



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

**Statement of Chairman Steven T. Walther
Regarding the Voting Deadlock Preventing the Commission from
Seeking Rehearing *En Banc* in *EMILY's List v. FEC*
October 22, 2009**

On September 18, 2009, a divided three-judge panel of the Court of Appeals for the District of Columbia Circuit rendered its decision in *EMILY's List v. FEC*, No. 08-5422 (D.C. Cir. Sep. 18, 2009). The two-judge majority opinion struck down, on constitutional and statutory grounds, three Commission regulations that implement how nonconnected Federal political committees may allocate funds to finance certain activities that influence both Federal and non-Federal elections, and that clarify when funds obtained through solicitations are “contributions” under the Federal Election Campaign Act (FECA). The third judge concurred in the result, agreeing that the regulations exceeded the Commission’s statutory authority, but disagreed with the majority’s constitutional analysis and its decision to reach the constitutional issue at all. Because the majority decided the issues on constitutional grounds, the Commission is prevented from amending its rules to provide an allocation that would be more closely tailored to the mix of State and Federal activities of political committees.

On October 21, 2009, by a vote of 3-3, the Commission failed to approve our General Counsel's recommendation to file a petition for rehearing *en banc*. I voted for, and firmly believe the Commission should seek, a rehearing *en banc* by the full Court of Appeals, which in this case would consist of all nine active judges on the DC Circuit.

Under the Federal Rules of Appellate Procedure, rehearing by the full Court of Appeals is warranted when a majority opinion either conflicts with a decision of the United States Supreme Court or involves one or more questions of exceptional importance. *See* Fed. R. App. P. 35. In this instance, rehearing *en banc* is appropriate because both of these criteria are clearly met: First, the majority opinion is inconsistent with the Supreme Court's decisions in *McConnell v. FEC*, 540 U.S. 93 (2003), *FEC v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238 (1986), and *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (as recognized by the concurring judge on the panel); and second, the majority opinion, by its sweeping and unnecessary constitutional analysis, has serious implications far beyond the regulations directly at issue in this case.

Seeking rehearing *en banc* is particularly appropriate in this matter because the majority opinion reached conclusions on constitutional issues that were not requested by

the plaintiff, were not necessary to its holding, and were not briefed by either party at any stage in the litigation.

In my view, the question of whether or not to support a rehearing *en banc* should not be based upon an individual Commissioner's view of the correctness of the holding. Rather, in a case like this, where the constitutional arguments were not squarely before the court, the ruling has significant and lasting national impact, and where the DC Circuit is the locus of most of the Commission's litigation on such issues, it is in the best interest of the Commission, as an institution, and in the best interest of others guided by the FECA, to have the issues decided by the broadest consensus available in the DC Circuit after full briefing on those issues. The Commission and the public were foreclosed from that opportunity in this case.

For the foregoing reasons, I believe that it was an unequivocal responsibility of the Commission to seek guidance from the entire Circuit Court in order to obtain clarity on the law reflecting the consensus of the full Circuit, especially on the constitutional issues, rather than the more limited opinion of two judges on a divided Circuit panel.



Steven T. Walther
Chairman



Date