whether communications "promote, support, attack or oppose a clearly identified candidate." 69 Fed. Reg. at 68,060. The choice it made – mere "reference" – brings the full force of

federal regulation to bear on communications which, lacking any federal electioneering content, simply mention a federal candidate.

This reference standard is, of course, even broader than the one that the FEC failed to uphold in *WRTL*, as even the electioneering communication restriction limited its scope to the jurisdiction in which the candidate was running. It was the analogy to this provision that the FEC banked on as a defense, explicitly, in defending the reference standard here. The FEC suggested earlier in this litigation that EMILY's List argument was a "rehash" of the case against the electioneering communication heard by the *McConnell* Court. But the FEC, in this dismissive treatment of the constitutional complaint, did not know now then, as all parties to the case now know, that the "rehash" is highly relevant – indeed controlling – under the Court's *WRTL* decision.

The breadth of the Commission's position, and its infirmity under the *WRTL* standard, is plain enough from its opinion on a question put directly to it by EMILY's List. EMILY's List asked if it was required under the 2004 allocation rules to pay 100% of the costs of a communication featuring reference to a federal candidate presented as a success story in its program of support for nonfederal candidates. The federal candidate was Senator Debbie Stabenow, formerly a state senator, and EMILY's List was proposing to include her in a public communication distributed outside her state, for "the purpose of stressing the importance of successes for women in State elective office." (*See* FEC Adv. Op. Request 2005-13 (Aug. 18, 2005), *at* Attachment D).

The Commission held that "[r]egardless of its context," the reference alone triggered a 100 percent federal financing requirement. Moreover, the agency stated, "This analysis does not change if a candidate for election in a year other than 2006 [the year of the communication, when Senator Stabenow was running for re-election] were to be substituted for Senator Stabenow in EMILY's List public communication . . . ." (*See* FEC Adv. Op.

2005-13 (Oct. 20, 2005), *at* Attachment E). In other words, for purposes of the rule chosen by the Commission, it did not matter that the communication was not directed to Senator's electorate, and it would have mattered no more if the Senator was replaced in the communication with another federal candidate not even running in that year. "Reference" rules, supremely.

This attempt to have an entire communication colored by simple reference is no different than the one that the Court rejected in *WRTL*. It is the ultimate bootstrap: regardless of purpose, and without any tailoring of its regulation to more narrowly address true federal election related activity, the FEC proposes on reference alone to control how EMILY's List funds purely nonfederal activity. Reference could not carry the weight that the FEC proposed to put on it when defending the electioneering communication in *WRTL*. It cannot bear that weight any more so here.

Once again, it cannot be enough for the FEC to argue that EMILY's List is different because its activities relate to some elections, albeit nonfederal ones. The FEC cannot assert jurisdiction over nonfederal elections, any more than it can, in the hope of improving federal campaign finance enforcement, ban grassroots lobbying or issue ads from the airwaves in pre-election periods. Its enforcement program is bounded in both instances by constitutional constraints, and it must adopt rules narrowly tailored to the interest it asserts. This is what *WRTL* makes plain.

2. The FEC attempts to ground its absolute control over EMILY's List activities on its "identity" as a political committee, also inconsistent with *WRTL*

The FEC repeatedly maintains that EMILY's List can be more aggressively regulated because it is a political committee registered with the Commission for some purposes. In effect, the FEC believes that it can slip the limits on its authority by appealing to the identity of the speaker. This is what it proposed to do in *WRTL*, arguing that corporations and unions,

barred from influencing federal elections, had inferior constitutional if the FEC attributed to it a federal election influencing purpose or intent.

The Supreme Court in *WRTL* would have none of this. It specifically turned away the claim that a speaker's identity renders it vulnerable to regulation that, considered solely in light of the affected speech, would otherwise be impermissible. *See WRTL*, 127 S. Ct. at 2673. EMILY's List does not surrender its rights to participate fully in nonfederal elections, on terms set by the various states, simply because its federal activities subject it to federal regulation.

This is not to say that the FEC has no interest in guarding against subterfuge or evasion. But it must do so with care, advancing its compelling interests through narrowly tailored means. As it hoped to do through *WRTL*, the FEC wants its enforcement authority on easy terms. As with the mere "reference" standard, the agency seeks the easiest possible terms by effectively penalizing EMILY's List's for its willing registration as a political committee for the purpose of influencing federal elections.

That EMILY's List is a political organization is undisputed. The question remains how the FEC might control those of its activities that are truly federal election related in nature, within its jurisdiction. The FEC says, in effect, that the FEC's political committee status defines how it should conduct its nonfederal activities. But this status is a product of its federal election activities – which are not the activities in question, by definition. As in *WRTL*, the FEC is sparing itself the had work of distinguishing regulated federal election activities from the activities it is forbidden to regulate.

3. The FEC offers "alternatives" to EMILY's List to avoid federal dictation of the resources available for the regulation of nonfederal activity – again in contravention of the standards articulated in WRTL

The FEC seeks throughout its case to mitigate the harm inflicted on Emily's List by showing it a way out – the suppression or reworking of its own speech. In *WRTL*, the

reference to a federal candidate could be avoided altogether, stricken and the text revised to avoid the statutory prohibition. Or, the FEC counsels, the problem could be mitigated by addition as well as deletion: a nonfederal candidate can be added to a text to open up the opportunities for a dollop more of nonfederal financing.

As the Court in *WRTL* held in clear terms, the choice of speech is the speaker's and not the government's, and unconstitutional burdens on speech are not cured by having the speaker alter what it is he or she had to say.

> That argument is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says "I disagree with the draft," or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices. Such notions run afoul of "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."

WRTL, 127 S. Ct. at 2671 n.9 (internal citations omitted) (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.,* 515 U.S. 557, 573 (1995)) (citing *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996); *Cohen v. California,* 403 U.S. 15 (1971)). As EMILY's List has shown in this case, it is already straining to accommodate the rules, in just the fashion recommended by the FEC: it is changing the communication from what it deems politically most salient, to what the regulators demand as the cost of doing business.

Once again, the FEC makes no bones about its assumption that a little text editing is a small price to pay for allowing a political committee to function within the nonfederal sphere on the same basis of its competitors in the same election. In AO 2005-13, EMILY's List proposed to fund a communication solely on a ballot initiative, including in it an appeal to Democrats. This reference to a party, even in this nonfederal context, triggers under the applicable rule a 50% federal financing requirement. "A discussion of a State legislative

initiative or referendum does not alter the application of these rules." (*See* FEC Adv. Op. 2005-13, *at* Attachment E).

And yet, the FEC "notes that if the references to 'Democrats' were to be removed from the public communications, EMILY's List would be permitted to pay for the revised communications with 100 per cent non-Federal funds." (*Id.*). This is just the alternative of re-writing of a communication, promoted by the government to sidestep the unavoidable constitutional issue, that the *WRTL* Court would not countenance.

E. The Solicitation Rules Exceed the Commission's Authority in Regulating Federal Regulations

Thus far EMILY's List has shown how the FEC's theory of the case misconstrues *McConnell* and conflicts with clear dictates of *WRTL*. The demonstration has focused on the allocation rules, which, on the basis of mere reference to parties and candidates, trigger severe restrictions on EMILY's List's capacity for competing in nonfederal elections under state rules. Additional defects of the same nature, equally at odds with *WRTL*, can be found in another of the FEC's 2004 rules causing the proceeds of certain solicitations to be treated as, to the last penny, as "contributions" under federal rules. *See* 11 CFR § 100.57. The solicitations governed by this rule are those that "indicate[] that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." *Id.* § 100.57(a).

For purposes of the application of this rule, the FEC is indifferent to the extent to which a federal candidate may benefit from the proceeds; the question of whether the solicitation commits to the expenditure of funds in only part, or small part, for the benefit of the federal candidate, all the funds generated are treated as federal contributions unless a nonfederal candidate is also clearly identified. As a result, stringent limits apply to the sources or amounts of these funds, even if the proceeds were to be dedicated to the support of nonfederal candidates. It is this harsh result that has required EMILY's List to alter its

solicitations so it is able to continue to solicit and accept funds to use in connection with nonfederal elections.

The First Amendment requires that any contribution limits be "'closely drawn' to match a 'sufficiently important interest.'" *Randall v. Sorrell*, 126 S. Ct. 2479, 2491 (2006) (*quoting Buckley*, 424 U.S. at 25). The solicitation regulation is anything but "closely drawn"; instead, it takes an "all or nothing" approach is not unlike the allocation rules, particularly where the mere reference to a single federal candidate is sufficient to compel the 100% federal financing of a public communication. Yet the FEC, citing in its rulemaking the case of *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995), defends this regulation, once again, as essential to its "prophylaxis-upon-prophylaxis" enforcement scheme.

Survival Education Fund cannot help its cause. In the first instance, the judgment of the lower court in that case, rendered years ago, does not trump later constitutional authority, particularly *WRTL*. More telling, the FEC, by its own reading of *Survival Education Fund*, shows how wide a gulf separates its reasoning from the constitutional course set by the Supreme Court.

The question before the court in *Survival Education Fund* was whether a nonprofit corporation's solicitation of funds would have to disclose its sponsor and its authorization, if any, of a candidate, if the communication or any of the activities it would fund included "express advocacy." The court found that a solicitation only triggers a federal contribution when it is a solicitation for "contributions that are earmarked for activities or 'communications that expressly advocate the election or defeat of a clearly identified candidate.'" *Id.* at 295 (quoting *Buckley*, 424 U.S. 80). In short, this was a case presenting essentially the question before the *WRTL*, which is whether a communication could be regulated as campaign-related, or escaped regulation as an "issues" communication. Express advocacy – in the communication or the activities funded – was the line of demarcation, as

provided clearly in the settled constitutional law, *Buckley v. Valeo*, and in no way disturbed by *WRTL*.

Yet the rule adopted by the FEC skirts the requirement of express advocacy and rests its application on an "indication" that the sponsor of the communication seeks funds to "support or oppose" a clearly identified federal candidate. "Indicate" is not a defined term, and nor are the terms "support or oppose": none are related to the express advocacy requirement, which applies where a communications "expressly advocates the election or defeat of a clearly identified candidate."

The significance of this – and its contravention of the standards enunciated by the Court in *WRTL* – is simply this: the FEC has adopted a rule that allows for wide discretion by the agency in capturing nonfederal activity and treating it as federal. This is the impact of the rule, functioning much like the mere reference rules, without any tailoring to the requirement of a compelling interest in federal election related activity. Any "indication" of support for or opposition to a named federal candidate leads under the rule to full federal capture of the proceeds.

The FEC had an opportunity to demonstrate the breadth of this rule in its response to EMILY's List's request for advice in Advisory Opinion 2005-13. The proposed communication sought funds through an appeal from Senator Stabenow, and the Commission reviews each of three statements to determine whether they "indicate" support or opposition to a federal candidate. The FEC did not conduct an express advocacy analysis: its scope of inquiry was based on this more amorphous "indication" of support or opposition. The Commission found that this indication in statements such as "EMILY's List's support over the years for candidates like me has made an enormous difference to the progress of women toward equality in the pursuit of political office." (Adv. Op. 2005-13, *attached as* Attachment E).

The agency found this indication potentially even in statements which affirm the intention to use the funds for candidates for state office. While the FEC found no indication on one version of this communication, it cautioned that this conclusion was limited to the text before it, and notably: "Any additional text in the communication, including particularly any references to a clearly identified Federal candidate, could affect the analysis . . . ." (*Id.*). Any reference could support a finding of indication, bringing the full proceeds under federal regulation, regardless of EMILY's List's stated or even proven intention to use the funds for nonfederal electoral purposes.

Moreover, as in the allocation rules, the FEC could not resist offering EMILY's List in this opinion the alternative of re-writing the script to save itself. The Commission noted: "Because the [proposed] communications will not refer to any non-Federal candidates, they will not satisfy [that portion of the 'indication' rule], which would have permitted EMILY's List to consider up to 50 per cent of the proceeds to be donations to its non-Federal account." (*Id.*).

This is what Emily's List has been required to do, in other contexts: to revise texts not to say what it believes best advances it nonfederal objectives, but to mitigate the unforgiving effects of the 2004 rules in depressing EMILY's List's legitimate nonfederal activities without constitutional justification. (*See* B. Cocanour Aff. ¶¶ 17-23; Attachment A). The Supreme Court made clear in *WRTL* that directing political speech is not a legitimate function of a government agency, and the FEC cannot answer the constitutional objection to the rules as crafted.

V. THE REGULATIONS VIOLATE THE COMMISSION'S STATUTORY AUTHORITY

The Administrative Procedure Act ("APA"), §§ 553-706, forbids federal agencies from promulgating regulations "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). "[A]n agency literally has no power to act

. . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Deference to an administrative agency's interpretation is only appropriate when "Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (citation omitted); *see also Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("[T]he agency's interpretation of the statute is not entitled to deference absent a delegation of authority from Congress to regulate in the areas at issue.") (emphasis in original). Courts must vacate "administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984).

The regulatory authority of the Commission is granted at 2 U.S.C. § 438(a)(8), which permits it to "prescribe rules, regulations, and forms to carry out the provisions of [the Federal Election Campaign Act]." Thus, the Commission has authority only to effectuate the provisions of federal campaign finance law. The definitions of "contribution" and "expenditure" only apply to "anything of value" made "by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i), (9)(A)(i). The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 et seq., regulates contributions and expenditures by political committees. But FECA does not define every payment made to or by a political committee as a contribution or expenditure. The FEC's new regulations far exceed FECA's limited grant of authority

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

The final rules apply severe financing restrictions on the basis of a mere "reference" to a federal candidate or to a political party. *See* 11 C.F.R. § 106.6(f). The rules require that communications that merely reference a clearly identified federal candidate must be paid for with at least some federal funds, and with entirely federal funds if no clearly identified

nonfederal candidate are mentioned. *See id.* This is a course that Congress rejected when developing FECA and its subsequent amendments. Congress focused the statutory scheme instead on expenditures "for the purpose of influencing" a federal election. *See* 2 U.S.C. § 431(8)(A)(i), (9)(A)(i). The Congress has had occasion to mark out the boundaries of a "federal election influencing purpose," but the FEC in this instance, in the promulgation of the 2004 rules, disregarded these statutory commands.

That the FEC has transgressed the boundaries of its statutory authority is apparent from Congress' recent enactment of BCRA. Congress changed the allocation rules for political party committees, concluding that the mixed-purpose allocation rules then in place for political parties allowed for too much nonfederal financing. *See* 2 U.S.C. § 441i(a); *McConnell v. FEC*, 540 U.S. at 132-34, 142. But in overriding those rules for national, state and local parties, Congress again rejected the step adopted by the FEC and under challenge here.

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

Of particular significance is Congress' choice of means to address the state and local parties' financing of so-called "issue advertisements." Those ads – a foundational concern of

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

In contrast, Congress declined to address allocation by non-party entities like EMILY's List. In doing so, Congress accepted the longstanding allocation regime set forth in 11 C.F.R. Part 106 for those entities. BCRA's legislative history reflects no concern whatsoever that the FEC's regulation apparatus for their allocation – intact since 1990 – posed any public policy concern. While that does not necessarily preclude the FEC from adjusting those rules, the FEC must respect the boundaries FECA establishes concerning what conduct by non-candidate non-party entities can be compelled to be funded by a federal political committee. Regulating mere references to federal candidates in the communication of allocating committees goes well beyond a statutory basis for FEC regulation. When applied beyond the sphere of federal election activity, such as to the state and local election activity vital to EMILY's List, these restrictions at issue contravene the statute and exceed the Commission's authority.

EMILY's List, like other nonconnected political committees subject to the new rules, is not a political party committee, and is not controlled by officeholders or candidates. It is not subject to BCRA's revisions to the allocation requirements for national, state, and local

political party committees. Yet the FEC has imposed upon its activities financing restrictions beyond the permitted statutory range, and even more onerous than even those Congress dictated for state and local parties, which are presumed to be under the control of candidates. Under the new rule, the mere "reference" to a federal candidate triggers far-reaching and operationally debilitating restrictions on EMILY's List's ability to finance activities influencing state and local elections.

In the wake of *WRTL*, this restriction cannot stand. As noted, addressing the one circumstance in which federal law predicated federal funding on a mere "reference" to a federal candidate – the electioneering communication restriction, *see* 2 U.S.C. § 434(f)(3)(A)(i) – the Supreme Court stepped in and sharply limited the application of this prohibition to communications containing "the functional equivalent of express advocacy." *WRTL*, 127 S. Ct. at 2659. In other words, as a matter of constitutional law, "reference" was an insufficient standard.

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

- A communication that promotes a gubernatorial candidate, by citing his support of an incumbent President's social or fiscal policies, must be paid in part with federal funds if the President is running for reelection.
- A communication promoting the candidacy of a gubernatorial candidate, in part on the basis of his support for the "Kerry-Hatch" legislation, must be paid

in part with federal funds as a federal election activity so long as either senator has raised sufficient funds for re-election to make him a federal candidate; even if the communication is made thousands of miles away from their home states, and even if neither senator is up for re-election in this election cycle.

- A communication in support of a state legislative candidate must be paid in part with federal funds if the communication mentions endorsement of the candidate by a federal officeholder who is running for reelection.
- A communication raising funds for a political committee's program to support generally state and local candidates must be paid entirely with federal funds, as a federal election activity, if it refers to a federal candidate who has endorsed the program or otherwise vouched publicly for its effectiveness.
- A communication supporting a political party generally and that refers to no candidates, that is run before an election in which there are no federal candidates on the ballot, must be paid for with fifty percent federal funds.

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

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

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

Indeed, the Common Cause court considered whether the FECA regulated funds spent by dual-purpose entities on activities that influenced only state elections. The Common Cause court expressly rejected the plaintiff's claim that state election activities conducted by allocating committees are regulated by the FECA, and held that "the FECA regulates federal elections only." 692 F. Supp. at 3695. It cited the House Report on the 1979 amendments, which noted that slate cards featuring both federal and state candidates may be paid for with a mix of federal and state funds. *Id.* And it noted that "Nothing in the language of the amendments suggests that they reach beyond federal elections and into the realm of state elections." *Id.*

To be sure, the court did hold out the possibility that the FEC could make a finding that no allocation scheme can meet the requirements of the statutes. This statement was only noting the possibility that allocation may prove unworkable in practice – not giving permission to the FEC, on a regulatory whim, to require wholly state activities to be financed with federal funds. Besides, the Commission has made no such finding that no allocation

system can effectively meet the statutory requirements. And while such an argument might be possible to make with regard to activities that influence both federal and state elections, it would be nonsensical to make such an argument with regard to activities that are entirely nonfederal. The mere "reference" rule applies not just to activities that are of mixed character, but also, as described above, to activities that are purely nonfederal, and that do not influence federal elections. To require any use of federal funds for purely state activity – and to require, in some circumstances, that only federal funds be used – is, as the Common Cause court noted, beyond the statutory bounds of the FECA.

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

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

This arbitrary minimum also exceeds the Commission's statutory authority to promulgate regulations in aid of enforcement of the law. Under the rules previously in effect – the "funds expended" method – organizations paid the "federal share" of administrative costs in proportion to their actual financial commitment to federal elections. *See* 11 C.F.R. § 106.6 (2004). The new "allocation" rule does not deserve the name. It is not shaped by any notion of proportionality but instead places a heavy burden on political committees – the payment of fifty percent of administrative costs with federal funds – regardless of whether they support only a single federal candidate and one hundred nonfederal candidates, or contribute $1,00.01 dollars to one federal candidate plus $100,000 to nonfederal candidates,

or devote a million dollars to federal election activity and $2,000 to nonfederal activity. All organizations that register with the FEC as political committees – which they must do if they raise or spend over $1,000 to influence federal elections, *see* 2 U.S.C. § 431(4)(A) – are considered to be identical under the FEC's new regulations. A multi-million-dollar state political committee that spends $1,000.01 on a billboard supporting a federal candidate as its only federal activity now must use federal funds to pay for fifty percent of all its administrative expenses, even though only a tiny fraction of its administrative activity can fairly be attributed to influencing federal elections.

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

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

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

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

11 C.F.R. § 100.57(a). If EMILY's List now refers to a federal candidate in a communication designed to raise monies for its state and local election program, it risks a Commission finding that its communication "indicates" that some portion of the monies received may be used to "support or oppose" the federal candidate. The rule does not define the term "indicate"; rather, the Commission has simply offered vague "examples" of one possible application in the Explanation and Justification issued with the adopted final rule.

69 Fed. Reg. at 68,057. The Commission's guidance is also ambiguous, if not hopelessly confusing; it states that the new rule "requires an examination of only the text of the communication" and that it "turns on the plain meaning of the words used," but it also stresses that its application is not "limited to solicitations that use specific words or phrases." *Id.*

While the application of the rule is highly uncertain, there is no doubt about its intended and actual effect: to limit the use of "references" to federal candidates in solicitations for state and local election purposes, and to impair fundraising messages that refer to federal officeholders who make and execute government policy. Any such references, if the Commission concludes that they "indicate" somehow that the funds will be used, to any extent, to" support or oppose" a federal candidate, will transform funds received into federally regulated "contributions." This means that if EMILY's List receives a contribution permissible under state law, but contrary to the applicable limits and source restrictions of federal law, it must refund all or part of it to the donor. *See* 69 Fed. Reg. at 68, 058-59. Moreover, having received "contributions" in excess of federal limits – because its intention was to raise and spend them for state and local election activity – it faces liability under FECA for receiving illegal contributions. *See* 2 U.S.C. § 437g.

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

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

VI. THE REGULATIONS ARE ARBITRARY AND CAPRICIOUS

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

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

As noted above, the final regulations require that fifty percent of all administrative and voter drive expenses be paid for with federal funds; this minimum threshold amount

entirely replaces the funds expended method. This application of a universal threshold to all allocating committees is arbitrary and capricious.

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

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

The Commission's decision is even more capricious than if the rule had been adopted in a vacuum, because it supplants the "funds expended" method of calculating allocation ratios. This method was designed to ensure that a nonconnected committee's allocation ratio for administrative expenses reflected the actual behavior of the organization. This system flexibly accommodates both differences committee to committee and from cycle to cycle. It

accommodated organizations that only dabble in federal elections, those that only tread lightly in nonfederal elections, and those – such as EMILY's List – with an active commitment to both. To replace this system with a one-size-fits-all minimum percentage is arbitrary and capricious.

B. The Solicitation Regulation Is Arbitrary and Capricious

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

The Commission explained, in the explanation and justification of the final rules, why it believed at least some funds should be defined as "contributions" in response to such a solicitation. However, there was no "rational basis" for the agency's decision to deem all such funds received to be contributions. *See Envtl. Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). No explanation was proffered as to why a solicitation's specific explanation of how it will use the funds it receives should not trump the presumption that all funds are donated and will be used for the purpose of influencing a federal election.

The solicitation regulation also states that funds received in response to solicitations that indicate that funds will be used to support both clearly identified federal and nonfederal candidates will be at least fifty percent federal contributions. Even if a solicitation states how funds will be used, the regulation imposes its own arbitrary threshold amount of federal contributions. The Commission does not explain, in the explanation and justification of the final rules or elsewhere, why this uniform level was chosen, even if the solicitation explicitly

provides otherwise. No rationalization is given for this arbitrary system. The rule is therefore arbitrary and capricious.

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

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

In the publication of the final rules, the Commission only discussed corruption in the context of the definition of "political committee," regulations not ultimately adopted. The final rules contain no explanation of their effect on stemming corruption. The solicitation regulation's explanation focused on the Commission's belief that it had the power to act; the allocation regulation's explanation focused on administrative convenience. In neither case did the Commission consider the impact on the only recognized constitutionally permissible goal of campaign finance reform. Because the Commission did not "consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, the regulations are arbitrary and capricious.

VII. CONCLUSION

For the foregoing reasons, Plaintiff EMILY's List's Motion for Summary Judgment should be granted.

Respectfully submitted,

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