UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST
1120 Connecticut Avenue NW
Suite 1100
Washington, DC 20036,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463,

Defendant.

CASE NUMBER 1:05CV00049
JUDGE: Colleen Kollar-Kotelly
DECK TYPE: TRO/Preliminary Injunction
DATE STAMP: 01/12/2005

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff EMILY's List brings this Complaint for Declaratory and Injunctive Relief.

1. This action challenges regulations promulgated by the Federal Election Commission ("FEC" or "the Commission") to implement the provisions of the Federal Election Campaign Act of 1971 ("FECA"), as amended, including the Bipartisan Campaign Reform Act of 2002 ("BCRA").
2. In FECA, Congress established a detailed legal structure governing particular aspects of federal election campaign finance, and each amendment to that scheme has been both carefully weighed and vigorously negotiated. Congress created the FEC in part to promulgate rules to implement this carefully wrought statutory structure, but it has not authorized the FEC to regulate activity beyond the reach of FECA.

3. In early 2004, the FEC abruptly embarked on a hurried and broad-sweeping regulatory effort to address the activities of nonfederal political organizations registered with the Internal Revenue Service ("IRS") under section 527 of the Internal Revenue Code. Following a rushed and chaotic rulemaking process, the FEC issued new final rules on November 23, 2004. These rules are unrelated to the Commission's stated regulatory objectives, and they are statutorily and constitutionally infirm.

4. As described below, the Court should invalidate these final rules, because they are "in excess of [the FEC's] statutory jurisdiction, authority or limitations," adopted "without observance of procedure required by law," are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. §§ 553(b), 706(2)(A), (C), (D), and because they violate the First Amendment to the United States Constitution.

PARTIES

5. Plaintiff EMILY's List is a political organization and maintains its offices in the District of Columbia. EMILY's List makes disbursements in connection with federal and nonfederal elections. The organizational purposes of EMILY's List are to recruit and fund viable pro-choice women candidates; to help them build and run effective campaign organizations; and to mobilize women voters to help elect progressive candidates across the nation. During the 2003-04 election cycle, EMILY's List was active in connection with hundreds of federal, state and local election races.

6. EMILY's List has standing to challenge the regulations at issue. EMILY's List's fundraising, communications, voter outreach, administration, and reporting efforts are directly affected by the promulgated regulations, which impair its operations and interfere with its core political speech. EMILY's

List faces personal, particularized and concrete injury in the event the challenged regulations are allowed to stand. Plaintiff's injuries stem directly from the FEC's promulgation of new regulations; were those regulations vacated, the injuries would be eliminated.

7. Defendant FEC is the federal administrative agency responsible for the enforcement of FECA. The Commission's offices are located in the District of Columbia.

JURISDICTION AND VENUE

8. This action arises under the United States Constitution; the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq.*, as amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e) because the Defendant is a United States agency headquartered in this District, and because a substantial part of the events giving rise to Plaintiff's claim occurred in this District.

FACTUAL ALLEGATIONS

Background

10. EMILY's List is a nonconnected committee within the meaning of 11 C.F.R. § 106.6(a) and is not a party committee or an authorized committee of a candidate. EMILY's List disburses funds in support of, and in opposition to, candidates for federal, state and local offices.

11. Since EMILY's List engages in both federal and nonfederal election activity, it maintains two bank accounts, pursuant to 11 C.F.R. § 102.5. The federal

account, registered with the FEC, accepts only "federal funds," that is, "hard" money from sources and in amounts permissible under FECA. The nonfederal account, registered with the IRS, accepts only nonfederal funds, that is, "soft" money from sources and in amounts that would not be permissible under FECA for federal elections.

12. Because EMILY's List disburses funds for federal and nonfederal activities, FEC regulations at 11 C.F.R. Part 106 require that it allocate certain expenses between its federal and nonfederal accounts.

13. Under long-standing FEC regulations in effect until January 1, 2005, EMILY's List's administrative expenses and the costs of its generic voter drives have been allocated between its federal and nonfederal accounts using the "funds expended" method. 11 C.F.R. § 106.6(c). Under this method, EMILY's List would pay these costs with a mix of federal and nonfederal funds, such that the percentage of federal funds was equal to the ratio of federal expenditures to the total amount of federal and nonfederal disbursements. The funds expended method was designed to ensure that expenses that benefited an organization's overall activities, both federal and nonfederal, were paid in a manner that reflected that committee's engagement in federal elections.

14. Under the Commission's long-standing regulations, EMILY's List's fundraising expenses have been paid for under the "funds received" method. 11 C.F.R. § 106.6(d). Under this method, EMILY's List would pay the expenses of a particular fundraising effort with a mix of federal and nonfederal funds, such that the percentage of federal funds was equal to the ratio of federal receipts to the total federal and nonfederal funds raised.

The Notice of Proposed Rulemaking

15. On March 11, 2004, the Commission issued a notice of proposed rulemaking ("NPRM") entitled "Political Committee Status." Political Committee Status, 69 Fed. Reg. 11,736 (Mar. 11, 2004). The NPRM was motivated by widely publicized reports about the political activities of independent groups organized under section 527 of the Internal Revenue Code, that were alleged to be outside of the FEC's purview.

16. The NPRM included a wide range of proposed regulatory changes on a variety of topics, principally including a definition of the FECA term "political committee" and the addition of an allocation formula for voter drives and public communications that "promote, support, attack, or oppose" a clearly identified federal candidate.

17. The NPRM proposed to expand the definition of the FECA term "contribution" to include all funds received in response to a communication that expressly advocated the election or defeat of a clearly identified federal candidate.

18. The NPRM briefly mentioned potential alternative standards for defining "contribution." Each of these encompassed only funds received in response to a communication that "promotes, supports, attacks, or opposes" a clearly identified federal candidate.

19. The NPRM did not mention any proposed standard for defining "contribution" that included all funds received in response to a communication that "indicates" that any portion of funds received would be used to "support or oppose" a federal candidate.

20. The NPRM did not mention any proposed standard for treating moneys received as nonfederal on the basis that the communication "refer[s] to" a nonfederal candidate.

21. The NPRM also included various alternative proposals for revising the allocation system for nonconnected committees.

22. The NPRM included proposals to require that a minimum amount of federal funds be used to pay for the administrative and generic voter drive expenses of nonconnected committees.

23. The NPRM also stated that the Commission was considering other federal-funds minimum percentages. The NPRM included no proposed regulatory language for these options.

24. The NPRM did not mention any proposed standard for allocating administrative expenses using a uniform fifty-percent minimum federal-funds requirement for all allocating committees choosing to allocate disbursements, regardless of the nature of the actual activities and disbursements supported by the administrative activities.

25. The NPRM also proposed a range of communications that would have to be paid for with entirely federal funds. All of the targeted communications were those that "promote, support, attack, or oppose" a clearly identified federal candidate or political party.

26. The NPRM also proposed a rule governing communications that promoted, supported, attacked, or opposed one or more clearly identified federal candidates and a political party. The rule would have required that federal funds be used for the time or space used for federal candidates, but permitted allocation between federal and nonfederal funds for the time or space used for the political party.

27. The NPRM did not mention any proposed standard requiring that communications that "refer to" clearly identified federal candidates be paid for with entirely federal funds if they did not also refer to clearly identified nonfederal candidates.

28. The NPRM did not mention any proposed standard requiring that communications or voter drives that "refer to" a political party but no clearly identified candidates be paid for with at least fifty percent federal funds, regardless of the nature of the committee's overall activities and disbursements.

The Rulemaking

29. The NPRM invited public comments to be filed by April 9, 2004, fewer than thirty days after the NPRM was published.

30. On May 13, the FEC voted not to adopt several proposed final rules. The FEC instead unanimously approved the FEC General Counsel's recommendation "[t]hat within 90 days, the Commission should either issue final rules, issue a second NPRM that would offer commenters a more focused proposal, or decide – at least for now – to defer the issuance of new rules and instead look for guidance from Congress."

31. On August 12, the General Counsel submitted new draft final rules to the FEC.

32. On August 18, the General Counsel submitted amendments to these draft final rules to the FEC.

33. At an FEC public ("open") meeting on August 19, the FEC defeated by a 3-3 vote a motion to conduct a sixty-day comment period on the General Counsel's draft final rules.

34. Instead, at this meeting the FEC approved new draft final rules, and instructed the General Counsel to make certain technical corrections and prepare the "Explanation and Justification" to accompany the rule when published in the Federal Register. On October 28, 2004, the FEC approved the final rules, and the connected Explanation and Justification.

35. On November 23, the FEC published these final rules and the Explanation and Justification. Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056 (Nov. 23, 2004). The effective date of the rules was January 1, 2005.

The Solicitation Regulations

36. The final regulations include a new section 11 C.F.R. § 100.57, entitled "Funds Received in Response to Solicitations."

37. The rule includes in the definition of "contribution" all 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."

38. The rule also provides that if such a communication "refer[s] to" both federal and nonfederal candidates, at least fifty percent of the funds received are defined as contributions, no matter how many federal or nonfederal candidates are mentioned, to what extent or in what context they are mentioned, or whether the communication describes another ratio by which the funds will be divided between federal and nonfederal purposes.

39. This regulation, unlike the proposed rule, does not depend on the use of "express advocacy."

40. The FEC admitted in the Explanation and Justification of the final rules that "[i]n the NPRM, the proposed regulation text . . . took a different approach" than did the final regulation. 69 Fed. Reg. at 69,057.

The Allocation Regulations

41. The final rules also revised 11 C.F.R. § 106.6 regarding allocation of disbursements by nonconnected committees (as well as separate segregated funds of corporations and labor organizations) between federal and nonfederal funds. The revised regulation requires that all nonconnected committees pay for their administrative and voter drive expenses, and the costs of communications for public communications that refer to a political party but not to any clearly identified federal or nonfederal candidates, with a minimum of fifty percent federal funds. This minimum amount applies to all nonconnected committees with federal and nonfederal accounts, no matter their scope or their actual respective shares of federal and nonfederal disbursements.

42. The final regulation also requires that nonconnected committees pay for voter drives and communications that "refer to" a clearly identified federal candidate, but not to a clearly identified nonfederal candidate, with entirely federal funds, no matter the context in which the candidate is mentioned. This regulation does not incorporate any "promote, support, attack, or oppose" or other content standard other than a mere "refer[ence]."

43. The final regulation specifies that for communications that refer to a clearly identified federal candidate but no clearly identified nonfederal candidate, even the time or space used to refer to a political party must be paid for with entirely federal funds.

44. The final regulation requires that nonconnected committees pay for public communications and voter drives that "refer to" clearly identified federal and nonfederal candidates on an allocated basis, based on the "proportion of space or time devoted to each" candidate.

45. The FEC's Explanation and Justification of the final rules did not mention the prevention of circumvention of FECA as a goal of the allocation regulations. The Explanation and Justification instead described the reason for the new allocation regulations as an attempt to "simplify . . . the allocation system."

COUNT I

Violation of the APA: Exceeding Statutory Authority

46. Plaintiff incorporates by reference paragraphs 1 through 45 as if fully set forth here.

47. The APA 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).

48. The FEC's solicitation and allocation regulations purport to enforce FECA, as amended. But FECA regulates only moneys spent by nonconnected committees "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8), (9). Both the solicitation and allocation regulations exceed the FEC's statutory authority under FECA and the APA.

49. The solicitation regulations exceed the FEC's statutory authority by limiting the amount and source of funds used for nonfederal elections, and for other nonfederal purposes. By requiring that funds received be considered contributions even if a communication states that the funds will also be used for non-federal elections or for other, non-electoral purposes, the regulation

unlawfully restricts far more funds than those given for the purpose of influencing federal elections.

50. The allocation regulations also exceed the FEC's statutory authority. The requirement that administrative expenses, generic voter drives and political party communications be paid with at least fifty percent federal funds unlawfully restricts the amount and source of funds used for non-federal elections. A committee is required to pay for its administrative expenses using fifty percent federal funds, no matter the nature of the committee's activities or how small a percentage of its disbursements are spent on federal elections. The result is a mandatory subsidization of nonfederal electoral expenses with federal funds.

51. The allocation regulation's requirement that voter drives and public communications that refer to a clearly identified federal candidate but not to a clearly identified nonfederal candidate be paid for with one hundred percent federal funds restricts activities that do not have the purpose of influencing federal elections.

52. The allocation regulation's requirement that committees allocate federal funds to pay for communications that refer to both clearly identified federal and nonfederal candidates also restricts activities that do not have the purpose of influencing federal elections.

53. These regulations are not authorized by FECA, and thus they violate 5 U.S.C. § 706(2)(C).

COUNT II

Violation of APA: Lack of Proper Notice of Final Regulations

54. Plaintiff incorporates by reference paragraphs 1 through 53 as if fully set forth here.

55. The APA requires that notice of a proposed rule be published in the Federal Register and that interested persons have a fair and meaningful opportunity to comment. 5 U.S.C. § 553(b). Notice of the solicitation and allocation regulations violated this requirement.

56. The proposed solicitation rule concerned only communications "expressly advocating" the election or defeat of a clearly identified federal candidate. While it briefly mentioned potential alternative standards, each alternative concerned communications that "promote, supports attack, or oppose" a clearly identified federal candidate. The NPRM did not mention any proposed standard for treating funds received in response to a communication as federal or nonfederal based on a mere "refer[ence]" to a nonfederal candidate. Yet that is the standard in the final regulation.

57. The NPRM did not mention any proposed standard for defining "contribution" requiring that all funds received in response to a solicitation be funds from sources and in amounts restricted by federal campaign law, if the solicitation merely "indicates" that any portion of funds received would be used to support or oppose a federal candidate. Yet that is the standard adopted in the final regulation.

58. The NPRM did not mention any proposed standard for allocating administrative and voter drive expenses that involved a blanket fifty-percent minimum federal-funds requirement for all nonconnected committees that have federal and nonfederal accounts. Yet that is the standard adopted in the final regulation.

59. The NPRM did not mention any proposed standard that public communications or voter drives that simply referred to clearly identified federal candidates be paid for with entirely federal funds or be allocated

between federal and nonfederal funds. Yet that is the standard adopted in the final regulation.

60. The NPRM did not mention any proposed standard that public communications that reference a political party and a clearly identified federal candidate, but no clearly identified nonfederal candidate, must be paid for with entirely federal funds. Yet that is the standard adopted in the final regulation.

61. The NPRM did not disclose that the FEC was relying on evidence of committees' allocation practices from the past ten years, and conclusions based on that evidence. Yet that evidence was relied upon for the final rules.

62. Overall, the NPRM gave inadequate notice as to the final regulations. It focused primarily on two major substantive departures from the existing regulatory scheme: the definition of a "political committee" and the imposition of a "promote, support, attack, or oppose" standard. But neither the "political committee" definition nor the "promote, support, attack, or oppose" standard were included in any fashion in the final regulations. This framework of the original NPRM did not give reasonable notice of the scope or character of the final regulations, which also were not a logical outgrowth of the proposed rules.

63. The FEC failed to give adequate notice of the rules it adopted, in violation of 5 U.S.C. § 553(b).

COUNT III

Violation of APA: Regulations That Are Arbitrary, Capricious And An Abuse of Discretion

64. Plaintiff incorporates by reference paragraphs 1 through 63 as if fully set forth here.

65. The APA permits reviewing courts to set aside agency action if that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

66. The solicitation regulation arbitrarily requires that all funds received in response to a communication that "indicates" support or opposition to a federal candidate be considered contributions, regardless of the actual content of the communication. It also imposes an arbitrary fifty-percent federal funds requirement for solicitation communications that "refer to" both federal and nonfederal candidates, regardless of the content of the communication or how many federal or nonfederal candidates are referred to.

67. The allocation regulations arbitrarily attach fifty-percent thresholds to the payment of administrative and generic voter drive expenses, regardless of the actual ratio of federal to nonfederal disbursements or the size of the allocating committee.

68. The Commission has provided no rational explanation why fifty percent was chosen as the appropriate threshold in either case, and the FEC did not base that threshold on any rulemaking record or agency experience.

69. The FEC did not take into account the comments of the regulated community, and instead predicated the final rules on ease of administration for the FEC and supposed simplicity of comprehension by the regulated community.

70. The FEC failed to attribute to the solicitation and allocation regulations any purpose to deter corruption or the appearance of corruption, and they serve no such purpose.

71. The FEC's promulgation of these regulations was arbitrary, capricious and an abuse of discretion, in violation of 5 U.S.C. § 706(2)(A).

COUNT IV

Violations of First Amendment

72. Plaintiff incorporates by reference paragraphs 1 through 71 as if fully set forth here.

73. Under *Buckley v. Valeo*, 424 U.S. 1 (1976), and *McConnell v. FEC*, 540 U.S. 93 (2003), the First Amendment to the United States Constitution prohibits the FEC from restricting the types and amounts of funds used to influence federal elections unless the restrictions are narrowly tailored to prevent corruption or the appearance of corruption in the electoral process.

74. The challenged regulations do not purport to prevent corruption or the appearance of corruption in the electoral process, and they serve no such purpose.

75. The solicitation regulation that requires that at least fifty percent of funds received in response to such communications be treated as contributions when the communications "refer to" at least one federal and one nonfederal candidate unconstitutionally interferes with protected speech.

76. The solicitation regulation that requires that one hundred percent of funds received in response to a communication that "indicates" that funds received will be used to support or oppose the election of a clearly identified federal candidate be treated as contributions is unconstitutionally vague and overbroad.

77. The allocation regulation that requires that only federal funds be spent on public communications that "refer to" clearly identified federal candidates, and not to clearly identified nonfederal candidates, unconstitutionally interferes with protected speech.

78. The allocation regulation that requires that fifty percent federal funds be spent on administrative expenses, and on voter drives and communications that refer to a political party but not to any clearly identified federal or nonfederal candidate, unconstitutionally interferes with protected speech.

79. Because the solicitation and allocation restrictions are not narrowly tailored to prevent corruption or the appearance of corruption, or to serve any other compelling government interest, and because the challenged regulations are vague and overbroad, they violate the First Amendment to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 702-704, 706(2), Plaintiff EMILY's List seeks a judgment:

a. Declaring that the FEC's solicitation and allocation regulations violate the APA because they are beyond the scope of the FEC's authority;

b. Declaring that the FEC's solicitation and allocation regulations violate the APA because they were not promulgated with required notice;

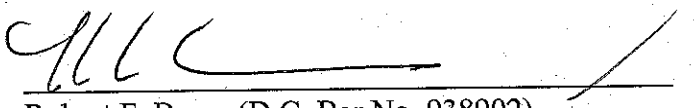
c. Declaring that the FEC's solicitation and allocation regulations violate the APA because they are arbitrary, capricious, and an abuse of discretion;

d. Declaring that the FEC's solicitation and allocation regulations violate the First Amendment to the United States Constitution;

e. Enjoining the FEC from undertaking any action to administer and enforce the unlawful regulations; and

f. Granting such other and further relief as the Court deems proper.

Respectfully submitted,



Robert F. Bauer (D.C. Bar No. 938902)
PERKINS COIE LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011
(202) 628-6600

Attorney for EMILY's List