



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

**STATEMENT REGARDING EMILY'S LIST v. FEC**

**Vice Chairman MATTHEW S. PETERSEN and  
Commissioners CAROLINE C. HUNTER AND DONALD F. MCGAHN**

On September 18, 2009, the D.C. Circuit Court of Appeals held that the Commission may not enforce certain sections of its regulations because they are unconstitutional and exceed the Commission's statutory authority, and directed that they be vacated.<sup>1</sup> We agree with the *EMILY's List* decision. The court followed Supreme Court precedent in applying constitutionally sound reasoning. Thus, we did not support seeking a rehearing *en banc*. We set forth our reasoning in greater detail below.

In 2005, EMILY's List<sup>2</sup> sought an advisory opinion regarding an advertisement that would have referenced a U.S. Senator, but would not have aired in that Senator's home state, nor would it have referenced that Senator's election. The Commission decided that it had jurisdiction over such non-campaign related speech, and that under Commission regulations, EMILY's List would have to pay for the advertisement with so-called "hard dollars." EMILY's List filed suit against the Commission, challenging three regulations governing how such non-candidate, non-party committee groups may raise and spend money for grassroots and state and local electoral activity.

The D.C. Circuit Court of Appeals agreed with EMILY's List that the regulations are unconstitutional and exceed the Commission's statutory authority, and accordingly directed that they be vacated. The Office of General Counsel recommended that the Commission seek *en banc* review of the decision. In our view, that recommendation and related arguments did not address the central issue: Was the D.C. Circuit wrong when it held that the regulations go too far, and regulate activity unrelated to federal elections? In other words, can the Commission regulate an advertisement sponsored by a non-candidate, non-party grassroots organization, simply because it references a politician, even when that advertisement is not run in that politician's home state and does not mention her election? Because we agree with the D.C. Circuit that the Commission cannot regulate such speech, and that the regulations go too far and functioned as an impermissible spending limit, we could not support this recommendation.

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<sup>1</sup> *EMILY's List v. FEC*, No. 08-5422, 2009 WL 2972412 (D.C. Cir. Sept. 18, 2009).

<sup>2</sup> EMILY's List is a non-profit group that promotes certain female Democratic candidates.

Since joining the Commission, as is our obligation, when we have been called upon to apply the regulations at issue,<sup>3</sup> we have done so within the constitutional limits provided by Supreme Court precedent, even in the face of accusations that we were refusing to enforce the law.<sup>4</sup> We also expressed concern that these regulations might be in direct violation of the mandates of *Buckley v. Valeo* and its progeny and were being read by others at the Commission in a way that limited grassroots spending.<sup>5</sup> Although we had endeavored to avoid exceeding such established jurisdictional boundaries, others have taken a more activist, pro-regulatory approach – which has now been rejected by the D.C. Circuit. Ultimately, the challenged regulations limited the ability of EMILY’s List and others similarly situated to spend funds on state and local electoral and grassroots activity. This is not what Congress intended when it passed the Bipartisan Campaign Reform Act (“BCRA”).<sup>6</sup> Nor is it within the already-established limits of the Government’s jurisdiction, as defined by the courts.

The arguments most strongly advanced for petitioning a rehearing did not address defending the regulations, but rather attacked the constitutional analysis of the court. But we have no duty to attack a constitutional analysis that is based on, and not at odds with, well-established precedent. After all, we have taken an oath to “support and defend the Constitution.” Moreover, while the Commission has the power to promulgate rules to carry out the provisions of the statute and to defend the statute in court,<sup>7</sup> it is not our duty to defend fundamentally flawed regulations that, in our view (and that of three circuit court judges), are promulgated without any statutory basis and (according to two of those judges) violate the Constitution.<sup>8</sup>

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<sup>3</sup> See MURs 5977 and 6005 (American Leadership Project), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn. See also MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn.

<sup>4</sup> See, e.g., MUR 5541 (November Fund), Statement of Reasons of Commissioners Cynthia Bauerly and Ellen Weintraub at 6.

<sup>5</sup> Our position might have been different were the regulations not applied beyond the well-established limits of the Commission’s jurisdiction and in a manner inconsistent with the intent of at least one of the original supporters of the regulations. In fact, one former Commissioner, who was a Member when the regulations at issue were promulgated, opined that the regulations have been “implemented by the General Counsel in a way that is quite different from what the Commissioners thought they were passing in 2004.” Bradley Smith, “Will EMILY’s List be appealed?” (Sept. 29, 2009), available at <http://www.campaignfreedom.org/blog/detail/will-EMILYs-list-be-appealed>.

<sup>6</sup> See Letter to the Federal Election Commission from Members of Congress to the Federal Election Commission (Feb. 10, 2004) (signed by Nancy Pelosi, Steny H. Hoyer, and 56 other U.S. Representatives) (“We are writing to say for the record that, when we voted for BCRA, we voted to get federal elected officials and political parties out of the business of raising and spending soft money – monies that presented the clearest danger of creating the fact or appearance of corruption in our government. The law did not aim similar restrictions at other political organizations or public advocacy groups, so long as they are neither controlled by, nor coordinate their activities with political parties, candidates, officeholders, or their agents. In fact, it was our hope that BCRA would reinvigorate grassroots organizations to participate in the political process.”); see also Letter to the Federal Election Commission from Members of Congress to the Federal Election Commission (Feb. 12, 2004) (signed by eight U.S. Senators, echoing the same sentiment).

<sup>7</sup> 2 U.S.C. § 437d(a)(6).

<sup>8</sup> The decision whether to appeal a court decision or seek *en banc* review is much different than a determination of whether to authorize the Office of General Counsel to defend against a suit filed under

Seeking discretionary review would, after nearly five years of protracted litigation, only prolong unconstitutional restrictions on EMILY's List's spending. The continuation of an activist application of the challenged regulations would have the practical effect of extending uncertainty as to the effect and reach of these regulations, despite the panel's unanimity as to their illegitimacy. Such uncertainty chills public debate and causes some to hedge and trim their political activities.<sup>9</sup> This would be unacceptable.

Some have suggested that a review by the full D.C. Circuit would bring greater "clarity" to the law, particularly with respect to constitutional issues. We disagree. This decision is clear and, as the court deliberately set forth, flows directly from Supreme Court precedent. Moreover, a petition for rehearing *en banc* in a matter that concerns an aggrieved litigant seeking to exercise its rights is a far cry from the statutory provision permitting the Commission to seek judicial review of the constitutionality of the law.<sup>10</sup>

Finally, the Solicitor General recently represented to the Supreme Court that the Commission is more than capable of exercising discretion in areas of dubious constitutionality.<sup>11</sup> Perhaps exercising such discretion, and finding more of a middle

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2 U.S.C. § 437g(a)(8). In defending against an (a)(8) suit, the Commission merely explains why its decision to take no action on a complaint was not arbitrary and capricious or contrary to law; there is no implication that all Commission members necessarily agreed with the ultimate outcome in the enforcement matter. If the decision generates a split between Commissioners, the Commissioners voting against going forward on the complaint write a statement of reasons explaining their rationale; this statement generally forms the basis of the Commission's defense in the (a)(8) suit. Again, there is no plausible imputation of those views set forth in the statement on the rest of the Commission. In fact, Commissioners who wished to pursue the complaint are free to write their own statements explaining why they think the other Commissioners were wrong. *See, e.g., Public Citizen v. FEC*, No. 09-762 (D.D.C., filed April 24, 2009) and MURs 5694 and 5910 (Americans for Job Security) Statement of Chairman Walther and Commissioners Bauerly and Weintraub (arguing that the Commission should have taken further action on the plaintiff's complaint.). However, in situations like the *EMILY's List* case, if we were to support the petition for rehearing *en banc*, there would be no similar ability to disassociate ourselves from arguments with which we strongly disagree.

<sup>9</sup> *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007) (warning the Commission about rules which give rise to "a burdensome, expert-driven inquiry, with an indeterminate result," which will "unquestionably chill a substantial amount of political speech," and reiterating that it "must give the benefit of any doubt to protecting rather than stifling speech").

<sup>10</sup> 2 U.S.C. § 437h.

<sup>11</sup> *See* Transcript of Oral Argument at 65-67, *Citizens United v. FEC*, No. 08-205 (S. Ct. argued Sept. 9, 2009) (Solicitor General Kagan told the Supreme Court that "although [the Act] does cover full-length books," "the FEC has never applied [it] in that context," "there has never been an enforcement action for books," and there has been no administrative practice of ever applying it to books," suggesting the Commission's ability to exercise discretion in areas of constitutional doubt.). The issue has arisen, however, in other contexts. *See* MUR 5642 (George Soros) (three Commissioners voted to authorize suit against George Soros for failing to report to the Commission the costs associated with promoting his book, which expressly advocated the defeat of President George W. Bush). *See also FEC v. Forbes*, 98 Civ. 6148 (S.D.N.Y. Aug. 21, 1998) (the Commission asked the court to find that bi-weekly columns authored by the candidate in Forbes Magazine resulted in knowing violations of the Federal Election Campaign Act by the candidate, the magazine, and his campaign committee); *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981) (plaintiff sought to block the Commission from investigating a video-taped reenactment of Senator Edward Kennedy's automobile accident at Chappaquiddick, which was produced in

ground of the sort we have suggested previously, might have avoided the court's decision in EMILY's List. Regardless, we hope that in the future, the Commission can exercise such judgment, and accept that it cannot suppress protected speech as a means to regulate activities within its jurisdiction. Instead, to truly accomplish its mission, the Commission must ensure that its actions are within proper jurisdictional limits (provided by the statute as limited by the courts), so as to set forth a more consistent and thus effective administration and enforcement of the rule of law.

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None of the arguments in favor of seeking *en banc* review of the court's decision is persuasive to us. Those who have supported a more activist, pro-regulation approach argue that the D.C. Circuit did not need to reach the constitutional issues to rule in favor of EMILY's List, but could have simply declared the Commission's action to be beyond its statutory authority (a conclusion reached by all three judges). But this ignores how the parties presented and argued the issues in the case. First, the plaintiff unambiguously raised the constitutional issue in its initial complaint, filed in 2005. And the plaintiff clearly maintained its constitutional argument throughout the case, most recently in its reply brief, arguing that: "[t]he regulations at issue in this case violate the First Amendment, *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, and the Administrative Procedures Act."<sup>12</sup> The Commission itself heightened the importance of the constitutional issues by relying on Supreme Court cases regarding the constitutionality of regulating the spending of independent individuals and groups of individuals. Specifically, the Commission cited the Supreme Court's decision in *FEC v. California Medical Association* for the proposition that the Court had already upheld this sort of regulation against constitutional attack (which, in our view, overstated the holding of that case, but in any event, invited the constitutional issue).<sup>13</sup> Thus, the D.C. Circuit decided the issues that were presented by the parties.

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connection with the publication of a February 1990 *Reader's Digest* article about Senator Kennedy, who was a candidate for President at the time of publication).

<sup>12</sup> Reply Brief of Plaintiff-Appellant EMILY's List at 1, *EMILY's List*, No. 08-5422 (D.C. Cir.) (Mar. 26, 2009) (internal citations omitted); *id.* at 7 ("The question for this court now becomes whether [the regulations] pass constitutional, *Chevron*, and APA muster.").

<sup>13</sup> See Motion for Summary Judgment of Defendant Federal Election Commission at 19, No. 05-0049 (D.D.C. 2005) (Jun. 6, 2005) ("Finally, plaintiff's claim that the new regulations will impose 'severe restrictions' on its political speech is unsupported in fact or in law. Indeed, this Court stressed that the new rules do not 'prevent Plaintiff from engaging in whatever political speech it seeks to undertake,' quoting *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,' and concluding that in the same way, plaintiff here may engage in the same speech as before 'but may be required to raise money from a greater number of donors.' *Plaintiff's brief offers no reason for revising this conclusion, and has thus failed to establish any constitutional or statutory right to the prior allocation system.*") (internal citations omitted) (emphasis added); Brief for the Federal Election Commission, *EMILY's List*, No. 05-5160 (D.C. Cir.) (Oct. 12, 2005) at 21 (citing *Cal. Med. Ass'n v. FEC* ("*Cal Med*"), 453 U.S. 182, 197-98 (1981) as "upholding contribution limits applied to independent political committees"). Cf. MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 5, n. 21 (recognizing that the Court in *Cal Med* upheld political committee contribution limits to a multicandidate political committee that made direct contributions to candidates but noting a potentially different result if contribution limits were applied to an independent speech group).

We find it curious that those who attack the court's opinion also attempt to find solace in Judge Brown's concurring opinion, which they treat as if it were a dissent.<sup>14</sup> It is not. After all, Judge Brown joined in the result, and much of the rationale of the court. As for the points of disagreement, the majority explicitly addressed the concerns raised by Judge Brown. And even more so than the majority, Judge Brown pulled no punches when discussing her views about the Commission and the regulations it promulgated:

- “By the plain language of the Federal Election Campaign Act (FECA), the FEC lacks the power it now asserts.”<sup>15</sup>
- “Here, the FEC has set aside Congress's command that the agency's jurisdiction be bounded by the ‘purpose’ for which money is spent. Instead of strictly minding this jurisdictional marker, the FEC conclusively presumes a federal purpose drives any spending that might influence a federal election.”<sup>16</sup>
- “In an age when even pizza shops and used-car dealers invoke the stereotype of wasteful federal spending to sell their wares, the FEC's lack of sophistication [in applying a mere reference standard] is startling.”<sup>17</sup>
- “My colleagues' distaste for the FEC's handiwork is to their credit. It shows they take the First Amendment seriously. And they are right, of course, that if constitutional law were better acquainted with the Constitution, regulations such as these would never survive Article III scrutiny.”<sup>18</sup>

It is also strange that those who so fervently support the regulation of independent speech would embrace an opinion that provides the following view of the Supreme Court's campaign finance jurisprudence:

While I have argued courts should not unnecessarily assail legislative acts, political speech is the core of what the First amendment protects. From *Buckley* to *McConnell* the Court has relied on an *ad hoc* empiricism ill-suited to the complex interactions of democratic politics. The government has unlimited resources, public and private, for touting its policy agenda. Those on the outside – whether voices of opposition, encouragement, or

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<sup>14</sup> See, e.g., Press Release, Democracy 21, EMILY's List v. FEC: A Case of Extreme Judicial Overreaching by a D.C. Circuit Court of Appeals Panel (Sept. 29, 2009), available at [http://www.democracy21.org/index.asp?Type=B\\_PR&SEC={91FCB139-CC82-4DDD-AE4E-3A81E6427C7F}&DE={D8691495-21FD-418E-B421-447645D35507}](http://www.democracy21.org/index.asp?Type=B_PR&SEC={91FCB139-CC82-4DDD-AE4E-3A81E6427C7F}&DE={D8691495-21FD-418E-B421-447645D35507}) (last visited Oct. 21, 2009) (“Given the strong objections raised by Judge Brown to the majority's opinion, the FEC should appeal the decision to the full Court of Appeals for *en banc* review,” according to Fred Wertheimer, President of Democracy 21.”).

<sup>15</sup> *EMILY's List* at \* 18 (opinion of Brown, J., concurring).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at \*19 (opinion of Brown, J., concurring).

<sup>18</sup> *Id.* at \*24 (opinion of Brown, J., concurring).

innovation – must rely on private wealth to make their voices heard. An increasingly anomalous campaign finance jurisprudence only impoverishes this essential debate. *McConnell*'s careless invocation of access and influence (two integral aspects of political participation) as synonyms for corruption is instructive. Such an expansive, self-referential, and amorphous definition of corruption, coupled with lax standards of scrutiny and a willingness to accept as “evidence” any plausible theory of corruption or claim of circumvention, is likely to doom any argument for protection of core political speech. Someday the Supreme Court may be persuaded to reconsider this approach. But that cannot be our task.<sup>19</sup>

Second, conspicuously absent from the analysis of those who support further review is any persuasive discussion of whether or why the court would grant *en banc* review, or assuming such review is granted, the likelihood of success on the merits. The applicable rule states that:

An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.<sup>20</sup>

Thus, *en banc* review is solely within the discretion of the court and is warranted in only rare circumstances.<sup>21</sup> These circumstances do not exist here. There have been no intervening changes in the law from the time the case was argued in May 2009 to the time the decision was rendered in September 2009 that would warrant reconsideration. There is no intra-circuit discord. Nor did the decision create a split among the circuits. In addition, the underlying issue is not of the sort that has been considered “of exceptional importance” by the courts.<sup>22</sup> The court did not strike a statute nor reverse any sort of long-standing Commission interpretation of the Federal Election Campaign Act of 1971 (“the Act”).<sup>23</sup> What were at issue were three rather recently promulgated regulations.

Two of these regulations required federal political action committees to pay certain costs with a fixed percentage of “hard money” regardless of whether a committee's actual federal election-related spending constituted that percentage of its overall spending. Specifically, a political committee was required to pay for

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<sup>19</sup> *EMILY's List* at \*30 (opinion of Brown, J., concurring).

<sup>20</sup> Fed. R. App. P. 35(a).

<sup>21</sup> According to information provided to the Commission in 2008 by the Office of General Counsel, over the past twenty years, the D.C. Circuit has granted rehearing *en banc*, on average, in only three cases each year.

<sup>22</sup> For example, these regulations are no more exceptional than the regulations that the D.C. Circuit invalidated in *FEC v. Shays* (“*Shays I*”). There the Commission sought *en banc* review of the D.C. Circuit Court of Appeal's decision regarding the so-called “soft money” regulations promulgated pursuant to BCRA, but the request was denied. *Shays, et al. v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), petition for reh'g *en banc* denied, No. 04-5352 (D.C. Cir. Oct. 21, 2005).

<sup>23</sup> We view such instances as different, which is why we did not object to the filing of an *amicus* brief to the Ninth Circuit in *U.S. v. O'Donnell*, C.D. Cal., Criminal No. 08-872 (2009), where a district judge in a criminal case held that a long-standing agency interpretation was inconsistent with the statute.

administrative expenses with at least 50 percent federal funds, regardless of the amount actually spent for a federal purpose. Certainly, this regulation was intended to be a much-needed simplification of the prior regulatory scheme.<sup>24</sup> But as a practical matter, very few political committees opted to come within the reach of this regulation – of the approximately 2,000 political committees that file with the Commission, only about 30 sought to use non-federal funds (so-called “soft money”) for a portion of their overhead expenses. Similarly, a political committee producing a public communication with a non-federal purpose (such as opposing a state ballot initiative) and merely referencing a clearly identified federal candidate but no clearly identified non-federal candidate would have to pay for it with 100 percent “hard money.” Despite its simplicity, the court found that the one-size-fits-all approach of these regulations, which did not accurately reflect a committee’s actual Federal election-related spending, was really an impermissible spending limit.

Under the guise of imposing contribution limits, the third regulation formalized the Commission’s effort to limit the ability of outside individuals and groups of individuals to spend on issue advertisements. In reality, since its promulgation, it has been the basis for only one enforcement matter.<sup>25</sup> Nevertheless, this approach, which, in our view, runs afoul of the distinction between a “contribution” and “expenditure,” was really a spending limit of the sort already deemed unconstitutional by the Supreme Court. Such efforts to limit independent spending have been met with judicial hostility.<sup>26</sup>

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<sup>24</sup> Under the old rule, the overhead ratio was calculated based upon an estimate of what the committee anticipated to be the ratio of the committee’s own contributions to federal and state/local candidates. This estimate would then be adjusted periodically, within certain time limits and based upon actual spending. This approach was so confusing, the Commission abandoned it. However, the Commission failed to articulate a reasonable basis for imposition of a 50 percent ratio, other than it being a bright line. *See* Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5603 (Feb. 7, 2007) (stating that the new regulations will “curtail longstanding complaints that the Commission’s allocation regulations have permitted non-Federal funds to substantially subsidize the overhead and day-to-day operations of the organization’s Federal activity.”). *See also* Reply Brief of Plaintiff-Appellant EMILY’s List at 9, *EMILY’s List*, No. 08-5422 (D.C. Circuit) (Mar. 26, 2009) (“The Commission does not explain why, in setting the allocation ratio for administrative and generic expenses, the Commission chose to round to the nearest 50 percent. It fallaciously assumed that, because a political organization does two things at the same time, it must be doing both in equal measure.”).

<sup>25</sup> MURs 5977 and 6005 (American Leadership Project).

<sup>26</sup> These flawed regulations were nothing more than yet another back-door impermissible limit on independent spending, designed to avoid both the mandates of long-standing Supreme Court precedent beginning with *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), and the statutory limits of the Commission’s jurisdiction. Such efforts by the Commission, and the subsequent rejection of its theories by the courts, are not new. Years ago, the Commission attempted to limit spending by employing amorphous content restrictions. *See, e.g., Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1036 (1998) (striking down a Commission regulation requiring voter guides to provide equal space to candidates, a content restriction, by narrowly construing the Act to avoid First Amendment concerns), *FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff’d per curiam*, 92 F.3d 1178 (4th Cir. 1996) (affirming the district court’s dismissal of a case brought by the Commission against a group that had made independent expenditures, concluding that “the Defendants’ advertisements represent the very type of issue advocacy the *Buckley* Court sought to exempt from government regulation.”). Then, after that was rejected, the Commission undertook a number of high-profile and costly investigations based upon unspecified theories of “coordination,” which met a similar fate in the courts. *See, e.g., FEC v. Christian Coalition*, 965 F. Supp. 66 (D.D.C. 1997); 52 F. Supp.2d 45 (D.D.C. 1999). The Commission then

Therefore, given that the Supreme Court in *Buckley* held spending limits unconstitutional, the D.C. Circuit was properly applying the logic of well-established precedent<sup>27</sup> when it held that, regardless of how contributions are solicited:

[i]f one person is constitutionally entitled to spend \$1 million to run advertisements supporting a candidate (as *Buckley* held), it logically follows that 100 people are constitutionally entitled to donate \$10,000 each to a non-profit group that will run advertisements supporting a candidate.<sup>28</sup>

Moreover, these regulations were based upon a number of flawed premises, championed by a handful of self-styled “reform” groups as a way to equalize and limit speech.<sup>29</sup> For example, the Commission had presumed that simply because a portion of an entity’s activity came within its jurisdiction (*i.e.*, activity related to Federal elections), it was then free to regulate all its activities (*i.e.*, activity related to state and local elections).<sup>30</sup> The Commission also assumed that it could, without a grant of statutory

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attempted to limit spending by way of creative “contribution” limits – which the D.C. Circuit has now vacated. *See also* Comments of Perkins Coie LLP Political Law Group at 3, Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74495 (Dec. 8, 2008) (“[The Commission’s] efforts to propound and enforce an ‘electioneering message standard in the 1990s were unsuccessful, with great cost resulting to the respondents who were burdened with opposing it in administrative and court litigation (citing *Colorado Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 613 (1996); *Clifton*, 114 F.3d at 1309). Its more recent efforts to use a disclaimer case, *FEC v. Survival Educ. Fund, Inc.*, 65 F. 3d 285 (2d Cir. 1995), as the basis to impose political committee status on unregistered nonprofit organizations, seems similarly flawed.”).

<sup>27</sup> *See Miller v. Gammie et al.*, 335 F.3d 889, 900 (9th Cir. 2003) (discussing the applicability of Supreme Court precedent to an appellate court’s decision making, including *en banc* review) (citing *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J. concurring in part and dissenting in part (“As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of prior cases, but also to their explications of the governing rules of law.”); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989) (describing lower courts as being bound not only by the holdings of higher courts’ decisions, but also by their “mode of analysis”).

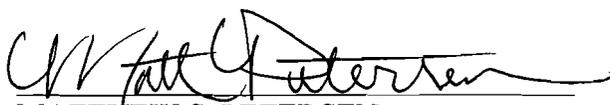
<sup>28</sup> *EMILY’s List* at \*6.

<sup>29</sup> *See, e.g.*, Comments of Democracy 21, Campaign Legal Center & Center for Responsive Politics in Response to Notice of Proposed Rulemaking, No. 2004-6 at 1-2 (Apr. 5, 2004) (criticizing “the spending of tens of millions of dollars of soft money explicitly for the purpose of influencing the presidential election by section 527 groups.”). *But see* Richard A. Hasen, *Level Playing Field – The Law May Allow Ads Attacking the Democratic Presidential Nominee to Go Unanswered*, Slate (Jan. 28, 2004), available at <http://slate.msn.com/id/2094599/> (“But as long as it is impermissible (under *Buckley*) to limit what individuals such as [George] Soros can independently spend on an election, there is little justification for limiting the amount they can contribute to other groups for the same spending if those groups are unaffiliated with, and do not contribute to, candidates or parties.”). As we previously explained, in our view merely because the Court in *McConnell* permitted Congress to impose more onerous restrictions on party committees does not then mean that similar restrictions may be applied to independent speech groups. MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 5, n.21.

<sup>30</sup> *See* MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 6, n.24 (“Certainly, merely because some portion of an entity’s activities come within an agency’s jurisdiction does not mean that the agency is free to regulate all of its activities, *i.e.*, those that do not influence federal elections.”). *See also* Reply Brief of Plaintiff-Appellant EMILY’s List at 9, *EMILY’s List*, No. 08-5422 (D.C. Circuit) (Mar. 26, 2009) (“just

authority, impose a regulatory regime on outside groups similar to that placed upon party committees by Congress. The Commission also believed that the mere reference to a Federal candidate – regardless of whether that reference was campaign related – was enough upon which to assert jurisdiction.

That all of this goes too far is best illustrated by an example cited by the court: under the challenged regulations, so-called “hard money” had to be used to pay for an advertisement, running only in California, in which Senator Jones from Maine endorses Candidate Smith for Governor of California.”<sup>31</sup> And this was not mere speculation by the D.C. Circuit. It was this mindset that caused the Commission in AO 2005-13 (EMILY’s List) to opine that advertisements that merely referenced a U.S. Senator, but were to be run outside of the Senator’s home state and did not reference the Senator’s candidacy could be regulated by the Commission.<sup>32</sup> Rather than continuing to pursue untenably expansive interpretations, we can and should work to craft regulations and enforce the law within the bounds of the Act and the First Amendment as interpreted by the Court. Because this regulatory scheme went too far, we could not vote to seek *en banc* review of the D.C. Circuit Court of Appeals’ decision in *EMILY’s List v. FEC*.

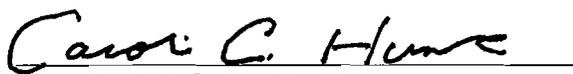


MATTHEW S. PETERSEN

Vice Chairman

10/22/2009

Date

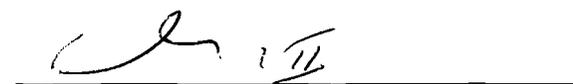


CAROLINE C. HUNTER

Commissioner

10/22/2009

Date



DONALD F. MCGAHN II

Commissioner

10/22/09

Date

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because it is impossible for the Commission to regulate with a scalpel does not mean it may still use a chainsaw”).

<sup>31</sup> *EMILY’s List* at \*14.

<sup>32</sup> AO 2005-13 (EMILY’s List) at 3-4 (requiring EMILY’s List to use 100 percent federal funds to pay for a public communication “in support of efforts on behalf of state legislative candidates that will refer to United States Senator Debbie Stabenow, but will not refer to any clearly identified non-Federal candidates... will not be distributed in the Senator’s home state, will not reference the Senator’s candidate for re-election, and will not solicit funds for her campaign.”).