UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	MOTION
	)	
Defendant.	)	

MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, defendant Federal Election Commission (the Commission) moves this Court for summary judgment. Pursuant to Local Civil Rules 7 and 56.1, a memorandum of points and authorities, a statement of material facts, a statement of genuine issues, and a proposed order accompany this motion.

The Commission makes this motion on the grounds that plaintiff has failed to show that it is entitled to a declaration that the allocation and solicitation regulations at issue in this case are unlawful and has also failed to show that it is entitled to an order invalidating those regulations. In particular, plaintiff has not carried its heavy burden to demonstrate that the regulations are facially overbroad under the First Amendment. Judicial review of such regulations is highly deferential, and the regulations challenged here represent permissible policy choices of the Commission in enforcing statutory contribution restrictions repeatedly upheld by the Supreme Court. Plaintiff has presented no new arguments and no new evidence that warrant this Court's altering the reasoning it employed in denying plaintiff's motion for a preliminary injunction. Most notably, *FEC v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007), on which plaintiff

relies, differs significantly, both factually and legally, from the present case and does not affect the integrity of the regulations challenged here.

Wherefore, the Commission respectfully moves that this Court grant this motion for summary judgment, as outlined above and in the memorandum accompanying the motion; deny plaintiff's motion for summary judgment; and dismiss this case with prejudice.

Respectfully submitted,

/s/ Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

/s/ David Kolker
David Kolker
Acting Associate General Counsel
(D.C. Bar # 394558)

/s/ Harry J. Summers
Harry J. Summers
Acting Assistant General Counsel

/s/ Vivien Clair
Vivien Clair
Attorney

/s/ Greg J. Mueller
Greg J. Mueller
Attorney
(D.C. Bar # 462840)

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

October 9, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM
	)	
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS SECOND MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT

Thomasenia P. Duncan
General Counsel

David Kolker
Acting Associate General Counsel
(D.C. Bar # 394558)

Harry J. Summers
Acting Assistant General Counsel

Vivien Clair
Attorney

Greg J. Mueller
Attorney
(D.C. Bar # 462840)

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

October 9, 2007

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

---

* Authorities on which the Commission chiefly relies are marked with an asterisk.

STATUTES AND REGULATIONS

FEDERAL REGISTER

MISCELLANEOUS

EMILY's List, one of the best-funded federal political committees in the United States, has failed to carry its heavy burden of establishing that several regulations issued by the Federal Election Commission (FEC or Commission) in 2004 are overly broad under the First Amendment or are otherwise unlawful. Two of the regulations provide allocation rules for mixed federal and state electoral activities by federal political committees, *see* 11 C.F.R. §§ 106.6(c), (f), and the third clarifies when solicitations lead to "contributions" under the Federal Election Campaign Act of 1971, as amended (FECA or Act), codified at 2 U.S.C. §§ 431-455. *See* 11 C.F.R. § 100.57.

Judicial review of Commission regulations is highly deferential, and plaintiff's challenge ultimately rests on objections to the Commission's policy choices, not on any dispute whether the Commission has the power to promulgate allocation rules for mixed electoral activities or clarify the statutory definition of "contribution." Indeed, as this Court noted in denying plaintiff's motion for a preliminary injunction, EMILY's List "has not demonstrated any right, statutory or otherwise, to the former system of allocation rules." *EMILY's List v. FEC*, 362 F. Supp. 2d 43, 55 (D.D.C. 2005). The Court also concluded that section 100.57 "appears on its face to be reasonably designed to prevent corruption or the appearance of corruption" by implementing the Act's contribution restrictions. *Id*. at 57. Furthermore, the Supreme Court's recent decision in *FEC v. Wisconsin Right to Life, Inc*. (*WRTL*), 127 S.Ct. 2652 (2007), does not bolster plaintiff's weak case, for that decision did not address contributions, but an entirely different topic — the constitutional distinction between electoral advocacy and issue advocacy as applied to proposed advertisements by a nonprofit corporation. Because EMILY's List is a political committee whose major purpose is the nomination or election of federal candidates, it is

unlike WRTL, and it has offered no sustainable argument why this Court should alter its prior reasoning. The Court should therefore grant summary judgment for the Commission.

BACKGROUND

A. THE PARTIES

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

Plaintiff EMILY's List has been registered with the Commission as a multicandidate nonconnected political committee for more than 20 years.[1] *See* 2 U.S.C. § 433(a). It has separate bank accounts to fund its federal ("hard money") and nonfederal ("soft money") activities, pursuant to 11 C.F.R. § 102.5(a). The federal account can only accept contributions that comply with the Act's source and amount restrictions, that is, contributions of up to $5,000 per year from individuals or other political committees registered with the Commission, but no contributions from corporations, labor unions, or foreign nationals.[2] EMILY's List may spend funds from its federal account in connection with federal elections or nonfederal elections.

---

[1] The Act defines "political committee" in relevant part as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year…." 2 U.S.C. § 431(4)(A). *See also infra* pp. 20-21. A "nonconnected committee" is a political committee that is not a party committee, an authorized committee of a candidate, or a separate segregated fund (SSF) established by a corporation or labor organization. 11 C.F.R. § 106.6(a). A "multi-candidate committee" is a political committee that has been registered at least 6 months, has more than 50 contributors and has made contributions to at least 5 candidates for federal office. 2 U.S.C. § 441a(a)(4).

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

EMILY's List's nonfederal account can accept contributions that do not comply with the Act's source and amount restrictions, but it can use those funds only in connection with nonfederal elections. EMILY's List has registered its nonfederal account with the Internal Revenue Service as a "section 527" organization, 26 U.S.C. § 527. *See* Plaintiff's Memorandum 3-4.

EMILY's List is one of the top federal political committees in fundraising. It raised more than $25 million in federal funds alone during the 2003-04 election cycle, and it again raised $25 million in the 2005-06 election cycle, a period without a presidential election, when such contributions typically decline substantially.[3] "EMILY's List is the biggest PAC, which means we have the most hard money, so it's not an issue of not having it," according to its president, Ellen Malcolm. Liz Sidoti, *Bush, Kerry to Pull Ads on Friday*, Associated Press Newswires, June 7, 2004 (Exh. 3). EMILY's List has also recently stated that it, as "the nation's largest political action committee, continues to be the dominant financial resource for Democratic candidates." *See* EMILY's List, Press Release, dated February 1, 2007, available at http://www.emilyslist.org/newsroom/releases/20070201.html (Exh. 4).

EMILY's List has regularly filed an H1 Schedule reporting the "allocation" ratio of federal and nonfederal dollars for shared administrative expenses and the costs of generic voter drives.[4] During the ten years leading up to the promulgation of the regulations at issue here, EMILY's List *never* reported less than a 50% allocation ratio for these activities or for direct

---

[3] *See* http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_04+C00193433 (data from FEC Web site) (Exh. 1)**;** http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_06+C00193433 (data from FEC Web site) (Exh. 2).

[4] Prior to the effective date of the new regulations, the H1 Schedule, submitted with the first report filed during a two-year election cycle, included an estimated allocation ratio based on the previous election cycle's payments for direct candidate support or on a reasonable estimate of the upcoming cycle's payments for support of federal and nonfederal candidates. 11 C.F.R. § 106.6(c)(1) (2004). *See infra* pp. 5-6.

federal candidate support.[5] *See EMILY's List*, 362 F. Supp. 2d at 58 (finding that plaintiff does not dispute these facts). In fact, at the end of the 1995-96 election cycle EMILY's List reported a final allocation ratio of 70% federal candidate support and 30% nonfederal.[6]

B. STATUTORY AND REGULATORY BACKGROUND

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

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

Prior to the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (BCRA), the Commission examined solicitations of contributions made "for the purpose of influencing any election for Federal office" to enforce the contribution limitations and prohibitions, as well as the disclaimer requirements in FECA. *See* 2 U.S.C. § 441d(a). Although no Commission regulation addressed the wording of solicitations, the courts and the Commission applied the statutory definition of "contribution" to determine whether a particular mailing was a solicitation of contributions. In *FEC v. Survival Education Fund, Inc. (SEF)*, 65 F.3d 285 (2d Cir. 1995), the Second Circuit performed such an analysis in holding that mailings sent by two nonprofit issue advocacy groups constituted solicitations of contributions under FECA because the text of the mailings "leaves no doubt that the funds contributed would be used to advocate

---

[5] *See* http://query.nictusa.com/cgi-bin/fecimg/?_25970012630+0, at 6 (final H1 for 2003-04 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_23990455760+0, at 5 (final H1 for 2001-02 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_21036814768+0, at 33 (final H1 for 1999-2000 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_99034233180+0, at 70 (final H1 for 1997-98 election cycle). *See* Exh. 5.

[6] Available at http://query.nictusa.com/cgi-bin/fecimg/?_97031750959+0, at 92 (Exh. 6).

President Reagan's defeat at the polls, not simply to criticize his policies during the election year." *Id.* at 295.

Since 1977, the Commission has required political committees to allocate their administrative expenses and the costs of certain activities (such as voter registration) that affect both federal and nonfederal elections between separate federal and nonfederal accounts. *See* 11 C.F.R. § 106.1 (1977); FEC Advisory Opinion (AO) 1978-10. The Commission's allocation regulations were substantially amended in 1990 to "provide guidance to committees on how to allocate such costs by creating a comprehensive set of allocation rules, and by enhancing the Commission's ability to monitor the allocation process to ensure that prohibited funds are excluded from federal election activities." Regulations on Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26,058 (1990). The 1990 regulations replaced the prior general standards for allocation with specific methods and percentages for political committees to use when allocating certain expenses.

Between 1990 and 2004, 11 C.F.R. § 106.6(c) permitted nonconnected committees (such as EMILY's List) to allocate administrative expenses and the costs of generic voter drives under the "funds expended method." 11 C.F.R. § 106.6(c) (2000). These costs were allocated based on a ratio of "Federal expenditures" to "total Federal and non-Federal disbursements" made by the committee during the two-year election cycle. *Id.* Committees were required to estimate and report this ratio to the Commission at the beginning of each election cycle based on prior experience or a reasonable prediction of activities. *Id.*; 11 C.F.R. § 104.10(b) (2000). Committees were then expected to report revised ratios during the election cycle to reflect their actual disbursements. *Id.* "Generic voter drives" were defined as various activities which urged the general public to support candidates of a certain party or associated with a certain issue,

without mentioning a specific candidate. 11 C.F.R. § 106.6(b)(iii) (2000). Voter drive activity that mentioned a specific candidate could not be allocated under this formula. 11 C.F.R. § 106.1(a) required committees to allocate expenditures made on behalf of one or more clearly identified federal and/or nonfederal candidates according to the benefit reasonably expected to be derived by each candidate. For publications and broadcast communications, the allocation was determined by the proportion of space or time devoted to each candidate compared to the total devoted to all candidates. 11 C.F.R. § 106.1(a)(2000). The rules from the 1990 amendments were still in effect at the time of the 2004 rulemaking at issue in this case.

2. Bipartisan Campaign Reform Act

In March 2002, Congress enacted BCRA to substantially amend FECA. With regard to the Commission's allocation regulations, BCRA eliminated allocation for national political party committees and substituted a different allocation regime for other party committees, although it explicitly left determination of the method of allocation to the Commission. 2 U.S.C. § 441i(b)(2)(A). These amendments did not directly address allocation by nonconnected political committees under 11 C.F.R. § 106.6.

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

a. The Notice of Proposed Rulemaking and Public Comment

On March 11, 2004, the Commission published a detailed NPRM proposing a variety of possible amendments to regulations regarding the definitions of "political committee," "contribution," "expenditure," and the allocation requirements for nonconnected committees. *See* Political Committee Status, Proposed Rule, 69 Fed. Reg. 11,736 (March 11, 2004) (Exh. 7). Following a four-week comment period, the Commission held public hearings on April 14 and 15, 2004. *Id.*

The Commission received more than 100,000 comments from political committees, political parties, nonprofit organizations, individuals, campaign finance organizations, and Members of Congress that addressed the many contentious regulatory questions being examined in this rulemaking. The Commission's two days of public hearings included 31 witnesses, representing numerous organizations with a broad range of opinions and concerns about many different issues. A number of commenters addressed allocation questions. Some supported the elimination of allocation in favor of requiring the use of 100% federal funds for all expenditures under 11 C.F.R. § 106.6, and some suggested abandoning the funds expended method entirely in favor of a simpler system.[7] Others supported specific percentages to be used as a federal minimum for administrative expenses,[8] or simply urged the Commission to require a "significant minimum hard money share."[9] At least one commenter suggested that public communications should be allocated either 100% federal or 100% nonfederal based upon whether federal or nonfederal candidates were included in the communication.[10] One commenter argued that some revisions of the funds expended method would be too burdensome to committees because of the reporting and bookkeeping that would be required.[11]

---

[7] *See* Comments of Public Citizen, at 12-13 (April 5, 2004) (Exh. 8); Comments of Republican National Committee, at 7-8 (April 5, 2004) (Exh. 9). The FEC filed a certified index to the administrative record and excerpts from that record with this Court earlier in this litigation. *See* Docket Entries 11, 12, 19.

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

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

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

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

There was also testimony at the hearing regarding the complexities of the former allocation system and the proposal to move to a flat minimum federal percentage.[12] Other witnesses testified that the current allocation scheme permitted circumvention of the rules in BCRA,[13] and specifically discussed the possibility of a 50% federal minimum for allocated expenses.[14] Witnesses also addressed the Commission's proposal that money given in response to solicitations indicating that funds received would be used to support or oppose a federal candidate would be "contributions" under FECA.[15]

b. The Final Rules

The Final Rules and accompanying Explanation and Justification were published in the Federal Register on November 23, 2004, with an effective date of January 1, 2005. *See* Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (Exh. 13).

---

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

[13] *See, e.g.*, Apr. 14 Tr. at 158-59 (testimony of Craig Holman) (stating that nothing in FECA justifies any allocation ratio) (Exh. 14); Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 15, 2004 (Apr. 15 Tr.) at 27-28 (testimony of Lawrence Noble) (stating that the funds expended allocation method allowed a "wholesale evasion of the soft money rules as applied to political organizations") (Exh. 15).

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

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

New 11 C.F.R. § 100.57 includes a general rule establishing when funds received in response to certain solicitations must be treated as "contributions" under FECA, along with several exceptions to this rule "to avoid sweeping too broadly." 69 Fed. Reg. 68,056. Section 100.57(a) states that all money received in response to a solicitation is a "contribution" under FECA if the solicitation "indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 69 Fed. Reg. 68,066. The rule seeks to capture solicitations that "plainly seek funds 'for the purpose of influencing Federal elections.'" 69 Fed. Reg. 68,057.

The Commission included numerous examples and explained that the standard in 11 C.F.R. § 100.57 was drawn from the *Survival Education Fund* decision (*see supra* p.4). 69 Fed. Reg. 68,057. If a solicitation meets the standard in section 100.57(a), but also refers to at least one clearly identified nonfederal candidate, then only 50% of the money received from the solicitation must be treated as contributions under FECA. 69 Fed. Reg. 68,058; 11 C.F.R. § 100.57(b)(2). If a solicitation refers to nonfederal candidates but does not indicate that any funds received will be used to support or oppose the election of a clearly identified federal candidate, then 11 C.F.R. § 100.57(a) does not apply and none of the funds received are federal contributions under that provision.

The Commission also adopted final rules changing the allocation scheme for nonconnected committees in 11 C.F.R. § 106.6. 69 Fed. Reg. 68,059-63. The Commission explained that examination of the public comments and the history of public filings regarding allocation by committees led it to conclude that a revised allocation method was needed to enhance compliance with FECA and make the system easier for committees to understand and follow, and for the Commission to administer. 69 Fed. Reg. 68,060. The new 11 C.F.R.

§ 106.6(c) replaces the funds expended method with a flat 50% federal funds minimum for administrative expenses, generic voter drives, and public communications that refer to a political party without any reference to clearly identified candidates. 69 Fed. Reg. 68,062. A new provision, 11 C.F.R. § 106.6(f), which governs certain public communications and voter drives, was also adopted. 69 Fed. Reg. 68,063. Public communications and voter drives that refer to one or more clearly identified federal candidates, but to no nonfederal candidates, must be financed with 100% federal funds, regardless of whether political parties are also mentioned. 69 Fed. Reg. 68,063; 11 C.F.R. § 106.6(f)(1). Conversely, public communications and voter drives that refer to a political party and only nonfederal candidates may be financed with 100% nonfederal funds. 69 Fed. Reg. 68,063; 11 C.F.R. § 106.6(f)(2). Public communications and voter drives that refer to both federal and nonfederal candidates are subject to a time/space allocation between federal and nonfederal accounts, regardless of whether they also mention political parties. 69 Fed. Reg. 68,063; 11 C.F.R. § 106.6(f)(3). Only voter drives that refer to a federal candidate in the printed materials, or in which written instructions tell employees or volunteers to refer to a federal candidate, are covered by these provisions. 69 Fed. Reg. at 68,061; 11 C.F.R. § 106.6(b)(2)(i), (ii).

C. PLAINTIFF'S SUIT AGAINST THE COMMISSION

EMILY's List filed suit on January 12, 2005. The complaint challenged the Commission's new regulations at 11 C.F.R. §§ 100.57, 106.6(c) and 106.6(f), alleging that each was in excess of the Commission's authority, was arbitrary and capricious, and was promulgated without adequate notice under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2), and further alleging that each violated the First Amendment. Complaint ¶¶ 46-79.

On February 25, 2005, this Court denied plaintiff's motion for a preliminary injunction. In reaching that decision, the Court concluded that "all four of the considerations relevant to the Court's determination … weigh in favor of denial of Plaintiff's request." 362 F. Supp. 2d at 52. In particular, the Court concluded that plaintiff had not shown a substantial likelihood of success on the merits on any of its claims. *See id.* at 52-57. The Court also found that "[i]t is abundantly clear that Plaintiff had sufficient notice of the proposed revisions to the FEC's allocation regulations." *Id.* at 54.[16]

On April 21, 2005, EMILY's List appealed this Court's preliminary injunction decision. On December 22, 2005, the D.C. Circuit affirmed this Court's denial of EMILY's request for a preliminary injunction. *EMILY's List v. FEC*, 170 Fed. Appx. 719 (D.C. Cir. 2005). The D.C. Circuit considered "the evidence of irreparable harm submitted by EMILY's List and its likelihood of prevailing on the merits," and concluded that the court "cannot say the district court abused its discretion in denying injunctive relief." *Id.* at 719.

On July 12, 2007, this Court denied the parties' previous summary judgment motions without prejudice and directed the parties to file updated summary judgment motions in light of the Supreme Court's recent decision in *WRTL*. Order, filed July 12, 2007.

[16] EMILY's List has now waived its prior lack-of-APA-notice claim by failing to present any arguments whatsoever in support of that claim in its September 14, 2007, summary judgment memorandum. *See, e.g.*, *New York v. United States EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (argument not made by petitioners in their opening brief was thereby waived). *Cf. PDK Labs., Inc. v. United States Drug Enforcement Administration*, 438 F.3d 1184, 1196 (D.C. Cir. 2006) (manufacturer's reference to employee's statement as "hearsay" in fact section of opening brief did not prevent waiver of that argument where manufacturer waited until its reply brief to argue that the statement should have been disregarded).

ARGUMENT

I. THE COURT SHOULD GRANT SUMMARY JUDGMENT FOR THE COMMISSION

A. Standard of Review for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). The court must view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Defenders of Wildlife v. Department of Agriculture*, 311 F. Supp. 2d 44, 53 (D.D.C. 2004) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970)). "But mere assertions of facts in pleadings and affidavits, when unsupported by any evidence, are not necessarily sufficient to preclude summary judgment." *National Souvenir Ctr., Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 511 n.4 (D.C. Cir. 1984).

EMILY's List has failed to provide evidence sufficient to support its own motion for summary judgment. In particular, EMILY's List relies heavily in its Statement of Material Facts on the Declaration of Britt Cocanour, filed September 14, 2007, citing that declaration to support 30 of its 49 facts. However, the Cocanour declaration consists of a series of vague, conclusory, and speculative statements and provides insufficient evidentiary support for the plaintiff's assertions in its brief that the regulations at issue are "operationally debilitating restrictions" (Mem. 35) that "cripple" (Mem. 1) plaintiff's ability to finance nonfederal activities. *See Greene*

v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999) ("[a]ccepting such conclusory allegations as true, therefore, would defeat the central purpose of the summary judgment device").

B. EMILY's List Lacks Standing Under Article III

Three elements constitute the "irreducible constitutional minimum" of Article III standing: (1) an injury-in-fact that is "concrete and particularized," not "conjectural" or "hypothetical"; (2) a causal connection between the injury and the challenged conduct of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The party invoking federal jurisdiction bears the burden of establishing that it satisfies these elements. *Id.* at 561. "The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Id.* at 571 n.4 (citation omitted). EMILY's List has not shown that it meets even the first required element, injury-in-fact.

The new 50% federal funds minimum requirement of 11 C.F.R. § 106.6(c) has not required EMILY's List to alter its practices. For more than ten years preceding the effective date of this regulation, plaintiff never reported less than a 50% federal/nonfederal allocation ratio, *see supra* pp. 3-4, and plaintiff has provided no evidence that it will change its longstanding practice and begin spending significantly more resources on nonfederal activity. Indeed, the reports that plaintiff has filed with the FEC and the IRS since the initiation of this litigation strongly suggest that plaintiff has, in fact, adhered closely to its historic norm. *See* FEC Facts ¶¶ 7-8.[17]

Moreover, neither 11 C.F.R. § 106.6(c) nor the other allocation provision challenged here, section 106.6(f), prohibits plaintiff from engaging in electoral speech or in any of the other

[17] Plaintiff suggests (Mem. 16) that 11 C.F.R. § 106.6(c) places it at a competitive disadvantage "with other nonfederal organizations." But EMILY's List is not a "nonfederal" organization; it is a federal political committee and federal campaign activity is its major purpose. *See infra* pp. 20-21. The regulation treats all federal political committees the same.

campaign activities listed in the regulations. The regulations impose no expenditure ceiling. Thus, EMILY's List may spend as much money as it wishes on the covered activities, consistent with its ability to attract more supporters and raise more funds — and plaintiff prides itself on its notable success in both respects. *See, e.g.*, Pl. Mem. 2 ("one of the nation's largest political organizations"). Indeed, plaintiff's president has publicly stated that a lack of hard money has not been an issue for her organization. *See supra* p. 3; Exh. 4; *see also* FEC Facts ¶¶ 5-9 (plaintiff's financial data).

Instead of harming EMILY's List, the solicitation regulation, 11 C.F.R. § 100.57, offers the organization the opportunity to control whether its solicitations result in "contributions" under the Act. It can state whatever it wishes in a solicitation and, by exercising its choice of wording, determine whether the solicitation invites "contributions." *See* 69 Fed. Reg. 68,057.

In arguing that the three regulations it challenges are causing it injury, EMILY's List cites (Mem. 9) *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). However, the D.C. Circuit has explained that *Elrod* did not eliminate a First Amendment plaintiff's burden to show that its interests are actually threatened or in fact being impaired at the time relief is ought. *See National Treasury Employees Union v. United States*, 927 F.2d 1253, 1254-255 (D.C. Cir. 1991); *Christian Knights of the Ku Klux Klan Invisible Empire v. District of Columbia*, 919 F.2d 148, 149 (D.C. Cir. 1990) (describing *Elrod* as a case in which "First Amendment rights were totally denied by the disputed Government action").

EMILY's List also invokes (Mem. 10) the First Amendment overbreadth doctrine. But a plaintiff may successfully rely on that doctrine only where there is "a *realistic danger* that the statute itself will *significantly compromise* recognized First Amendment protections of parties not before the Court." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789,

801-02 (1984) (emphases added). EMILY's List's Statement of Material Facts does not include any evidence that third parties not before this Court face a "realistic danger" that the regulations challenged here will "significantly compromise" those parties' First Amendment rights.

C. Judicial Review of the Commission's Regulations Is Highly Deferential

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

Under this standard, "[a] court cannot substitute its judgment for that of an agency … and must affirm if a rational basis for the agency's decision exists." *Appeal of Bolden*, 848 F.2d 201, 205 (D.C. Cir. 1988). *See also Sierra Club v. EPA*, 353 F.3d 976, 978 (D.C. Cir. 2004) ("'The arbitrary and capricious standard deems the agency action presumptively valid[,] provided the action meets a minimum rationality standard.'" (Citation omitted.)). Where the statute simply authorizes the agency to "make ... such rules [...] as [are] necessary to carry out the provisions of this Act," as does 2 U.S.C. § 437d(a)(8), the "validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) (citation omitted).

The Commission's construction of its own governing statute is entitled to substantial deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). Under the "familiar two-step *Chevron* framework," the Court "first ask[s] 'whether Congress has directly spoken to

the precise question at issue,' in which case [the Court] 'must give effect to the unambiguously expressed intent of Congress.' If the 'statute is silent or ambiguous with respect to the specific issue,' however, [the Court] move[s] to the second step and defer[s] to the agency's interpretation as long as it is 'based on a permissible construction of the statute.'" *Rhinelander Paper Co. v. FERC*, 405 F.3d 1, 6 (D.C. Cir. 2005) (quoting *Noramco of Delaware v. DEA*, 375 F.3d 1148, 1152 (D.C. Cir. 2004) (other citations omitted)). Whether a competing interpretation of the statute might also be reasonable is irrelevant. "[U]nder *Chevron*, courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views." *FEC v. National Rifle Ass'n*, 254 F.3d 173, 187 (D.C. Cir. 2001) (quoting *Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998)).

Moreover, the Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). *Accord*, *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) ("[T]he FEC's express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC … to resolve any ambiguities in statutory language. For these reasons, the FEC's interpretation of the Act should be accorded considerable deference.'" (citation omitted)).

D. The Level of Judicial Scrutiny Appropriate for Contribution Limits Applies to This Case

In *Buckley v. Valeo*, 424 U.S. 1 (1976), and subsequent cases, the Supreme Court has subjected limits on campaign contributions to lesser scrutiny than the "strict scrutiny" applicable to restrictions on campaign expenditures. *See, e.g., Buckley*, 424 U.S. at 19; *McConnell v. FEC*, 540 U.S. 93, 134-36 (2003); *FEC v. Beaumont*, 539 U.S. 146, 161 (2002); *Nixon v. Shrink*

Missouri Gov't PAC, 528 U.S. 377, 387-88 (2000). In those cases, the Court recognized that a contribution limit, unlike an expenditure limit, "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20. "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21; *accord, McConnell*, 540 U.S. at 135. Moreover, the "overall effect" of dollar limits on contributions is "merely to require candidates and political committees to raise funds from a greater number of persons." *Buckley*, 424 U.S. at 21-22. As a result, the Court has concluded that "contribution limits impose serious burdens on free speech only if they are so low as to 'preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21). In light of these considerations, the Court has held that a contribution limit is valid if it satisfies the "lesser demand" of being "closely drawn" to match a "sufficiently important interest." *Shrink Missouri*, 528 U.S. at 387-88; *accord, Beaumont*, 539 U.S. at 162. *See also Buckley*, 424 U.S. at 25.

This less rigorous standard of scrutiny applies to all of the regulations at issue here. First, as EMILY's List concedes (Mem. 29), this standard applies to 11 C.F.R. § 100.57, which clarifies which funds received in response to a solicitation are regulated "contributions" under the Act. Because the whole point of the regulation it to help flesh out the "statutory standard for 'contribution' by reaching payments 'made … for the purpose of influencing any election for Federal office,'" 69 Fed. Reg. 68,056, the regulation obviously focuses entirely on contribution limits, not expenditure limits.

Second, the lower standard of scrutiny also applies to the allocation regulations challenged here, 11 C.F.R. §§ 106.6(c) and (f). As this Court previously concluded, the "new [allocation] rules do not in fact prevent Plaintiff from engaging in whatever political speech it seeks to undertake," and they do "not limit [committees' such as EMILY's List] right to undertake their desired political expression." 362 F. Supp. 2d at 58. Thus, as a matter of constitutional law, the allocation rules are subject to review as contribution limits. As the Supreme Court explained when it upheld BCRA's restrictions on the solicitation and spending of "soft money" by political parties, "for purposes of determining the level of scrutiny, it is irrelevant that Congress chose … to regulate contributions on the demand rather than the supply side." *McConnell*, 540 U.S. at 138 (citing *FEC v. National Right to Work Comm.*, 459 U.S. 197, 206-11 (1982)). The Court explained that "the relevant inquiry" instead "is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction of the contribution itself would not." *Id.* at 138-39. The Court answered that inquiry in the negative. *Id.* at 139. Under that analysis, the allocation regulations are indistinguishable from the soft money provisions in BCRA. Rather than limiting the amount of money that political committees can spend on mixed federal/nonfederal activity, the regulations merely require that a certain percentage of federal dollars be raised to pay for certain activity. Thus, the allocation regulations do not "burden[ ] speech in a way that a direct restriction of the contribution itself would not." *Id.* "That they do so by [restricting the spending of nonfederal funds on certain activities] does not render them expenditure limitations." *Id.* (footnote omitted).

E. The Commission's Allocation and Solicitation Regulations Are Lawful

The Commission's regulations reasonably implement the Act's requirement that federal funds be used to pay for activity that influences federal elections. In particular, the allocation regulations ensure that federal political committees — groups whose major purpose is the nomination or election of federal candidates — do not circumvent this requirement or the Act's general contribution limits. Below, we explain how these regulations actually work and why they are reasonable. We then explore the three main reasons why the centerpiece of plaintiff's current attempt to challenge these regulations, its reliance on the Supreme Court's recent decision in *WRTL*, is flawed. As we explain *infra* pp. 41-44, first, *WRTL* concerned a limit on expenditures, not contributions. Second, that case involved line drawing between electoral advocacy and "issue advocacy," not the distinction at issue here, *i.e.*, the line between *federal and nonfederal election* activity. Third, *WRTL* involved a restriction on a nonprofit ideological corporation that was not a political committee, while here the allocation regulations apply *only* to political committees, whose major purpose is, by definition, federal campaign activity.

1. The New Allocation Regulations Are Consistent with the Act, Which Does Not Specify How Federal and Nonfederal Spending Is to Be Allocated

The Act says nothing at all about allocation of expenditures by nonconnected political committees, much less does it mandate a particular allocation framework. Indeed, in the Supreme Court's discussion of the exploding use of soft money just before the enactment of BCRA, the Court explained that, "concerning the treatment of contributions intended [to be spent on activities] to influence both federal and state elections," a "literal reading of FECA's definition of 'contribution' would have required such activities to be funded with hard money." *McConnell*, 540 U.S. at 123. The Court thus made clear that the statutory language does not

require *any* allocation to a soft money account for mixed spending that influences both federal and state elections. After all, a contribution or expenditure that influences state elections may simultaneously affect federal elections. *See id.* at 166.

Years ago this district court held that, although the Act authorizes the Commission to permit allocation of mixed expenditures, the Commission could just as well "conclude that *no* method of allocation will effectuate the Congressional goal that *all* moneys spent by [the party committees at issue] … be 'hard money' under the FECA." *Common Cause v. FEC*, 692 F. Supp. 1391, 1395-96 (D.D.C. 1987) (emphases in original). The same reasoning applies to allocation of funds spent by nonconnected political committees, *see EMILY's List*, 362 F. Supp. 2d at 55 n.9, especially in light of the Supreme Court's construction of the term "political committee."[18]

The Act defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). However, the Supreme Court in *Buckley* added a requirement to the statute's financial thresholds for political committee status. To avoid constitutional vagueness problems and yet "fulfill the purposes of the Act," the Court concluded that the term "political committee" "only encompass[es] organizations that are under the control of a candidate or the

---

[18] Plaintiff strains (Mem. 36-37) to escape the reasoning of *Common Cause*, claiming that the case stands for the proposition that the FECA does not reach "purely state and local activity." However, contrary to plaintiff's characterization, the current case is not about "purely" nonfederal activities, but about the regulation of mixed purpose (or entirely federal) activities — the same kind of mixed activities that were at issue in *Common Cause*, as this Court recognized in its preliminary injunction ruling. *See EMILY's List*, 362 F. Supp. 2d at 55-57. Moreover, plaintiff's apparent suggestion (Mem. 37) that *Common Cause* was merely describing the possible administrative impracticality of rules for mixed-activity allocation — rather than the Commission's regulatory discretion to end such allocation entirely if it proved to be impractical — is contrary to the plain language of the decision. *See Common Cause*, 692 F. Supp. at 1396.

major purpose of which is the nomination or election of a candidate." *Id*. at 79. The Court limited the term "political committee" in this way to exclude "groups engaged purely in issue discussion." *Id*. Having thus narrowed the reach of "political committee," the Court explained that "[e]xpenditures of … 'political committees' … *can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.*" *Id.* (emphasis added).[19]

Moreover, the Commission has long applied the Court's major purpose test in determining whether an organization is a "political committee" under the Act, and the Commission interprets that test as limited to organizations whose major purpose is *federal* campaign activity. *See* Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (2007).

Thus, the major purpose of federal political committees such as EMILY's List, like that of national party committees, is to influence federal elections. In turn, the use of an allocation formula — any allocation formula — by a nonconnected committee for expenses that may influence both federal and nonfederal elections is a permissive administrative construction, not a statutory entitlement. As this Court explained when it denied EMILY's List's request for a preliminary injunction, "[i]t is clear then, that the FEC's decision to allow any given allocation formula by a political committee such as EMILY's List, with respect to expenditures intended to

[19] The Court reaffirmed its "major purpose" test in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("[S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.") (citing *Buckley*, 424 U.S. at 79)). *See also id*. at 261 n.6. More recently, the Court implicitly endorsed the test in upholding BCRA's regulation of political party activity against a vagueness challenge. *McConnell*, 540 U.S. at 170 n.64. Quoting the "major purpose" language of *Buckley*, the Court noted that "actions taken by political parties are presumed to be in connection with election campaigns." *Id.*

influence both federal and nonfederal elections, is within the Commission's purview." 362 F. Supp. 2d at 56.

Congress addressed the allocation of "hard" and "soft" money for "mixed purpose" activities that influence federal elections for the first time in BCRA, but only by creating a limited allocation regime applicable to state and local party committees. *See* 2 U.S.C. § 441i(b)(2)(A) (Levin Amendment). Significantly, BCRA expressly "gives the FEC responsibility for setting the allocation ratio" under that regime. *McConnell*, 540 U.S. at 163 n.58. Congress did not include in BCRA any reference to an allocation ratio for nonconnected political committees, and nothing in the Act or its legislative history indicates that Congress intended by its silence to restrict the Commission's discretion to determine allocation ratios for such committees.

Since *Buckley*, the Supreme Court has repeatedly held that the statutory contribution restrictions serve the important governmental purposes of preventing corruption and the appearance of corruption, and has upheld measures intended to foreclose circumvention of those provisions. *See, e.g.*, *Buckley*, 424 U.S. at 26-28, 46-47; *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *FEC v. Beaumont*, 539 U.S. 146, 160 (2003); *McConnell*, 540 U.S. at 143-45. In particular, the Court long ago upheld the contribution limits applicable to multicandidate committees like EMILY's List, stressing that they were enacted "in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*," and explaining how contributors seeking to evade FECA's aggregate and individual candidate limits might otherwise channel funds through multicandidate committees for that purpose. *California Med. Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981). And as this Court concluded in denying a preliminary injunction, under the reasoning of both *Common Cause* and

McConnell it is clear that "the FEC is empowered under FECA to modify allocation rules to ensure that unregulated monies are not used to improperly influence federal elections." *EMILY's List*, 362 F. Supp. 2d at 57.[20]

As this Court further noted, "[t]he 'funds expended' allocation method allowed non-party committees to calculate the federal portions of their allocated spending at or close to zero." *EMILY's List*, 362 F. Supp. 2d at 48. A recent conciliation agreement between the Commission and America Coming Together (ACT) illustrates this potential for abuse. *See* FEC News Release, *FEC To Collect $775,000 Civil Penalty From America Coming Together* (Aug. 29, 2007) (News Release) (FEC Exh. 16). Like EMILY's List, ACT is a registered federal nonconnected political committee that also has a nonfederal account registered with the Internal Revenue Service under section 527 of the Internal Revenue Code. *See News Release*. The conciliation agreement (FEC Exh. 17) settles allegations that ACT in the 2004 elections used federal/nonfederal allocation ratios that greatly underrepresented the proportion of its disbursements required to be paid with federal funds.[21]

---

[20] This Court also noted that, under the rationale of *McConnell*, the solicitation regulation "appears on its face to be reasonably designed to prevent corruption ... and like the allocation regulations, the solicitation regulation appears to be designed to enforce the contribution restrictions embodied in FECA." 362 F. Supp. 2d at 57.

[21] For most of the 2004 election cycle, ACT used an allocation ratio of just 2% federal funds and 98% nonfederal funds for its administrative expenses and generic voter drives. Conciliation Agreement at 2-3, 6. The Commission concluded that approximately $70 million dollars in disbursements characterized by ACT as "administrative expenses" for door-to-door canvassing, direct mail, and telemarketing were actually attributable to clearly identified federal candidates and thus were required to be paid with 100% federal funds. *Id*. at 7. The Commission further found that another $70 million in voter drive costs were directly attributable at least in part to clearly identified federal candidates, and thus should have been paid either with 100% federal funds or allocated between federal and nonfederal candidates based on the time or space devoted to the candidates. *Id*. at 9. ACT agreed to pay a $775,000 civil penalty and to cease and desist from violating the relevant statutory and regulatory restrictions and reporting requirements. *Id.* at 12.

Although *McConnell* distinguished political parties from independent groups when it addressed BCRA's soft money restrictions, *McConnell* never suggested that there is any broad constitutional or statutory barrier that would prevent the Commission from adjusting the regulations governing allocation and solicitation by federal political committees. To the contrary, the *McConnell* Court reiterated *Buckley's* holding that a political committee's major purpose is federal campaign activity. *McConnell*, 540 U.S. at 170 n.64 (quoting *Buckley*, 424 U.S. at 79). Indeed, in light of the Supreme Court's construction, federal political committees are more like national political parties than state or local parties, because the law does not presume that the latter organizations have as their major purpose the nomination or election of *federal* candidates.

Finally, as this Court emphasized, the new rules do not "prevent Plaintiff from engaging in whatever political speech it seeks to undertake." *EMILY's List*, 362 F. Supp. 2d at 58. The Court quoted *Buckley*'s observation that the overall effect of FECA's contribution limits is "merely to require candidates and political committees to raise funds from a greater number of persons" (424 U.S. at 21-22), and concluded that EMILY's List may engage in the same speech as before "but may be required to raise money from a greater number of donors." *Id.* Plaintiff's memorandum offers no good reason for revising this conclusion, and plaintiff has thus failed to establish any constitutional or statutory right to the prior allocation system.

2. 11 C.F.R. § 106.6(f) Uses Permissible Criteria to Define Which Candidate-Specific Communications Are Subject to Allocation Rules

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

and for the Commission to administer these requirements." 69 Fed. Reg. 68,060. Specifically, the new regulation establishes

> candidate-driven allocation rules for voter drives and public communications that refer to clearly identified Federal or non-Federal candidates regardless of whether the voter drive or public communication refers to a political party. When the voter drive or public communication refers to clearly identified Federal candidates, but no clearly identified non-Federal candidates, the costs must be paid for with 100% Federal funds. Similarly, when the voter drive or public communication refers to clearly identified non-Federal candidates, but no clearly identified Federal candidates, the costs may be paid 100% from a non-Federal account. Any voter drives or public communications that refer to both clearly identified Federal and non-Federal candidates are subject to the time/space method of allocation under 11 C.F.R. 106.1. The final rules do not change the allocation methods in 11 C.F.R. 106.1, which are based on the benefit reasonably expected to be derived by each candidate.

69 Fed. Reg. 68,059. In sum, public communications and voter drives referring solely to clearly identified federal candidates must be financed solely with federal funds; those referring solely to clearly identified nonfederal candidates may be financed with nonfederal funds; and those referring to both federal and nonfederal candidates are subject to the time/space method of allocation under 11 C.F.R. § 106.1. As the Commission further explained (*id.* at 68,063), the new rules

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

Because, as shown above, Congress clearly has not "spoken to the precise question at issue" regarding allocation methods, 11 C.F.R. § 106.6(f) easily passes step one of *Chevron*, 467 U.S. at 842. Moreover, because 11 C.F.R. § 106.6(f) reasonably implements the Act's contribution limits, it also satisfies *Chevron* step two.

11 C.F.R. § 106.6(f) applies only to political committees, which, as we have explained, are "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," and whose expenditures thus "are, by definition, campaign related." *McConnell*, 540 U.S. at 170 n.64 (quoting *Buckley*, 424 U.S. at 79). EMILY's List complains (Mem. 32-38) that 11 C.F.R. §106.6(f) requires allocation of certain expenditures that "refer to" a clearly identified federal candidate. But because EMILY's List (unlike the plaintiff in *WRTL*) is a federal political committee whose major purpose is the nomination or election of federal candidates, the Commission acted well within its discretion in concluding that when such a committee's voter drives and public communications refer explicitly to clearly identified federal candidates, they should be financed with federal funds — or, if they also refer to nonfederal candidates, with a proportionate allocation between federal and nonfederal funds.

The Supreme Court has repeatedly held that different kinds of political entities may be regulated differently, to account for their basic nature and the potential for abuse. *See McConnell*, 540 U.S. at 158; *infra* p. 43. The provisions challenged here regulating nonconnected committees are less burdensome than the Act's restrictions on other entities. For example, Congress provided in BCRA that national party committees could no longer solicit, receive or spend *any* nonfederal funds, and the Supreme Court upheld those new restrictions despite the acknowledged role national party committees regularly play in nonfederal elections. *McConnell*, 540 U.S. at 142-61. EMILY's List, in contrast, can still solicit and spend nonfederal funds, subject to certain restrictions to ensure that such funds are not used to influence federal elections. To that end, 11 C.F.R. § 106.6(f) merely requires that nonconnected political committees allocate expenses for public communications and voter drives that refer to a mixture

of clearly identified federal and nonfederal candidates according to the pre-existing time/space method of 11 C.F.R. § 106.1.

BCRA also established a new allocation system for *state and local* party committees, which have a vital interest in nonfederal elections — and whose major purpose, unlike plaintiff's, is usually not the election of *federal* candidates. As the Supreme Court noted in upholding the allocation requirements for those nonfederal committees, BCRA "prevents donors from contributing nonfederal funds to state and local party committees to help finance 'Federal election activity.'" *McConnell*, 540 U.S. at 161-62. Moreover, two of the four statutory categories of "Federal election activity" encompass the same kind of voter drive activity included in 11 C.F.R. § 106.6(f): voter registration, 2 U.S.C. § 431(20)(A)(i), and get-out-the-vote and generic campaign activity in connection with a federal election, 2 U.S.C. § 431(20)(A)(ii). These provisions regulate the financing of such activities by state and local parties without regard to whether they involve *any* references to federal candidates. "A campaign need not mention federal candidates to have a direct effect on voting for such a candidate …. [G]eneric campaign activity has a direct effect on federal elections." *McConnell*, 540 U.S. at 168 (citations and internal quotation marks omitted). This reasoning applies with at least as much force to the activities of federal political committees like EMILY's List, which could similarly be attractive vehicles for circumvention of the FECA's aggregate and individual contribution limits. *See California Med. Ass'n*, 453 U.S. at 197-98.

EMILY's List poses several hypothetical examples (Mem. 35-36) designed to show that some applications of 11 C.F.R. § 106.6(f) might exceed the Commission's statutory authority. But plaintiff does not really contend that even the hypothetical communications it crafted to support its argument *cannot* have any influence on federal elections. The first three examples all

involve references to both federal and nonfederal candidates, and all could influence federal elections. Even if a political committee would try to influence a nonfederal election by identifying an out-of-state federal candidate (as in plaintiff's first hypothetical), it is not evident that such a communication could not affect an in-state federal election. Such a communication may well suggest that its audience support a party's full slate of candidates (federal and state) on the basis of their alliance with a prominent out-of-state candidate's policies or the out-of-state candidate's support for the in-state candidates.[22] Moreover, to the extent the federal references are as small a part of the communication as plaintiff implies, the federal share of the expenditure would be proportionately small under the time/space allocation rules of 11 C.F.R. § 106.1. Plaintiff's last hypothetical example is equally meritless.[23] It concerns (Mem. 36) a "communication supporting a political party generally and that refers to no candidates." The applicable regulation (11 C.F.R. § 106.6(c), not 106.6(f)) requires that the costs of such a public communication be financed with at least 50% federal funds regardless of when it is run, because undifferentiated support of a political party denotes support of all of its candidates, federal and nonfederal.[24]

---

[22] Political committees like EMILY's List often identify out-of-state federal candidates in their communications, especially when urging people all over the nation to contribute funds to the political committee's preferred candidates. On plaintiff's own Web site, for example, where it solicits contributions to be given directly to a list of "recommended candidates," the list of candidates to be supported consists of federal candidates from Massachusetts, New Hampshire, and Colorado — although the page obviously reaches all 50 states. EMILY's List, "Recommended Candidates," available at https://secure1.emilyslist.org/Donation/index.cfm?event=initiative_showOne&initiativeID=375&mt=1406 (visited October 3, 2007).

[23] We address plaintiff's fourth hypothetical, about a solicitation, in our discussion of 11 C.F.R. § 100.57. *See infra* p. 39 n.33.

[24] Plaintiff also complains (Mem. 12) that the regulation would require the use of federal funds to finance an advertisement that, for example, urges Missouri voters to vote on a ballot initiative on the specified November election day and includes an endorsement by a Missouri candidate for federal office. But plaintiff overlooks the obvious. Such an advertisement would obviously benefit the federal candidate or, otherwise stated, influence federal elections because

In any event, in a facial challenge like the one EMILY's List brings here, worst-case examples are not sufficient to satisfy a plaintiff's burden of proof. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 800 (The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."); *Florida League of Prof'l Lobbyists v. Meggs*, 87 F.3d 457, 461 (11th Cir. 1996) ("As for the League's hypothesized, fact-specific worst case scenarios, we also decline to accept the facial challenge based on these perceived problems."); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 57 (D.C. Cir. 1990) ("Although hypothetical applications of [agency] rules might transgress the statutory provisions on which petitioner relies, we think it inappropriate to anticipate them in resolving petitioner's facial challenge to the rules."); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973) ("[W]e do not believe that [the statutory provision] must be discarded in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute.").

Finally, plaintiff's claim (Mem. 44) that the Commission has failed to show that 11 C.F.R. § 106.6(f) is "connected" to the risk of corruption is spurious. As discussed *supra* pp. 22-23, and as this Court previously held, the entire allocation system implements the contribution restrictions that have been held to serve an anti-corruption purpose. *See EMILY's List*, 362 F. Supp. 2d at 56-57. Moreover, contrary to plaintiff's assertion (Mem. 44), it is entirely proper for the Commission "to make ease of administration and enforceability a consideration in setting its standard," *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001). For example, in *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 406 (D.C. Cir. 1996), the Court upheld a donor information-gathering regulation adopted to enhance compliance and deter

---

encouraging sympathetic voters to vote for the ballot measure gets them to the polls, where the endorsing federal candidate is on the ballot.

corruption, noting that "[f]inding that political committees were not collecting sufficient data, the Commission concluded that an uncluttered follow-up request would yield more information." Similarly here, the Commission explained that 11 C.F.R. § 106.6(f) seeks to "enhance compliance with the FECA," as well as to create a system that is easier for political committees to understand and for the Commission to administer. *See* 69 Fed. Reg. 68,060.

3. 11 C.F.R. § 106.6(c) Establishes a Permissible Allocation Formula for Federal and Nonfederal Shared Expenses

Revised 11 C.F.R. § 106.6(c) governs the allocation between federal and nonfederal funds by nonconnected committees of their administrative expenses,[25] the costs of their "generic voter drives,"[26] and certain public communications. These disbursements benefit both federal and nonfederal candidates, and thus influence both federal and nonfederal elections.[27] The revised regulation applies a minimum federal funds rate of 50% to these dual-purpose disbursements. This flat rate replaces the complex "funds expended" method of calculating a ratio for use of federal and nonfederal funds. 69 Fed. Reg. 68,056.

As the Commission explained (69 Fed. Reg. 68,059), it changed the allocation regime to "establish a simpler bright-line rule.… The previous rules were a source of confusion for some … nonconnected committees and resulted in time-consuming reporting." The Commission had "discovered that very few committees chose to allocate their administrative and generic voter

---

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

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

[27] *See McConnell*, 540 U.S. at 167 ("Common sense dictates, and it was 'undisputed' below, that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office") (citing 251 F.Supp.2d at 460 (Kollar-Kotelly, J.)).

drive expenses under former section 106.6(c)." 69 Fed. Reg. 68,062.[28] Moreover, "[a]necdotal evidence suggested that many committees, including those that allocated, were confused as to how the funds expended ratio should be calculated and adjusted throughout the two-year election cycle," and "audit experience ha[d] also shown that some committees were not properly allocating under the complicated funds expended method." *Id.* By changing the allocation method, the Commission sought "to enhance compliance with the FECA, to simplify the allocation system, and to make it easier for … nonconnected committees to comprehend and for the Commission to administer" the requirements. 69 Fed. Reg. 68,060.

The Commission acted reasonably in adopting a flat minimum federal rate. As noted above, the Commission concluded that most of the regulated community neither used nor understood the complicated funds expended method of allocation, which needed to be recalculated repeatedly throughout the two-year election cycle. Suggestions for adjusting the funds expended method appeared merely to increase the complexity of the necessary calculations. Therefore, the Commission embraced instead a workable, easy-to-grasp and easier-to-enforce bright-line minimum flat rate method, and gave committees the option of paying for their administrative expenses and the costs of generic voter drives and certain public communications with a higher percentage of federal funds. "A flat minimum percentage makes the allocation scheme easier to understand and apply, while preserving the overall rationale underlying allocation." 69 Fed. Reg. 68,062. As noted *supra* pp. 29-30, it is well settled that simplifying regulation to promote ease of compliance and enforcement is a valid rulemaking objective.

---

[28] "Fewer than 2% of all registered nonparty political committees … allocate[ed] administration and generic voter drive expenses under former section 106.6(c)…." 69 Fed. Reg. 68,062. That means that the remaining committees used only federal funds for such activities.

As the Commission explained, "[n]either FECA nor any court decision dictates how the Commission should determine appropriate allocation ratios." 69 Fed. Reg. 68,062. *See also id.* at 68,063. The chosen federal flat minimum of 50% for activities that cannot be divided with scientific precision into exclusively federal and exclusively nonfederal components fairly reflects the dual nature of the disbursements. In fact, many of those few committees that have used the funds expended method "already use 50% or more as their Federal allocation ratio." 69 Fed. Reg. 68,066. EMILY's List itself has consistently allocated its costs on this same 50% basis. FEC Exh. 5. The prevalence of a 50% or higher ratio reflects the fact that even though federal elections occur biennially, many political committees begin preparing for them during the preceding "off" year. Indeed, the plaintiff's name makes that very point; "EMILY" is an acronym for "Early Money Is Like Yeast." FEC Exh. 18. In present off-year, for example, EMILY's List has raised more than $8,100,000 in "hard money" contributions as of August 31, 2007. FEC Exh. 19 (FEC Committee Summary Report, *available at* http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_08+C00193433). These circumstances are more than sufficient to establish that the Commission's choice of a 50% "line of demarcation is … within a zone of reasonableness, as distinct from the question of whether the line drawn by the Commission is precisely right." *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002) (internal quotation marks and citations omitted). *See also WorldCom*, 238 F.3d at 461. The Commission's reasoned rulemaking process and rational final rule are not at all the arbitrary and capricious conduct of which the plaintiff complains (Mem. 41-43).

EMILY'S List again counters by concocting extreme hypotheticals without evidentiary support. Plaintiff also again ignores the important fact that the regulation applies only to political committees, whose major purpose is federal campaign activity. *See supra* pp. 20-21.

For example, plaintiff offers (Mem. 8) the unlikely hypothetical of a political committee that spends 99 percent of its funds in state and local races. Plaintiff does not explain, however, why an organization that uses only one percent of its funds for federal electoral activity would qualify as a "political committee" under the Supreme Court's major purpose test; if that threshold is not met, the organization would not be governed by the 50% allocation regulation.[29]

The Commission's revision of 11 C.F.R. § 106.6(c) is analogous to (though more lenient than) Congress's decision in BCRA to impose a flat 100% federal funds requirement for the wages and salaries of state and local party committee employees who dedicate most of their compensated time to nonfederal electoral activities, if they spend at least 25% of their time on federal activities. *See* 2 U.S.C. § 431(20)(A)(iv). Expressly deferring to Congress's judgment, the Supreme Court upheld the 25% provision as a "prophylactic rule" that prevents circumvention of other provisions, *McConnell*, 540 U.S. at 170-71, a view that plainly does not coincide with plaintiff's concept of how allocation must be done.

EMILY's List has offered absolutely no evidence to controvert the Commission's conclusion, 69 Fed. Reg. 68,063, that the flat rate would result at most in "only a minimal increase in federal funds expended" even by those few committees — if there are any — that correctly used the funds expended method and consistently came up with a federal funds allocation ratio less than 50%. In any event, the relevant "question is not whether [the

---

[29] Plaintiff's discussion of its Campaign Corps program (Mem. 14-15) suffers from a similar lack of clarity. EMILY's List assumes that the costs of the program would fall within the 50% administrative expenses regulation, but the lack of relevant detail in plaintiff's description of the program makes it impossible to conclude whether all those costs would in fact qualify as "administrative expenses." *See, e.g.*, 11 C.F.R. § 106.1(c)(2) (addressing, *inter alia*, expenditures for "educational campaign seminars" and "training of campaign workers"). Moreover, although EMILY's List alleges (Mem. 15) that "77% of the graduates … worked on nonfederal races," plaintiff fails to state whether those graduates may have also worked on federal races or generic campaign activity.

regulation] reduces the amount of funds available over previous election cycles, but whether it is 'so radical in effect as to … drive the sound of [the recipient's] voice below the level of notice.'" *McConnell*, 540 U.S. at 173 (quoting *Shrink Missouri*, 528 U.S. at 397). EMILY's List has not even alleged that any of the challenged regulations have such a radical effect.[30]

Thus, the revised regulation, which implements the Act's contribution restrictions, easily satisfies the "less rigorous scrutiny applicable to contribution limits," *McConnell*, 540 U.S. at 141. Plaintiff does not challenge the Commission's authority to require it to allocate at least a portion of these expenditures to its federal account, only the size of the allocation the Commission adopted.[31] As with the underlying contribution limits themselves, however, "'[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2000 ceiling might not serve as well as $1000.'" *Buckley*, 424 U.S. at 30 (quoting lower court). And the fact that the Commission's regulation draws a line does not make the regulation unlawfully "arbitrary." *See Matthews v. Diaz*, 426 U.S. 67, 83 (1976) ("But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences…."); *American Federation of Government Employees v. OPM*, 821 F.2d 761, 777 (D.C. Cir. 1987) ("The lines drawn as a result of this [rulemaking] process may well be, in one sense, 'arbitrary' without being 'capricious'"); *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 n.7 (D.C. Cir. 1988) (same). *See also Worldcom*, 238 F.3d at 461-62. EMILY's List has

---

[30] Indeed, campaign finance reports filed by EMILY's List reveal that it raised more funds and spent more on allocated activities during the first third of the current election cycle than it had during the comparable period in the last presidential election cycle, 2003-04, when the former allocation regime was in effect. FEC Facts ¶¶ 8-9.

[31] In advocating that the Commission return to the funds-expended method of allocation, plaintiff implicitly concedes that the Commission has statutory authority to establish an allocation regime. *See also* 2 U.S.C. §§ 437c(b)(1) and 437d(a)(8) (granting the Commission broad rulemaking and policymaking powers).

presented no basis for denying the Commission deference and substituting a different line for the one the Commission drew.

But EMILY's List makes an even more fundamental mistake. It does not understand that the Act regulates disbursements that have the purpose of influencing federal elections, regardless of whatever other effects they may also have. The Act does not support plaintiff's assumption that the Commission must quantify the relative effect that dual-purpose spending has on federal and nonfederal elections. Because 11 C.F.R. § 106.6(c) governs spending that influences both federal and nonfederal elections, plaintiff's criticisms reflect little more than a policy dispute about how best to allocate expenses for activities that cannot be readily divided with scientific precision, but all of which have at least some influence on federal elections.

4. 11 C.F.R. § 100.57 Is a Permissible Interpretation of When Funds Given in Response to a Political Committee's Solicitation Are "Contributions" Under the Act

The Act authorizes the Commission to regulate "contributions" — money and anything of value given to political committees or candidates "for the purpose of influencing" federal elections. *See, e.g.*, 2 U.S.C. §§ 431(8), 437c(b), 437d, 438(a)(8), 441a. New regulation 11 C.F.R. § 100.57 specifies when funds received in response to a solicitation will be considered "contributions" under the Act. Thus, the subject of this regulation is plainly within the Commission's statutory authority. Plaintiff's challenge to the Commission's solicitation regulation is predicated on a fundamental misunderstanding of the regulatory standard.

The Supreme Court has always construed the statutory term "contribution" broadly, to include money "earmarked for political purposes" by the donor, and money spent by the donor "in cooperation with" a candidate or campaign committee. *Buckley*, 425 U.S. at 78. The term also includes money given to a multicandidate political committee like EMILY'S List, even if

the gift is designated solely for administrative expenses rather than support of federal candidates. *California Medical Ass'n*, 453 U.S. at 199 n.19 ("contributions for administrative support clearly fall within the sorts of donations limited by § 441a(a)(1)(C)") (plurality); *id.* at 203 (Blackmun, J., concurring). The purpose of 11 C.F.R. § 100.57 is to apply the broad statutory definition of "contribution" in a way that ensures that money given to a political committee in response to an appeal to help influence federal elections is subject to the statutory contribution limits.

Despite plaintiff's assertions to the contrary (*e.g.*, Mem. 12, 28), the solicitation provision does *not* apply to every solicitation of funds that "refers to" a federal candidate, or even every solicitation that "supports or opposes" a candidate. Rather, the text of 11 C.F.R. § 100.57 states plainly that it covers only a solicitation that "indicates that any portion of funds received will be used *to support or oppose the election* of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a) (emphasis added). Thus, the new provision is narrowly focused on solicitations that not only "refer to" a clearly identified federal candidate, but also indicate that the funds received will be used to support or oppose *the election* of that candidate. Clearly, money given in response to such solicitations is "for the purpose of influencing" a federal election.

The standard in 11 C.F.R. § 100.57 was drawn in large part from the Second Circuit's opinion in *FEC v. Survival Education Fund (SEF)*, 65 F.3d 285 (2d Cir. 1995), which construed a statutory provision governing solicitations of contributions under the pre-BCRA Act. That court held that contributions "for the purpose of influencing" a federal election would result from a solicitation that "[left] no doubt" that funds given in response would be used to help defeat a particular candidate in a federal election. *Id.* at 295.

EMILY's List does not dispute that this was a holding in the case. Rather, in a strained effort to link the Second Circuit's decision to *WRTL*, plaintiff (Mem. 29-30) gives a distorted account of the relevant portion of *SEF*, which did *not* turn on whether the solicitation in question contained express advocacy. Indeed, the Second Circuit explicitly eschewed ruling on that issue. *SEF*, 65 F.3d at 290, 296. Instead, in deciding whether the particular communication was required to include certain disclosures applicable to communications that "solicit[ ] any contributions," *see* 2 U.S.C. § 441d(a)(3), the court analyzed the phrase "earmarked for political purposes." 65 F.3d at 295-96 (citing *Buckley*, 424 U.S. at 78-80). The Supreme Court in *Buckley*, 424 U.S. at 78, had used that phrase in identifying types of gifts of money that are "made for the purpose of influencing [federal] elections," and thus are properly regulated by the Act as contributions. The Second Circuit explained that, "[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of" the disclosure provision "if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *SEF*, 65 F.3d at 295. Thus, EMILY's List is simply wrong when it argues (Mem. 29) that "[e]xpress advocacy … was the line of demarcation" at issue in *SEF*.

The Commission's explanation of 11 C.F.R. § 100.57 describes the application of this regulation and provides examples to guide committees in complying with the rule. *See* 69 Fed. Reg. 68,057. The Commission carefully crafted the rule so as to "leave[] the group issuing the communication with complete control over whether its communications will trigger new section 100.57." *Id.* The Commission stressed that this regulation is based only on the language of the solicitation itself — the Commission will not use any other statements or solicitations by the organization, the timing or targeting of the solicitation, or any other external information to

evaluate the solicitation. *Id.* This gives groups soliciting funds complete control over the wording of their solicitations, without having to worry about whether factors external to the text of their message will be construed in conjunction with it. Thus, if a group does not want to elicit contributions for a federal candidate and wants to ensure that none of the money it receives in response to a solicitation will be treated as federal contributions, it can simply draft its communication without indicating that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate.

The Commission gave examples of phrasing in a solicitation that would be for contributions under 11 C.F.R. § 100.57(a), and also included the following example of a solicitation that would *not* be for federal contributions:

> The President wants to cut taxes again. Our group has been fighting for lower taxes since 1960, and we will fight for the President's tax cuts. Send us money for our important work.

69 Fed. Reg. 68,057. As the Commission explained, this sample solicitation does *refer to* a clearly identified federal candidate ("the President"), but it discusses his policies as an officeholder and does not indicate that funds received will be used to *support or oppose the election of* the candidate. *Id.* Therefore, this solicitation would not trigger the rule, regardless of the timing of the mailing or the nature of the soliciting group.

FEC Advisory Opinion (AO) 2005-13 (October 20, 2005), requested by EMILY's List after it filed this suit, discusses another example (proffered by plaintiff) of a solicitation that would not trigger 11 C.F.R. § 100.57:[32]

> EMILY's List has always supported me [Senator Stabenow, a candidate for federal office,] when I most needed it. And that is why I am asking you to support EMILY's List today, so that it can continue the work on behalf of women who, by seeking state office today, will be ready to claim national leadership tomorrow.

[32] AO 2005-13 is attached as Exhibit E to plaintiff's summary judgment memorandum.

The Commission pointed out that, although this solicitation "features a clearly identified Federal candidate," the solicitation makes clear that Senator Stabenow is raising funds for EMILY's List to use on behalf of women who seek state office and not to support her own re-election.[33] Thus, plaintiff is simply wrong in asserting (Mem. 29) that "the mere reference to a single federal candidate is sufficient" to make the funds received federal contributions.

EMILY's List also attacks (Mem. 9) 11 C.F.R. § 100.57(b)(2) because it provides that, if a solicitation meets the standard in section 100.57(a) but also refers to at least one clearly identified nonfederal candidate, then 50% of the money received from the solicitation must be treated as a contribution. *See also* 69 Fed. Reg. 68,058. Plaintiff hypothesizes a solicitation expressly stating that a lower percentage of funds received would be used to support federal candidates. *See also* Mem. 43. However, plaintiff does not point to any language in the Act inconsistent with this regulation, and plaintiff's worst-case hypothetical example does not demonstrate that section 100.57 is unconstitutional on its face or beyond the Commission's authority to promulgate. Plaintiff provides no evidence that this issue was raised before the Commission, and it has supplied no real-world evidence of solicitations that expressly state that a certain low percentage of funds collected will be used to support or oppose the election of clearly identified federal candidates. As explained *supra* p. 29, plaintiff's worst-case hypothetical examples are insufficient for plaintiff to prevail in this facial challenge.[34]

---

[33] The Commission's analysis might also apply to plaintiff's penultimate hypothetical at Mem. 36, although plaintiff describes the hypothetical solicitation in such vague and ambiguous terms that the same result is not certain.

[34] Despite plaintiff's claim that the regulation will have a crippling effect on fundraising, plaintiff has raised more federal and nonfederal funds thus far in the 2007-08 election cycle than it did in the first third of the last comparable election cycle, 2003-04. *See supra* n.30.

EMILY's List also complains (Mem. 30) that the "indicates that" standard is not further defined in this regulation. However, the constitutional test for vagueness requires only that a provision "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). 11 C.F.R. § 100.57 provides adequate guidance as to what solicitations fall under the rule, and makes it easy for a political committee seriously interested in complying with the regulation to structure its solicitations to control whether funds it receives in response will be federal contributions. The regulation is certainly no more vague than the provision in 2 U.S.C. § 431(20)(A)(iii) ("promotes, supports, attacks, or opposes") upheld by the Supreme Court in *McConnell*, 540 U.S. at 170 n.64. As also noted in *McConnell*, "should plaintiff[] feel that [it] need[s] further guidance, [it is] able to seek advisory opinions for clarification, 2 U.S.C. § 437f(a)(1), and thereby 'remove any doubt there may be as to the meaning of the law.'" *Id.* (citation omitted).[35]

EMILY's List claims (Mem. 31) that 11 C.F.R. § 100.57 forces it and other solicitors to revise the texts of their solicitations to avoid triggering the regulation, and that section 100.57 thereby contravenes *WRTL*, which supposedly "made clear … that directing political speech is not a legitimate function of a government agency." But, once again, plaintiff ignores context. *WRTL* applied strict scrutiny in an as-applied challenge to a direct limit on corporate spending for speech. The *WRTL* decision was limited to issue advocacy and did not address solicitations for federal campaign contributions.

Moreover, courts have upheld statutory and regulatory provisions requiring persons who engage in electoral activity to include certain language in their communications or, indeed, to

[35] Indeed, EMILY's List has itself sought and received an advisory opinion about the regulation's application to proposed solicitations. *See supra* p. 38.

write certain communications. Most notably, in *Republican Nat'l Comm. v. FEC*, 76 F.3d at 406, the D.C. Circuit upheld an FEC rule directing political committees to make separate follow-up requests for contributor information if the committees wanted to qualify as having made "best efforts" to collect the information. In addition, two courts of appeals have upheld the FECA's "disclaimer" provision, 2 U.S.C. § 441d(a), which requires, *inter alia*, that persons who make disbursements to finance a public communication "expressly advocating the election or defeat of a clearly identified candidate, or solicit[ing] any contribution" include in their communication a statement whether the communication has been paid for or authorized by a candidate. *FEC v. Public Citizen*, 268 F.3d 1283 (11th Cir. 2001); *SEF*, 65 F.3d at 295-96.

F. The Supreme Court's Recent Decision in *WRTL* Does Not Support Plaintiff's Challenge to the Commission's Allocation and Solicitation Regulations

The integrity of the Commission's regulations is unaffected by *WRTL*. Unlike this case, *WRTL* was an as-applied challenge to a limit on expenditures brought by a corporation that claimed it wished to engage in issue advocacy, not a facial challenge brought by a federal political committee that intended to engage in some nonfederal election activity. As we explain below, EMILY's List ignores or conflates these critical differences.

1. Background: The *WRTL* Case

In 2003, the Supreme Court had held that the *McConnell* plaintiffs had failed to carry "their heavy burden" of establishing that BCRA's "electioneering communication" provision was substantially overbroad. *See McConnell*, 540 U.S. at 204-07.[36] The Court also noted that a corporation with a separate segregated fund could legally finance an electioneering

[36] BCRA amended the Act to prohibit corporations from using their general treasury funds to finance any "electioneering communication." BCRA § 203, codified at 2 U.S.C. § 441b(b)(2). BCRA defines an "electioneering communication" as, *inter alia*, any broadcast communication that refers to a clearly identified federal candidate during a specified pre-election period and is "targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)(i).

communication from that fund. *Id*. Alternatively, the corporation could use its treasury funds if it simply avoided referring to a clearly identified federal candidate in the communication. *Id*.

Shortly before the 2004 federal elections, WRTL, a nonprofit ideological advocacy corporation, sought to use its corporate treasury funds to finance electioneering communications, and it brought an as-applied challenge to that facially valid provision. *WRTL*, 127 S.Ct. at 2660-61. WRTL claimed that its proposed advertisements were constitutionally protected "issue advocacy" rather than campaign advocacy. The Supreme Court agreed, and the controlling opinion by Chief Justice Roberts applied strict scrutiny, placing the burden on the government to demonstrate that the prohibition was "narrowly tailored to serve a compelling governmental interest." 127 S. Ct. at 2664. Because the government could not show that WRTL's advertisements contained "express advocacy or its functional equivalent," *id*., the Court held that WRTL could not constitutionally be prohibited from using its corporate treasury funds to finance its proposed advertisements, *id*. at 2673.

2. The Reasoning and Holding of *WRTL* Do Not Undercut the Constitutionality of the Commission's Regulations

The decision in *WRTL* applied strict scrutiny in an as-applied challenge to an expenditure limit applicable to corporations and unions. In particular, the decision hinged on the distinction between issue advocacy and electoral advocacy. In stark contrast, the facial challenge brought by EMILY's List does not concern that crucial First Amendment distinction. Rather, it concerns the intersection of federal and nonfederal electoral activity as relevant to contribution limits for federal political committees, topics irrelevant to the *WRTL* litigation. These multiple differences mean that *WRTL* provides no support for EMILY's List here, despite the organization's attempt to clothe itself in WRTL's mantle. Although EMILY's List conflates nonfederal electoral activity and issue advertising (Mem. 2, 22), they are not the same. Indeed, EMILY's List itself

describes (Mem. 3) its nonfederal account as accepting funds to affect state and local candidate elections, not to engage in issue advocacy.

WRTL sued as a nonprofit ideological corporation seeking to use its corporate treasury funds for its issue advertising, while EMILY's List is a registered federal political committee with a nonfederal account that is challenging the Commission's discretion to set an appropriate allocation formula for political committees that engage in activity that affects both federal and nonfederal candidate elections. EMILY's List tries to minimize the importance of its status as a "political committee" under the Act (*see* Mem. 25-26) and cites *WRTL* for the proposition that the identity of the speaker (a corporation in *WRTL*) does not matter. Mem. 26 (citing *WRTL*, 127 S.Ct. at 2673). However, plaintiff conveniently ignores the narrow context to which Chief Justice Roberts was referring — issue advocacy. In federal campaign finance contexts, the Court has repeatedly found that the identity of the actor is indeed relevant. For example, in *California Medical Ass'n*, 453 U.S. at 201, the Court stated that the "differing structures and purposes" of different entities "may require different forms of regulation to protect the integrity of the electoral process." *Accord, McConnell*, 540 U.S. at 158; *FEC v. National Right to Work Comm.*, 459 U.S. at 210. Here, the identity of EMILY's List as a federal political committee is highly relevant.

As explained *supra* pp. 20-21, the major purpose of EMILY's List, like that of all federal political committees, is by definition federal campaign activity. The same could not be said of WRTL as a corporation. As a consequence, the requirements in the Commission's allocation regulations — such as the provision requiring administrative costs to be paid with at least 50% federal dollars — are entirely reasonable in light of the presumption inherent in the Supreme

Court's "major purpose" construction and the Commission's own interpretation of "political committee."[37]

Lastly, unlike WRTL, EMILY's List has brought a facial challenge. The burdens of proof and persuasion differ markedly in as-applied challenges and facial challenges. The Supreme Court in *WRTL* placed a heavy burden on the government, but, as the Court clearly held in *McConnell*, the plaintiff — not the government — bears the major burden in a facial challenge. *See McConnell*, 540 U.S. at 207. Thus, EMILY's List must carry the "heavy burden" of proving that the regulations at issue here are overbroad. *Id.* As we have shown, however, EMILY's List, like the plaintiffs in *McConnell*, has not established that the "application [of the challenged rules] to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the … [regulations'] plainly legitimate applications.'" *Id.* (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (alterations added)). *See also, e.g.*, *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988) (holding that a plaintiff must "demonstrate from the text of [the challenged law] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally"); *Broadrick v. Oklahoma*, 413 U.S. at 615 ("[P]articularly where conduct and not merely speech is involved, … the overbreadth of a statute must not only be real, but substantial as well ….). Indeed, aside from a few worst-case, hypothetical examples, EMILY's List has not even attempted to show that the amount of protected speech it envisions is in any way "substantial" in relation to the regulations' "plainly legitimate applications."

[37] As explained *supra* pp. 16-18, the level of judicial scrutiny applicable here is the level for cases challenging contribution limits. It is not, contrary to assertions by EMILY's List (*e.g.*, Mem. 19) the more rigorous "strict scrutiny" standard used in *WRTL*.

G. Plaintiff's Challenge to the Commission's Authority Ultimately Rests on the Flawed Contention that the Regulations Violate Principles of Federalism

As explained above, EMILY's List improperly conflates two different distinctions: (1) the line dividing electoral advocacy and issue advocacy, and (2) the line dividing federal electoral activity and nonfederal electoral activity. Plaintiff's real target (unlike WRTL's) is the second distinction. Consequently, although EMILY's List purports to rely on the First Amendment, plaintiff's implicit accusation is that the Commission has gone too far regulating nonfederal electoral activity, thereby violating constitutional principles of federalism. *See, e.g.*, Mem. 2, 9, 25, 26, 28. Several plaintiffs in *McConnell* attacked Title I of BCRA (the "soft money" restrictions) on that very ground, and the Supreme Court found no merit to their argument. *McConnell*, 540 U.S. at 186-87. For the same reasons, this Court should reject the implicit federalism argument of EMILY's List.

The Court in *McConnell* noted, first, that it had focused its attention in Tenth Amendment cases on laws that "commandeer the States and state officials in carrying out federal regulatory schemes." *McConnell*, 540 U.S. at 186. The Court then stated that, in contrast, Title I of BCRA "only regulates the conduct of private parties … and does not expressly pre-empt state legislation." *Id.* The Court acknowledged that Title I "prohibits some fundraising tactics that would otherwise be permitted under the laws of various States, and that it may therefore have an indirect effect on the financing of state electoral campaigns." *McConnell*, 540 U.S. at 186. The Court concluded, however, that "[t]hese indirect effects do not render BCRA unconstitutional," and observed that "such conflict is inevitable in areas of law that involve both state and federal concerns." *Id.* at 186-87.

Second, the Supreme Court held that Congress had not "overstepped" its power in enacting BCRA. "Congress has a fully legitimate interest," the Court stated, "in maintaining the

integrity of federal officeholders and preventing corruption of federal electoral processes through the means it has chosen." *McConnell*, 540 U.S. at 187.[38] The Commission's regulations are fully consistent with this interest, and EMILY's List has not suggested that they impose any "requirements … upon States or state officials" nor has plaintiff otherwise explained how these regulations violate "constitutional principles of federalism." *Id.* at 186.

II. THE REMEDY PLAINTIFF SEEKS IS UNSUPPORTED AND UNLAWFUL

The proposed order accompanying EMILY's List's summary judgment motion would have the Court hold unlawful and "set aside" the regulations at issue. If this Court were to find for plaintiff on the merits, it should reject the request that it set aside the regulations. First,

> [a]s this Court recently noted, "'[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards.' Accordingly, it is up to the agency to determine how to proceed next — not for the Court to decide or monitor." *Hawaii Longline Ass'n v. National Marine Fisheries Serv.*, 281 F. Supp. 2d 1, 38 (D.D.C. 2003) (quoting *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999)) (internal citation omitted). Consequently, the Court does not believe that there is a basis for granting Plaintiffs' request for relief, and shall remand the case to the Commission for further action consistent with this opinion.

Shays v. FEC, 337 F. Supp. 2d 28, 130 (D.D.C. 2004). Second, plaintiff implicitly — and mistakenly — assumes that the prior regulations it favors would somehow spring back to life if the regulations at issue were vacated. But, as this Court noted in denying preliminary relief in the current case, such relief would in fact leave the Commission "in the position of either allowing these areas to go unregulated until final resolution of this case, or hastily cobbling together an alternative, interim set of regulations." *EMILY's List*, 362 F. Supp. 2d at 59. Thus,

---

[38] In *Shays v. FEC*, 337 F. Supp. 2d 28, 104 (D.D.C. 2004), this Court cited these passages in *McConnell* in criticizing the Commission for paying *too much heed* to federalism concerns.

even if the Court were to rule in favor of EMILY's List on the merits, there is no basis for awarding the extraordinary relief it requests.

III. CONCLUSION

For the reasons given above, the Federal Election Commission's motion for summary judgment should be granted, and plaintiff EMILY's List's motion for summary judgment should be denied.

Respectfully submitted,

/s/ Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

/s/ David Kolker
David Kolker
Acting Associate General Counsel
(D.C. Bar # 394558)

/s/ Harry J. Summers
Harry J. Summers
Acting Assistant General Counsel

/s/ Vivien Clair
Vivien Clair
Attorney

/s/ Greg J. Mueller
Greg J. Mueller
Attorney
(D.C. Bar # 462840)

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

October 9, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	STATEMENT OF
	)	MATERIAL FACTS
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Fed. R. Civ. P. 56(c) and LCvR 7(h) (D.D.C.), defendant Federal Election Commission ("Commission" or "FEC") presents the following statement of material facts as to which there is no genuine issue and that entitle the Commission to judgment as a matter of law:

A. The Parties

1. The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret and civilly enforce the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA"), 2 U.S.C. 431-455. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g.

2. The Commission is empowered to "formulate policy with respect to" the Act, 2 U.S.C. § 437c(b)(1), and to promulgate "such rules … as are necessary to carry out the provisions" of the Act. 2 U.S.C. § 437d(a)(8). *See also* § 438(a)(8) and (d).

3. Plaintiff EMILY's List has been registered with the Commission as a multi-candidate nonconnected political committee for more than 20 years. Complaint, filed Jan. 12,

2005 ("Complaint"), ¶ 10; Plaintiff's Statement of Material Facts, filed Sept 14, 2007, ¶¶ 20 & 25. *See also* 2 U.S.C. §§ 431(4)(A), 433(a), 441a(a)(4); 11 C.F.R. § 106.6(a).

4. EMILY's List has separate bank accounts to fund its federal ("hard money") and nonfederal ("soft money") activities, pursuant to 11 C.F.R. § 102.5(a). Complaint ¶ 10.

5. In the 2001-02 election cycle, EMILY's List raised more than $15.5 million in federal contributions. In this cycle, EMILY's List raised well over 5.5 million in non-federal funds. *See http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_02+C00193433* data from FEC Web Site) (Exh. 20). In this cycle, EMILY's List reported total federal disbursements of over $17.2 million, and total allocated spending of $11.2 million, which was financed with approximately $5.6 million in federal funds and $5.5 million in nonfederal funds. *See* EMILY's List, Form 3X Year-End 2001, *available at* http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/24873/; EMILY's List, Form 3X Year-End 2002, *available at* http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/45037/.

6. In the 2003-04 election cycle, EMILY's List raised more than $25 million in federal contributions. In this cycle, EMILY's List also raised well over $8 million in non-federal funds. *See* http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_04+C00193433 (Data from FEC Web Site) (Exh. 1). In this cycle, EMILY's List reported total federal disbursements of approximately $26 million, and total allocated spending of $16.2 million, which was financed with approximately $8.1 million in federal funds and $8.1 million in nonfederal funds. *See* EMILY's List, Form 3X Year-End 2003, *available at* http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/105765;
EMILY's List, Form 3X Year-End 2004, *available at* http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/161030/.

7. In the 2005-06 election cycle, EMILY's List again raised over $25 million in federal contributions. In this cycle, EMILY's List also raised well over $7.8 million in non-federal funds. *See* http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_06+C00193433 (data from FEC Web Site) (Exh. 2). In this cycle, EMILY's List reported total federal disbursements of over $26 million and total allocated spending of 15.3 million, which was financed with approximately $7.5 million in federal funds and $ 7.8 million in nonfederal funds. *See* EMILY's List, Form 3X Year-End 2005, *available at http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/201801/*; EMILY's List, Form 3X Year-End 2006, *available at http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/285957/.*

8. So far in the 2007-08 election cycle, EMILY's List has reported raising over $8.1 million in federal contributions and well over $2.9 million in nonfederal funds through August 31, 2007, the first third of the two-year reporting cycle. *See* http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_08+C00193433 (Data from FEC Web Site) (Exh. 19). In this same eight-month period, EMILY's List reported total federal disbursements of over $7.1 million, and total allocated spending of $5.9 million, which was financed with $2.9 million in federal funds and $2.9 million in nonfederal funds. *See* http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/303798/(Data from FEC Web Site).

9. EMILY's List's fundraising and spending totals in the first third of the 2005-2006 and 2007-2008 election cycles exceed the totals at the same point in the comparable election cycles of 2001-2002 and 2003-2004, respectively. In the presidential cycles in 2003-04 and 2007-08, EMILY's List raised, respectively, $8 and $8.1 million in federal funds through the first third of the cycles. *See* http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/95568/ (2003 data from FEC Web Site) and *supra* ¶ 8 (2007 data). In the first eight months of those

same two cycles EMILY's List engaged in, respectively, $1.8 and $5.9 million of total allocated spending (including federal and nonfederal dollars). *Id.* In the non-presidential cycles in 2001-02 and 2005-06, EMILY's List raised, respectively, $7.3 and $8.7 million in federal funds through the first third of the cycles. *See http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/20038/* (2001 data from FEC Web Site); http://query.nictusa.com/cgi-bin/dcdev/forms/C00193433/186639/ (2005 data from FEC Web Site). In the first eight months of those same two cycles EMILY's List engaged in, respectively, $3.1 and $3.8 million of total allocated spending (including federal and nonfederal dollars). *Id.*

10. EMILY's List has recently stated that it, as "the nation's largest political action committee, continues to be the dominant financial resource for Democratic candidates." *See* EMILY's List, Press Release, dated February 1, 2007, available at http://www.emilyslist.org/newsroom /releases/20070201.html. "EMILY's List is the biggest PAC, which means we have the most hard money, so it's not an issue of not having it," according to its president, Ellen Malcolm. Liz Sidoti, "Bush, Kerry to Pull Ads on Friday," Associated Press Newswires, June 7, 2004 (Exh. 3).

11. EMILY's List has regularly filed an H1 Schedule reporting the "allocation" ratio of federal and nonfederal dollars for shared administrative expenses and the costs of generic voter drives.[1] During the ten years leading up to the promulgation of the regulations at issue here, EMILY's List *never* reported less than a 50% allocation ratio for these activities or for

[1] Prior to the effective date of the new regulations, the H1 Schedule, submitted with the first report filed during a two-year election cycle, included an estimated allocation ratio based on the previous election cycle's payments for direct candidate support or on a reasonable estimate of the upcoming cycle's payments for support of federal and nonfederal candidates. 11 C.F.R. § 106.6(c)(1) (2004). *See infra* p. 5.

direct federal candidate support.[2] *See EMILY's List*, 362 F. Supp. 2d at 58 (finding that plaintiff does not dispute these facts). In fact, at the end of the 1995-96 election cycle EMILY's List reported a final allocation ratio of 70% federal candidate support and 30% nonfederal.[3]

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

1. The Notice of Proposed Rulemaking

12. On March 11, 2004, the Commission published a detailed NPRM proposing a variety of possible amendments to regulations regarding the definitions of "political committee," "contribution," "expenditure," and the allocation requirements for nonconnected committees. *See* Political Committee Status, Proposed Rule, 69 Fed. Reg. 11,736 (March 11, 2004) (Exh. 7). Following a four-week comment period, the Commission held public hearings on April 14 and 15, 2004. *Id.*

a. Proposed 11 C.F.R. 100.57: Solicitations

13. In the NPRM, the Commission sought public comment regarding a new rule establishing that any funds received in response to particular types of solicitation are "for the purpose of influencing any election for Federal office" and, therefore, "contributions" under FECA. 69 Fed. Reg. 11,743.

14. The NPRM included proposed regulatory text stating that any funds provided in response to a solicitation that contained "express advocacy" for or against a clearly identified

---

[2] *See* http://query.nictusa.com/cgi-bin/fecimg/?_25970012630+0, at 6 (final H1 for 2003-04 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_23990455760+0, at 5 (final H1 for 2001-02 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_21036814768+0, at 33 (final H1 for 1999-2000 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_99034233180+0, at 70 (final H1 for 1997-98 election cycle). *See* Exh. 5.

[3] Available at http://query.nictusa.com/cgi-bin/fecimg/?_97031750959+0, at 92 (Exh. 6).

federal candidate are contributions. 69 Fed. Reg. 11,757 (proposed section 100.57 as a part of Alternative 1-B) (Exh. 7).

15. The NPRM sought public comment regarding different ways the express advocacy standard could be applied to solicitations, such as requiring that the solicitation state that the funds will be used for express advocacy, or including solicitations that expressly advocate the election or defeat of federal candidates of a particular party without specific references to clearly identified candidates. 69 Fed. Reg. 11,743.

16. The Commission also sought public comment regarding other possible standards that could be applied to solicitations:

> Should the new rule use a standard other than express advocacy, such as a solicitation that promotes, supports, attacks, or opposes a Federal candidate, or indicates that funds received in response thereto will be used to promote, support, attack or oppose a clearly identified Federal candidate?

69 Fed. Reg. 11,743.

b. Proposed Changes to 11 C.F.R. § 106.6: Allocation of Expenses

17. The Commission also sought comment on a number of possible changes to the allocation rules for nonconnected committees. The NPRM explained that the focus of BCRA and the Supreme Court's opinion upholding it in *McConnell v. FEC*, 540 U.S. 93 (2003), on the Commission's allocation regulations for political party committees prompted the Commission to examine more closely the allocation regulations in 11 C.F.R. § 106.6. 69 Fed. Reg. 11,753.

18. The Commission sought public comment on the possibility of completely eliminating allocation to nonfederal accounts of any administrative expenses or generic voter drives costs for nonconnected committees (*id.*):

> Given *McConnell*'s criticism of the Commission's prior allocation rules for political parties, is it appropriate for the regulations to allow political committees

> to have non-Federal accounts and to allocate their disbursements between their Federal and non-Federal accounts? If an organization's major purpose is to influence Federal elections, should the organization be required to pay for all of its disbursements out of Federal funds and therefore be prohibited from allocating any of its disbursements?

19. A number of proposals in the NPRM would have imposed a minimum federal percentage on the funds expended method in 11 C.F.R. § 106.6(c). 69 Fed. Reg. 11,754 (Exh. 7). The NPRM sought comment on several possible examples of a minimum percentage, ranging from 15% to 50%. *Id.* The Commission also stated that it was "considering other minimum Federal percentages as alternatives to those presented in the proposed rules," and explicitly asked for comment on whether it "[s]hould … adopt a fixed minimum Federal percentage." *Id.*

20. The NPRM also sought public comment on proposals to change the allocation methods for certain voter drive activity and public communications that specifically mention federal candidates. 69 Fed. Reg. 11,753. The Commission proposed allocating the costs of public communications that promote or oppose a political party under the same method as administrative expenses in 11 C.F.R. § 106.6(c). 69 Fed. Reg. 11,753.

21. The Commission sought public comment on a proposal to create a new section, 11 C.F.R. § 106.6(f), requiring allocation of public communications that promote, attack, support, or oppose ("PASO"), or expressly advocate the election or defeat of, a clearly identified federal candidate and a political party. 69 Fed. Reg. 11,755. Proposed section 11 C.F.R. § 106.6(f) would have required a combined application of the time/space allocation method, similar to that used in 11 C.F.R. § 106.1, and the 11 C.F.R. § 106.6(c) method for these public communications. *Id.* This proposal was similar to the approach used by the Commission in Advisory Opinion

2003-37, which evaluated some post-BCRA allocation questions by a political committee under the rules in 11 C.F.R. § 106.6. *Id.*

2. Public Comment and Hearings on the NPRM

22. The Commission received more than 100,000 comments from political committees, political parties, nonprofit organizations, individuals, campaign finance organizations, and Members of Congress that addressed the many contentious regulatory questions being examined in this rulemaking. *See* Administrative Record, filed May 4, 2005, Index of Documents at 3-60 and AR Disks 2-5.

23. The Commission's two days of public hearings included 31 witnesses, representing numerous organizations with a broad range of opinions and concerns about many different issues. A number of commenters addressed allocation questions. Some supported the elimination of allocation in favor of requiring the use of 100% federal funds for all expenditures under 11 C.F.R. § 106.6, and some suggested abandoning the funds expended method entirely in favor of a simpler system. *See*, *e.g.*, Comments of Public Citizen, at 12-13 (April 5, 2004) (Exh. 8); Comments of Republican National Committee, at 7-8 (April 5, 2004) (Exh. 9).

24. Other commenters supported specific percentages to be used as a federal minimum for administrative expenses (*see* Comments of Democracy 21, Campaign Legal Center, Center for Responsible Politics, at 17-19 (April 5, 2004) (Exh. 10)), or simply urged the Commission to require a "significant minimum hard money share." *See* Comments of Senators McCain and Feingold, Representatives Shays and Meehan, at 3 (April 9, 2004) (Exh. 11).

25. At least one commenter suggested that public communications should be allocated either 100% federal or 100% nonfederal based upon whether federal or nonfederal

candidates were included in the communication. *See* Comments of Republican National Committee, at 7 (April 5, 2004) (Exh. 9).

26. One commenter argued that some revisions of the funds expended method would be too burdensome to committees because of the reporting and bookkeeping that would be required. *See* Comments of Media Fund, at 20 (April 5, 2004) (Exh. 12).

27. There was also testimony at the hearing regarding the complexities of the current allocation system and the proposal to move to a flat minimum federal percentage. *See* Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 14, 2004 ("Apr. 14 Tr.") at 160 (testimony of Craig Holman) (stating the current allocation ratio was "a mess" and suggesting "it would certainly be a healthier improvement to at least come out with some sort of fixed percentage, that is a clear bright line test of how much illegal money can be used in Federal elections") (Exh. 14).

28. Other witnesses testified that the current allocation scheme permitted circumvention of the rules in BCRA. *See*, *e.g.*, Apr. 14 Tr. at 158-59 (testimony of Craig Holman) (stating that nothing in FECA justifies any allocation ratio) (Exh. 14); Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 15, 2004 ("Apr. 15 Tr.") at 27-28 (testimony of Lawrence Noble) (stating that the funds expended allocation method allowed a "wholesale evasion of the soft money rules as applied to political organizations") (Exh. 15).

29. Witnesses specifically discussed the possibility of a 50% federal minimum for allocated expenses. *See*, *e.g.*, Apr. 15 Tr. at 80-84 (testimony of Robert Bauer, counsel for plaintiff in this case, representing ACT) (responding to possibility of 50% federal minimum and other allocation proposals) (Exh. 15); *id*. at 80 (testimony of Lawrence Noble) ("We do suggest

the 50 percent rule. You might be able to come up with a different line, but you did come up in the proposed rulemaking with one that's 50 percent").

30. Witnesses also addressed the Commission's proposal that money given in response to solicitations stating funds received would be used to support or oppose a federal candidate would be "contributions" under FECA. *See, e.g.*, Apr. 15 Tr. at 207-08 (testimony of Margaret McCormick) ("under the proposed notice of rulemaking, the idea is if you solicit contributions and you say that your solicitation specifically says it will be used to support or defeat a specific candidate, the idea is that the contributions come back in") (Exh. 15).

31. During the rulemaking at issue here, EMILY's List failed to file comments before April 9, 2004, the deadline for rulemaking comments. During the rulemaking, the Commission had indicated that it would not consider any late-filed comments. *See* Notice available at http://www.fec.gov/press/press2004/20040407advisory.html.

3. The Final Rules

32. The Final Rules and accompanying Explanation and Justification were published in the Federal Register on November 23, 2004, with an effective date of January 1, 2005. *See* Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (Exh. 13).

33. New section 11 C.F.R. § 100.57 includes a general rule establishing when funds received in response to certain solicitations must be treated as "contributions" under FECA, along with several exceptions to this rule "to avoid sweeping too broadly." 69 Fed. Reg. 68,056. 11 C.F.R. 100.57(a) states that all money received in response to a solicitation is a "contribution" under FECA if the solicitation "indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 69 Fed. Reg. 68,066.

34. The Commission also adopted final rules changing the allocation scheme for nonconnected committees in 11 C.F.R. 106.6. 69 Fed. Reg. 68,059-63. The Commission explained that examination of the public comments and the history of public filings regarding allocation by committees led it to conclude that a revised allocation method was needed to enhance compliance with FECA and make the system easier for committees to understand and follow, and for the Commission to administer. 69 Fed. Reg. 68,060.

35. The new 11 C.F.R. § 106.6(c) replaces the funds expended method with a flat 50% federal funds minimum for administrative expenses, generic voter drives, and public communications that refer to a political party without any reference to clearly identified candidates. 69 Fed. Reg. 68,062.

36. A new section 11 C.F.R. § 106.6(f), which governs certain public communications and voter drives, was also adopted. 69 Fed. Reg. 68,063. Public communications and voter drives that refer to one or more clearly identified federal candidates, but to no nonfederal candidates, must be financed with 100% federal funds, regardless of whether political parties are also mentioned. 69 Fed. Reg. 68,063; 11 C.F.R. § 106.6(f)(1). Conversely, public communications and voter drives that refer to a political party and only nonfederal candidates may be financed with 100% nonfederal funds. 69 Fed. Reg. 68,063; 11 C.F.R. § 106.6(f)(2). Public communications and voter drives that refer to both federal and nonfederal candidates are subject to a time/space allocation between federal and nonfederal

accounts, regardless of whether they also mention political parties. 69 Fed. Reg. 68,063; 11 C.F.R. § 106.6(f)(3).

Respectfully submitted,

/s/ Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

/s/ David Kolker
David Kolker
Acting Associate General Counsel
(D.C. Bar # 394558)

/s/ Harry J. Summers
Harry J. Summers
Acting Assistant General Counsel

/s/ Vivien Clair
Vivien Clair
Attorney

/s/ Greg J. Mueller
Greg J. Mueller
Attorney
(D.C. Bar # 462840)

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

October 9, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	Civ. No. 05-0049 (CKK)
	)	
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	STATEMENT OF
	)	GENUINE ISSUES AND
Defendant.	)	OBJECTIONS

DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF GENUINE ISSUES AND OBJECTIONS

Pursuant to Local Civil Rules ("LCvR") 7(h) and 56.1, defendant Federal Election Commission ("FEC" or "Commission") submits the following Statement of Genuine Issues and Objections to Plaintiff's Statement of Material Facts, filed September 14, 2007 ("Plaintiff's Statement"). This statement contains the Commission's responses and objections to the evidence adduced by plaintiff in support of its motion for summary judgment.

The Commission generally objects to Plaintiff's Statement because much of the factual material Plaintiff submits was not part of the Administrative Record in the rulemaking in which the Commission promulgated the regulations at issue here. This material is irrelevant and immaterial to the merits of this action because it was not before the Commission when the agency conducted that rulemaking. Such extra-record evidence cannot be considered because courts must "confine their review to the 'administrative record'" when they review agency decisions. *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996); *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997) ("It is a widely accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made"); *see Amfac Resorts, L.L.C. v. Dep't. of Interior*,

143 F. Supp. 2d 7, 11 (D.D.C. 2001) ("The rationale for this rule derives from a commonsense understanding of the court's functional role in the administrative state. . . . 'Were courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President. . . . '") (quoting *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1325-26 (D.C. Cir. 1984), *aff'd in relevant parts sub. nom.*, *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir. 1986) (*en banc*)). Because the court "should have before it neither more nor less information than did the agency when it made its decision," extra-record evidence should not be considered. *IMS*, 129 F.3d at 623 (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)).

The Commission also objects to plaintiff's statement of facts because it contains a series of legal arguments. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 153 (D.C. Cir. 1996) (finding it improper to "repeatedly blend[] factual assertions with legal argument").

In addition to these general objections, specific responses and objections are presented below in numbered paragraphs tracking the numbering scheme in Plaintiff's Statement.

1. This paragraph purports to describe Advisory Opinion 2003-37, a legal document that speaks for itself.

2. To the extent this paragraph purports to describe Advisory Opinion 2003-37, that legal document speaks for itself. To the extent this purported fact is a description by the Commission's staff of an advisory opinion, it is immaterial in this case.

3. The Commission admits that "[o]n March 11, the Commission issued a wide-ranging proposal of new regulations ... [that] addressed a variety of topics ...." To the extent this

paragraph purports to describe the NPRM issued by the Commission, it describes a legal document that speaks for itself.

4. This paragraph purports to describe the NPRM and Advisory Opinion 2003-37 issued by the Commission, legal documents that speak for themselves.

5-7. No response.

8. FEC's Statement of Material Facts, ¶¶ 22-30, controverts plaintiff's assertion that the Commission did not receive "significant comment" on the portion of the rulemaking that resulted in the regulations subject to challenge in this lawsuit. These facts describe the significant and wide ranging comments and testimony the Commission received on the portion of the rulemaking addressing the definition of "contribution," "expenditure," and the allocation requirements for nonconnected committees. As support for this purported fact, plaintiff cites the Final Rule and Explanation and Justification ("E&J"), 69 Fed. Reg. 68056, a legal document that does not support plaintiff's purported fact and speaks for itself.

9. This paragraph purports to describe regulatory provisions and the E&J, which speak for themselves. The Commission further objects to this fact's statement that the regulations "did not address unregistered 527 organizations," because the regulations the Commission promulgated apply to all groups, including Section 527 organizations.

10-12. These paragraphs purport to describe regulatory provisions and the E&J, which speak for themselves. To the extent these paragraphs contain any factual allegations beyond what is in the regulations and E&J, the paragraphs are not supported by any citation, in violation of the local rules. *See* LCvR 7(h) (statement of material facts "shall include references to the parts of the record relied on to support the statement").

13-14. No response.

15-17. These paragraphs describe an advisory opinion request EMILY's List made to the Commission and an advisory opinion issued by the Commission. These legal documents speak for themselves. To the extent these paragraphs contain legal argument, such argument is not properly included in a LCvR 7(h) Statement.

18. This paragraph describes an advisory opinion request EMILY's List made to the Commission and an advisory opinion issued by the Commission. These legal documents speak for themselves. To the extent this paragraph contains legal argument, such argument is not properly included in a LCvR 7(h) Statement. This fact is controverted by the record, which shows that the communication was not "solely on a ballot initiative," but also included a reference to a political party within the meaning of 11 C.F.R. § 106.6(c).

19. This paragraph describes an advisory opinion request EMILY's List made to the Commission and an advisory opinion issued by the Commission. These legal documents speak for themselves. To the extent this paragraph contains legal argument, such argument is not properly included in a LCvR 7(h) Statement.

20-24. The Commission does not dispute that EMILY's List is a political organization that works to elect women to office. These paragraphs rely on the Declaration of Britt Cocanour, filed September 14, 2007, as their lone source of evidentiary support. The Commission objects to these facts and the Cocanour Declaration as conclusory, speculative, and without foundation. These facts, reproduced verbatim from the declaration, contain conclusions that the declarant does not state are based upon her personal knowledge. *See Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) ("[a]ccepting such conclusory allegations as true, therefore, would defeat the central purpose of the summary judgment device").

25. The Commission does not dispute that EMILY's List is registered as a political committee with the Commission and that the organization's activities are subject to the source and amount restrictions in the Federal Election Campaign Act.

26. No response.

27-28. To the extent these paragraphs describe specific regulations, those regulations speak for themselves. To the extent the paragraphs contain legal conclusions, they are not properly included in a LCvR 7(h) Statement. The Commission objects to these paragraphs to the extent they suggest, inaccurately, that the Commission's rules "prevent" EMILY's List from spending non-federal funds on non-federal activities. The Commission also objects to these paragraphs to the extent they contain speculation about EMILY's List's future activities.

29-30. The Commission objects to these facts as conclusory, speculative, and without foundation, because they rely upon the Cocanour Declaration. *See supra* ¶¶ 20-24.

31. The Commission objects to this purported fact because it is vague, ambiguous, and conclusory. This paragraph provides no factual support, relying on a conclusory statement in a declaration. The paragraph fails to specify whether the "graduates" it describes worked solely on nonfederal races, or whether they spent significant time on federal races or generic campaign activity as well. The Commission also objects to this paragraph, for the same reasons listed above, because it relies upon the Cocanour Declaration. *See supra* ¶¶ 20-24.

32. To the extent this paragraph describes specific regulations, those regulations speak for themselves. To the extent this paragraph is a legal conclusion, it is unsupported and not properly included in a LCvR 7(h) Statement. The Commission also objects to this fact as conclusory, speculative, and without foundation, because it relies upon the Cocanour Declaration. *See supra* ¶¶ 20-24.

33. The Commission objects to this statement because it is vague, ambiguous, unsupported, and speculative. In addition, the evidence before the Court controverts this statement, because it shows that in the past EMILY's List did not exceed a fifty percent allocation ratio even before the challenged regulations went into effect. *See* FEC Fact ¶ 11. The Commission objects to this fact as conclusory, speculative, and without foundation, because it relies upon the Cocanour Declaration. *See supra* ¶¶ 20-24.

34. The Commission objects to this fact as conclusory, speculative, and without foundation, because it relies upon the Cocanour Declaration. *See supra* ¶¶ 20-24.

35-36. The Commission objects to these purported factual statements as vague, speculative, and without foundation, because they rely upon the Cocanour Declaration. *See supra* ¶¶ 20-24.

37. To the extent this paragraph describes specific regulations those provisions speak for themselves. To the extent this paragraph contains legal conclusions it is not properly included in a LCvR 7(h) Statement.

38-42. The Commission objects to these facts as conclusory, speculative, and without foundation, because they rely upon the Cocanour Declaration. *See supra* ¶¶ 20-24.

43. This paragraph describes regulations that speak for themselves and includes legal conclusions that are not properly included in a LCvR 7(h) Statement. The Commission also objects to these facts as conclusory, speculative, and without foundation, because they rely upon the Cocanour Declaration. *See supra* ¶¶ 20-24. The Commission further objects because under 11 C.F.R. 106.6(f), federal political committees like EMILY's List are not "forced" to stop identifying federal candidates in their advertising, but are merely required to finance public communications that clearly identify federal candidates at least in part with federal funds.

44. No response.

45. The Commission objects to this fact as conclusory, speculative, and without foundation, because it relies upon the Cocanour Declaration. *See supra* ¶¶ 20-24. This paragraph is vague and speculative to the extent it purports to state what EMILY's List "would have preferred" or "would have included" under some other undefined regulatory structure. The Commission also objects to the paragraph as conclusory, speculative, without foundation, and in violation of Fed. R. Civ. P. 26(a)(2), to the extent it purports to offer expert opinion testimony regarding which methods of advertising are "more effective" and regarding the "purpose" of some undefined category of political advertising.

46. The Commission objects to this paragraph because it contains legal conclusions that are not properly included in a LCvR 7(h) Statement. The Commission also objects to this paragraph to the extent it suggest that the Commission's rules require EMILY's list to forego any communications or use specific language in any communication. The Commission also objects to these facts as conclusory, speculative, and without foundation, because they rely upon the Cocanour Declaration. *See supra* ¶¶ 20-24.

47-48. The Commission objects to these facts as conclusory, speculative, and without foundation, because they rely upon the Cocanour Declaration. *See supra* ¶¶ 20-24. The Commission further objects because under 11 C.F.R. 106.6(f), federal political committees like EMILY's List are not "prevented" from including references to federal candidates, and are not "prohibited from spending nonfederal funds to influence nonfederal elections," but are merely required to finance public communications that clearly identify federal candidates at least in part with federal funds.

49. The Commission objects to this fact as conclusory, speculative, and without foundation, because it relies upon the Cocanour Declaration. *See supra* ¶¶ 20-24.

The Commission also objects to this paragraph to the extent it states, inaccurately, that EMILY's List has been and will be "impeded" in raising and spending funds for nonfederal purposes by Commission regulations, which merely implement federal contribution restrictions. Furthermore, this paragraph is controverted by the record (FEC Facts 5-9) which shows that the plaintiff's fundraising and spending has steadily increased over comparable election cycles since these rules went into effect (i.e., comparing presidential cycles to presidential cycles, non-presidential cycles to non-presidential cycles).

Respectfully submitted,

/s/ Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

/s/ David Kolker
David Kolker
Acting Associate General Counsel
(D.C. Bar # 394558)

/s/ Harry J. Summers
Harry J. Summers
Acting Assistant General Counsel

/s/ Vivien Clair
Vivien Clair
Attorney

/s/ Greg J. Mueller
Greg J. Mueller
Attorney
(D.C. Bar # 462840)

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

October 9, 2007