ORAL ARGUMENT REQUESTED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5422

EMILY'S LIST,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF PLAINTIFF-APPELLANT EMILY'S LIST

Dated: January 26, 2009

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Plaintiff-Appellant EMILY's List submits this certificate as to parties, rulings, and related cases.

PARTIES

The parties and amici that appeared before the district court were EMILY's List, plaintiff; Federal Election Commission, defendant; and Campaign Legal Center, Center for Responsive Politics, Democracy 21, Senator Russell Feingold, Senator John McCain, Representative Martin Meehan, and Representative Christopher Shays, amici.

RULINGS UNDER REVIEW

The ruling at issue in this Court is the order of the District Court for the District of Columbia by United States District Judge Colleen Kollar-Kotelly, entered on July 31, 2008. The official citation is 569 F. Supp. 2d 18 (D.D.C. 2008)

RELATED CASES

The case on review was previously before this Court on an appeal by EMILY's List of the district court's denial of plaintiff's motion for a preliminary injunction. This Court affirmed. *EMILY's List v. FEC*, 362 F. Supp. 2d 43 (D.D.C. 2005), *aff'd*, 170 Fed. Appx. 719 (D.C. Cir. 2005) (per curiam) (No. 05-5160). There are no related cases currently pending in this Court or in any other court of which counsel is aware.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Plaintiff-Appellant EMILY's List hereby submits its corporate disclosure statement.

(a) EMILY's List has no parent company, and no publicly held company has a 10 percent or greater ownership interest in EMILY's List.

(b) EMILY's List is a political organization whose purpose is to recruit and fund viable women candidates; to help them build and run effective campaign organizations; and to mobilize women voters to help elect progressive candidates across the country. Since its organization 24 years ago, EMILY's List has helped to elect 78 Democratic women to the U.S. House of Representatives, 15 to the U.S. Senate, 9 to governorships, and over 364 to other state and local offices. EMILY's List is a nonconnected committee that is registered with, and reports to, the Federal Election Commission. EMILY's List also raises and disburses funds for the purpose of influencing state and local elections. EMILY's List reports its nonfederal receipts and disbursements to the Internal Revenue Service in accordance with 26 U.S.C. § 527(j), and to state authorities as required by applicable state law.

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GLOSSARY

ABC	Americans for a Better Country
ACT	America Coming Together
APA	Administrative Procedure Act
BCRA	Bipartisan Campaign Reform Act of 2002
FEC or the Commission	Federal Election Commission
FECA	Federal Election Campaign Act
JA	Joint Appendix
MUR	Matter Under Review
NPRM	Notice of Proposed Rulemaking

I. STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, because the case arises under the First Amendment and the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706. This Court has jurisdiction under 28 U.S.C. § 1291 over EMILY's List's timely appeal, filed September 25, 2008, from the district court's grant of summary judgment to the Federal Election Commission and its denial of EMILY's List's motion for summary judgment, entered July 31, 2008. (Joint Appendix ("JA") at 195).

The district court correctly found that EMILY's List has standing to challenge the Commission's allocation and solicitation regulations under Article III of the United States Constitution. *EMILY's List v. FEC*, 569 F. Supp. 2d 18, 37 (D.D.C. 2008) (JA at 153).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Do the Commission's solicitation and allocation regulations, codified at 11 C.F.R. §§ 100.57 and 106.6, violate the First Amendment of the United States Constitution?

II. Do the Commission's solicitation and allocation regulations exceed the Commission's statutory authority?

III. Are the Commission's solicitation and allocation regulations arbitrary and capricious?

III. STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are set out in the Addendum to this brief.

IV. STATEMENT OF THE CASE

On January 12, 2005, Plaintiff-Appellant EMILY's List filed a complaint in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against the Federal Election Commission. (JA at 9). The complaint alleged that new

regulations promulgated by the Commission severely restricted EMILY's List's decades-long program of supporting women candidates for public office. (JA at 10-11). The regulations changed how political committees could allocate spending between federal and nonfederal funds.[1] They required certain nonfederal political activity to be paid for with federal funds, which are subject to the strict source and amount limitations of the Federal Election Campaign Act of 1971, Pub. L. No. 92-255, 86 Stat. 3, codified at 2 U.S.C. § 431 *et seq.* ("FECA"). 11 C.F.R. § 106.6. The Commission also required political committees to treat as federal "contributions" the proceeds of fundraising solicitations that "indicate[]" they will be used to support a clearly identified federal candidate. *Id.* § 100.57(a). EMILY's List alleged that these regulations violated the First Amendment, exceeded the Commission's statutory authority, and were arbitrary, capricious, and an abuse of discretion. (JA at 10).

On the same day the complaint was filed, EMILY's List moved for a preliminary injunction. On February 25, 2005, the district court denied the motion. *EMILY's List v. FEC*, 362 F. Supp. 2d 43 (D.D.C. 2005) (JA at 33). Without reaching the merits, this Court affirmed the denial of the motion in an unpublished disposition, finding that the district court did not abuse its discretion. *EMILY's List v. FEC*, 170 Fed. Appx. 719 (D.C. Cir. 2005) (per curiam).

The district court then took up the case on the merits. The parties filed cross-motions for summary judgment. On July 12, 2007, the court ordered updated motions in light of the Supreme Court's decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL*") – which, according to the court, "significantly impacted a

[1] "Federal" funds, also referred to as "hard money," are funds that are subject to FECA's source and amount limitations, and disclosure requirements. *McConnell v. FEC*, 540 U.S. 93, 122 (2003). "Nonfederal" funds, or "soft money," are funds raised outside of these limits. *Id.* at 123.

number of the arguments raised by the parties." (JA at 6, Dkt. No. 29). And yet, on July 31, 2008, the court still granted summary judgment to the FEC, finding that WRTL "does not control the Court's analysis." *EMILY's List v. FEC*, 569 F. Supp. 2d 18, 41 (D.D.C. 2008) (JA at 160). EMILY's List timely appealed. (JA at 195).

V. STATEMENT OF THE FACTS

A. Description of EMILY's List

EMILY's List is a nonprofit corporation, incorporated under the laws of the District of Columbia, whose purpose is to recruit and fund women candidates for local, state, and federal office; to help them build and run effective campaign organizations; and to mobilize women voters to help elect progressive candidates across the country. (JA at 69). EMILY's List identifies opportunities to elect pro-choice Democratic women to local, state and federal office, recruits qualified candidates, trains them to be effective fundraisers and communicators, and works with them throughout the campaign to make sure that they are executing winning strategies. EMILY's List also works through its Women Vote! program to mobilize women voters for local, state, and federal elections through broadcast advertising, web sites, direct mail and personal voter contact. (JA at 69).

EMILY's List was founded in 1985. At that time, no Democratic woman had ever been elected to the United States Senate in her own right, no woman had ever been elected governor of a large state, and the number of Democratic women in the United States House of Representatives had declined to 12. (JA at 70). Since 1985, EMILY's List has helped to

elect 78 Democratic women to the U.S. House, 15 to the U.S. Senate, 9 to governorships, and over 364 to other state and local offices.[2]

The federal account of EMILY's List is a nonconnected political committee[3] that is registered with, and reports to, the Federal Election Commission. For the purpose of raising and disbursing funds for nonfederal elections, EMILY's List also maintains a nonfederal account. This account accepts funds from sources, and in amounts, that the states authorize for use in supporting local and state candidates, but that may not be permissible under federal campaign finance law for the support of federal candidates. (JA at 70). EMILY's List reports its nonfederal receipts and disbursements to the Internal Revenue Service in accordance with section 527(j) of the Internal Revenue Code, 26 U.S.C. § 527(j), and to state authorities as required by applicable state law.

All of EMILY's List's disclosure reports to the FEC and the IRS are publicly available on those agencies' respective Web sites.

B. "Allocation" Under the Former Regulatory Regime

Like other national political organizations, EMILY's List conducts a number of activities, such as voter identification, voter registration, get-out-the-vote and generic voter mobilization activities, which affect both federal and nonfederal elections. In addition, EMILY's List has certain fixed administrative and overhead costs, such as rent, salaries, supplies, and the like. For more than 25 years, the FEC provided for an "allocation" procedure to ensure that a political committee paid for those particular expenses attributable

[2] EMILY's List site, Women We Helped Elect, http://www.emilyslist.org/about/women_we_helped_elect/ (last visited Jan. 26, 2009).

[3] A "nonconnected committee" is a political committee that is not a party committee, an authorized committee of a candidate, or a separate segregated fund established by a corporation or labor organization. 11 C.F.R. § 106.6(a).

to federal elections with federal funds, and those particular expenses attributed to state and local elections with state funds. Fixed overhead costs were paid with both federal and state funds, on a ratio approximating the level of federal versus nonfederal activities undertaken by the committee. *See* 11 C.F.R. § 106.6 (2004).

For example, until the adoption of the new rules effective January 1, 2005, the regulation governing the allocation of administrative and generic voter drive expenses was based on the "funds expended" method. *Id.* § 106.6(c). Purely federal activity was paid for out of the federal account; purely nonfederal activity was paid for out of the nonfederal account. Payment for administrative expenses and for generic voter drives – that is, voter drives that did not refer to particular candidates – was made using funds from both accounts. In this last case, political committees paid the costs on the basis of the ratio of its direct support of federal candidates to its direct support of all candidates, federal and nonfederal. The rule called for precision in calculating and adjusting this ratio during an election cycle, requiring political committees to revise the ratio as required by its actual record of support given to both federal and nonfederal candidates.

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

C. BCRA and Allocation by Party Committees

Prior to 2002, *political party committees* were also allowed to allocate their expenses for mixed federal and nonfederal expenses, such as get-out-the-vote drives and generic party advertising. Unlike nonconnected committees, party committees allocated their expenses according to fixed percentages, rather than the funds expended method. 11 C.F.R. §§ 106.5(b)(2), (c)(1)(i) (2002).

This changed when Congress passed the Bipartisan Campaign Reform Act of 2002. BCRA was passed to stem the influence of soft money raised and spent by state and national party committees with the participation of federal officeholders and candidates. National parties would raise large amounts of unregulated soft money and transfer it to the state parties that could use a larger percentage of soft money to finance mixed-purpose activities that would help elect federal candidates. *McConnell v. FEC*, 540 U.S. 93, 124 (2003). Federal candidates would, in turn, solicit soft money for the parties, directing potential donors to party committees that could accept soft money. *Id.* at 125. According to a report issued by the Senate Committee on Governmental Affairs, parties would promise donors special access to candidates and government officials in exchange for soft money contributions. *Id.* at 130. The perceived danger was that unlimited soft money, received by parties maintaining close association with their candidates, would result in actual or apparent corruption. In response, BCRA banned national political parties from raising or spending soft money. 2 U.S.C. § 441i(a). BCRA also prohibited state parties from using soft money for specific types of "federal election activity," including voter identification, generic party advertisements, and communications that promote, support, attack, or oppose federal candidates. *Id.* §§ 431(20), 441i(b). In *McConnell v. FEC*, the Supreme Court upheld the

constitutionality of these provisions, relying heavily on the risks presented by the special relationship of parties and their candidates, including incumbents who could be swayed in the conduct of their official activities by soft money raised by them through the parties. *See* 540 U.S. at 156, 173.

The FEC amended its state party allocation rules to conform to BCRA. But the new rules still permitted state parties to pay for their administrative expenses with as little as 15 percent federal funds, depending on which federal candidates are on the ballot in a particular year. *See* 11 C.F.R. § 106.7(d)(2), (3) (2008).

D. Federal Election Commission Allocation and Solicitation Rulemaking

For more than two years after BCRA's passage, the FEC did not change the allocation rules that applied to non-candidate, nonparty political committees like EMILY's List. BCRA did not change the underlying law with respect to these groups. And these groups had not figured at all in the record that was assembled to pass BCRA and defend it against constitutional challenge. There was no record of independent political committees serving as vehicles for circumvention or corruption, as the parties were said to have done as conduits for large sums of soft money raised by their candidates.

But in 2004, the Commission abruptly changed course. With no intervening legislation, it moved to change significantly the allocation process that had been in place for more than a quarter century. The reason was a partisan effort to curtail nonparty, independent activity that was thought to be adverse to the reelection of President George W. Bush. A group called America Coming Together ("ACT") had been formed to identify and mobilize progressive voters on a then-unprecedented scale; it organized itself as a

nonconnected committee and applied the allocation ratios in order to pay its administrative and generic ballot expenses with a significant proportion of nonfederal funds.

First, a paper organization calling itself Americans for a Better Country ("ABC") filed an advisory opinion request with the FEC. Representing supporters of President Bush's reelection, it claimed to want to engage in the same activities attributed to ACT. In fact, however, the group had neither raised nor spent any funds – and still has not.[4] Its sole function was to induce the Commission to recast the allocation rules so as to curtail ACT's activities.

On February 19, 2004, responding to ABC's supposed request, the Commission issued Advisory Opinion 2003-37. In this opinion, the Commission – without a rulemaking – required allocating committees to pay for any public communication that "promotes, supports, attacks, or opposes" federal candidates entirely with federal funds.[5] FEC Adv. Op. 2003-37, at 9-11 (Feb. 19, 2004) (JA at 205-07). The Commission also built this requirement into the formulas used to calculate allocation, so that any communication of this kind – promoting, supporting, attacking or opposing a federal candidate – would be included in the tally of "direct" federal candidate support used to determine the federal share of allocated expenses. *See id.*; 11 C.F.R. § 106.6(c) (2004). The Commission's Office of General Counsel later described this advisory opinion as a "substantial reinterpretation of the 'allocation' rules." *See* FEC Agenda Doc. No. 04-48, at 7 (May 11, 2004) (JA at 271).

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[4] ABC's FEC disclosure reports may be viewed at http://www.fec.gov/disclosure.shtml.

[5] This standard mirrored language in BCRA that prohibited state parties from using soft money to pay for public communications that "promote," "support," "attack," or "oppose" a candidate for federal office. 2 U.S.C. §§ 431(20)(A)(3), 441i(b)(1). The Commission did not, however, cite to this provision but, rather, rooted its finding in FECA's definition of "expenditure." FEC Advisory Opinion 2003-37, at 9 (citing 2 U.S.C. § 431(9)) (JA at 205).

Then, on March 11, 2004, the Commission issued a wide-ranging notice of proposed rulemaking. *See* Political Committee Status, 69 Fed. Reg. 11,736 (proposed Mar. 11, 2004) (JA at 240) Its principal aim was to extend political committee status to so-called section "527" organizations which, while exempt from tax under the Internal Revenue Code because of their election-related activity, were nonetheless not required to register and report with the FEC. *Id.*

The proposed rules, through a revised definition of the FECA term "political committee," *see* 2 U.S.C. § 431(4)(A), required all section 527 organizations that were considered to participate in federal elections in any manner to register with and report to the Commission. The proposed rules also codified the changes to the allocation system first addressed in Advisory Opinion 2003-37, including the "promotes, supports, attacks, or opposes" standard. 69 Fed. Reg. at 11,753, 11,757-58 (JA at 257, 261-62). The proposed rules further treated as federal contributions those funds received in response to a fundraising solicitation expressly advocating the election or defeat of federal candidates. *Id.* at 11,757 (JA at 261).

The Commission set "a highly accelerated schedule for this important and far-reaching rulemaking, targeting approval of final rules just two months after publication of the NPRM." FEC Agenda Doc. No. 04-48, at 4 (JA at 268). Comments were due by April 9, and public hearings with 31 witnesses were held on April 14 and 15. Nonetheless, the rules created such controversy throughout the political and nonprofit communities that even with fewer than 30 days to address the "important and far-reaching rulemaking," more than 100,000 comments were submitted, "far exceeding the number of comments received in connection with any of the rulemakings to implement BCRA." *Id.* at 8 (JA at 272). The only

portions of the proposed rules to receive significant comment were those targeting section 527 organizations that did not register and report with the FEC, because that was both the impetus and focus of the proceeding, and because the new allocation regulations tracked changes already present in Advisory Opinion 2003-37.

The final rules, approved on October 28, did not include a revised definition of "political committee." Instead, the final rules created an allocation system totally unlike that contained in Advisory Opinion 2003-37 and the proposed rules – indeed, the Commission declared that they superseded Advisory Opinion 2003-37. Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,063 (Nov. 23, 2004) (JA at 289). The new rules focused not on whether communications "promoted, supported, attacked, or opposed" candidates, but whether they merely *referred* to candidates. 11 C.F.R. § 106.6(f) (2008). In addition, the allocation system for administrative expenses and voter drives was reduced to a system of arbitrary threshold amounts. For example, a public communication that referred to a political party, but to no clearly identified candidate at all, had to be financed with no less than 50 percent federally regulated funds. *Id.* § 106.6(c). The new rules took no account of the extent to which a political committee actually supported federal and nonfederal candidates. Far from a "refinement" in the allocation rules as originally suggested in the Commission's NPRM, 69 Fed. Reg. at 11,736 (JA at 240), the final rule effected a radical change, replacing "allocation" with arbitrary minimums, even though the Commission's own examination concluded that very few committees choose to allocate at all, *see* 69 Fed. Reg. at 68,062 (JA at 288). The final rules also contained a new definition of "contribution" that was far broader in scope than the one contained in the proposed rules; the new section 100.57

defined contributions as funds received in response to a solicitation that "indicates that" any portion of the funds will be used to "support or oppose" federal candidates. 11 C.F.R. § 100.57 (2008).

The final rules, with explanation and justification and several additional amendments, were approved on October 28, 2004, and published on November 23, 2004. *See* FEC Agenda Doc. No. 04-102, at 4-5 (Nov. 18, 2004) (minutes of Oct. 28, 2004 meeting) (JA at 279-80); 69 Fed. Reg. 68,056 (JA at 282).

E. Summary of New Regulations

The new regulations, found at 11 C.F.R. §§ 100.57 and 106.6, have three new features that are challenged here. First, they impose a minimum 50 percent allocation ratio, regardless of a committee's actual federal and nonfederal activities. Administrative expenses and generic communications that do not refer to any candidates must be paid for with at least 50 percent federal funds. *See id.* § 106.6(b)(1). A political committee that spends 99 percent of its funds in state and local races must use 50 percent federal funds for its administrative and generic expenses.

The second feature is the mere "reference" rule. Communications that refer to clearly identified federal candidates, and do not refer to clearly identified nonfederal candidates, must be paid for using 100 percent federal funds. *See id.* § 106.6(b), (f)(1). Using entirely federal funds is required even if the communication cannot be seen or heard by the referenced candidate's own voters. It is required even if the communication is made years before the referenced candidate is up for election. It is required no matter how small the amount of space or time devoted to the federal candidate. FEC Adv. Op. 2005-13, at 4-5 (Oct. 20, 2005) (JA at 302-03). And it is true even if the clear, unambiguous purpose of the

communication is to support nonfederal candidates. *Id.* at 5-6 (JA at 303-04). For example, a communication that refers simply to "Democratic members of the state assembly" must still be paid at least in part with federal funds. *Id.*

The third new feature is found at 11 C.F.R. § 100.57. This is an entirely new regulation, and it requires that organizations treat the fund they receive as contributions under federal law, subject fully to federal source restrictions and contribution limits, if the solicitation prompting the donation "indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." *Id.* § 100.57(a). If the solicitation refers to a nonfederal candidate as well as a federal candidate, at least 50 percent of the funds received must be treated as federal contributions; if the solicitation does not refer to a clearly identified nonfederal candidate, 100 percent of the funds received are federal contributions. *See id.* § 100.57(b). This regulation trumps even clear language in the solicitation itself stating that a smaller percentage of funds will be used for federal election purposes. *See* 69 Fed. Reg. at 68,057 (JA at 283). The result of the regulation is that a political committee may be required to refuse to accept, or to return, funds it could otherwise accept under state law for use in local and state elections. *See id.* at 68,058-59 (JA at 284-85).

On January 12, 2005, EMILY's List sued the Commission to enjoin enforcement of the new rules, foreseeing that they would have an immediate and severe effect on the committee's operations. (JA at 9-10). On August 18, 2005, EMILY's List submitted an Advisory Opinion Request to the FEC seeking clarification about the new regulations. FEC Adv. Op. Request 2005-13 (JA at 295). First, EMILY's List asked whether it would be required to pay at least 50 percent of its administrative expenses and generic voter drive

expenses with federal funds, even if its budget committed it to spend 65 percent of its candidate budget on contributions to or expenditures to influence specific nonfederal candidates. *Id.* at 1 (JA at 295). The Commission found that, under section 106.6 (c) EMILY's List was required to allocate a minimum of 50 percent federal funds "without regard to how much a federal political committee may choose to spend on non-Federal elections." FEC Adv. Op. 2005-13, at 2-3 (JA at 300-01).

EMILY's list also asked whether it had to pay for public communications that referred to "Democrats" without mentioning a specific federal or nonfederal candidate with at least 50 percent Federal funds. The Commission confirmed that it did, reasoning that "'references solely to a political party inherently influence both Federal and non-Federal elections.'" *Id.* at 4 (quoting 69 Fed. Reg. at 68,062) (JA at 302). However, if EMILY's List changed the content of its communication by removing the reference to Democrats, it could pay for the revised communication with 100 percent nonfederal funds. *Id.* at 5 (JA at 303).

Second, EMILY's List indicated that it wished to pay for and distribute a public communication in support of efforts on behalf of state legislative candidates that would refer to United States Senator Debbie Stabenow. The communication was intended to stress the importance of successes of women in state elective office, and highlight Senator Stabenow as a success story in its program of support for nonfederal candidates. The communication would not reference a clearly identified nonfederal candidate. FEC Adv. Op. Request 2005-13, at 1-2 (JA at 295-96). Even though the communication would not be distributed in Senator Stabenow's home state of Michigan, would not reference her federal candidacy, and even though Senator Stabenow was not up for election in 2006, the Commission opined that the communication would have to be paid for with 100 percent federal funds. FEC Adv. Op.

2005-13, at 3-4 (JA at 301-02). "Regardless of its context," the reference alone triggered a 100 percent federal financing requirement. *Id.* at 4 (JA at 302)

Finally, EMILY's List described a proposed funding solicitation that would ask recipients to support EMILY's List's nonfederal programs. The solicitation would feature a federal candidate, such as Senator Stabenow, making one of the following three statements:

> (a) "We are asking for your support, so that EMILY's List can support candidates, who, like me, could never succeed as women in politics without the combined commitment of all [of] us."
>
> (b) "EMILY's List's support over the years for candidates like me has made an enormous difference to the progress of women toward equality in the pursuit of political office. But we have a long way to go. That's why I need your help."
>
> (c) "EMILY's List has always supported me (Senator Stabenow) 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."

FEC Adv. Op. Request 2005-13, at 2 (JA at 296). The letter asked the Commission whether it would construe any of the above statements as "indicating" that funds would be used to support federal candidates under section 100.57. *Id.* The Commission opined that statements (a) and (b) both indicated that funds raised from the solicitation would be used to support Senator Stabenow's reelection. FEC Adv. Op. 2005-13, at 6 (JA at 304). The proceeds of those solicitations would, therefore, be "contributions" under section 100.57. The Commission's response was clear: the rules would be interpreted to encompass even purely nonfederal activities, and solicitations would be treated as supporting a federal candidate even when not directed to her voters, and not disseminated when she was actively running for reelection.

F. Effect on EMILY's List

The new solicitation and allocation regulations have had a direct effect on EMILY's List's activities. First, they have required EMILY's List to direct limited federal funds to purely nonfederal activity. The 50 percent allocation rules have prevented EMILY's List from spending a higher proportion of nonfederal funds on activities that exclusively or predominantly reflect nonfederal electoral purposes. (JA at 70). For example, among EMILY's List's administrative expenses is a program called Campaign Corps, which trains young people in campaign skills and helps to place them on campaigns. (JA at 70). In odd-numbered years, there are no regularly scheduled federal races on the ballot, and a vast majority of the students are placed on campaigns for state and local offices in New Jersey and Virginia, which hold elections in these years. In even years, graduates are placed with both federal and nonfederal campaigns. In the 2006 election cycle, 77 percent of the graduates trained by the program ultimately worked on nonfederal races. (JA at 70-71). Even though the vast majority of students go on to work on nonfederal races, EMILY's List has to pay for the program with 50 percent federal funds. (JA at 71).

EMILY's List has also changed its public communications to comply with the new allocation regulations. (JA at 73). EMILY's List has in the past paid for public communications supporting ballot initiatives. For example, in 2006, EMILY's List sponsored five advertisements supporting two ballot initiatives in Missouri. (JA at 73, 81-90). EMILY's List would have liked to include a reference to a clearly identified federal candidate in these advertisements to endorse the ballot initiatives, either a candidate from Missouri or a "superstar" federal candidate from outside the state. Ballot initiatives very often present questions of national scope, and endorsements by a national spokesperson such

as a federal-level officeholder or candidate are more effective in raising funds for or delivering persuasive messages about those initiatives. (JA at 73). In order to choose the most effective message, EMILY's List did not want to refer to any clearly identified nonfederal candidates. (JA at 73). However, under section 106.6(f), merely mentioning a federal candidate – even if that candidate lived in a state thousands of miles from Missouri and was not up for election in 2006 – would have required EMILY's List to pay for the communication with 100 percent federal funds. Thus, EMILY's List changed the content of its communication and omitted any reference to federal candidates. (JA at 73, 81-90).

Finally, EMILY's List has had to change the language of its solicitations. EMILY's List has drawn national attention for its success in electing clearly identified federal candidates, and these victories have helped to brand EMILY's List as an effective political organization. (JA at 71). Its national reputation encourages people to donate to its nonfederal programs, because donors are confident that if EMILY's List has succeeded with the election of federal candidates in high-profile national elections, it can succeed in local and state elections as well. (JA at 71). EMILY's List has also found that the use of certain well-known federal candidates and officeholders are uniquely effective at raising funds for its efforts on behalf of other federal and nonfederal candidates. (JA at 71). However, under section 100.57, as the Commission has construed it, EMILY's List must treat as a federal contribution funds received in response to a communication that indicates that any portion of the proceeds will be used to support or oppose the election of a clearly identified federal candidate. Thus, EMILY's List has in some cases removed references to federal candidates and, in others, added references to clearly identified nonfederal candidates, solely so that it can treat some of the funds received as nonfederal contributions. (JA at 72, 77).

VI. ARGUMENT

A. Summary of the Argument

The regulations at issue in this case violate the First Amendment. They are the functional equivalent of spending limits, prohibiting EMILY's List from supporting state and local candidates in certain ways when its federal funds are exhausted. In some cases, EMILY's List can avoid the harsh consequences of these regulations, but only by altering the content of its political speech – a result that is impermissible under the First Amendment. *See WRTL*, 127 S. Ct. at 2671 n.9. The regulations put a "substantial burden" on EMILY's List's speech and, therefore, fail under strict scrutiny. *See Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008).

Even if the regulations are viewed as contribution limits, they do not strike the required balance between the Commission's authority to regulate federal elections in the name of preventing corruption or its appearance and the preservation of rights of political associations like EMILY's List. The regulations were promulgated without any factual record demonstrating that nonconnected committees like EMILY's List have been complicit in candidate corruption; before this litigation commenced, the Commission had not once articulated how the regulations related to preventing candidate corruption; and the regulations restrict vast amounts of nonfederal activity, showing that they are not tailored to meet an important, let alone a compelling, government interest. *WRTL*, 127 S. Ct. at 2664; *Buckley v. Valeo,* 424 U.S. 1, 25 (1976)(per curiam).

Nor are the regulations permitted by FECA. FECA was passed to regulate contributions and expenditures made with "the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i), (9)(A)(i). In 2002, Congress passed BCRA to

remedy a specific and well-documented problem, the use of unregulated soft money by state and federal political parties, and thus gave the FEC authority to regulate a specific and limited class of state activity. *McConnell*, 540 U.S. at 167-70. The new allocation and solicitation regulations go far beyond the Commission's statutory authority, ensnaring state electoral activity by nonconnected, non-party political committees in its regulatory web solely because it "references" a federal candidate.

Finally, the regulations are arbitrary and capricious. The Commission replaced a flexible regulatory system with arbitrarily set minimum percentages and, in promulgating the regulations, failed to consider the *only* recognized constitutionally permissible goal of campaign finance reform. And the district court violated a fundamental principle of administrative law, supplying an explanation that the agency itself had not provided. *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This Court should reverse and grant summary judgment to EMILY's List.

B. Standard of Review

This Court reviews a district court's ruling on cross-motions for summary judgment de novo. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918 (D.C. Cir. 2008). A party is entitled to summary judgment if, based on the pleadings, depositions, and affidavits, "'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)). In ruling upon a motion for summary judgment, this Court must view the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

C. The Commission's Illegal and Disparate Treatment of EMILY's List Violates the First Amendment of the United States Constitution

1. The Allocation and Solicitation Regulations Substantially Burden Core Protected Speech and Are Subject to Strict Scrutiny

In regulating the manner in which political committees spend funds and what they may say while raising funds, the Commission's regulations burden what the Supreme Court has described as "political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley*, 424 U.S. at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). In *Buckley*, the Court sharply distinguished expenditure limits from contribution limits. The Court found that spending limits directly "constrain campaigning by candidates" and thus must be analyzed under strict scrutiny. *Id.* at 20. In contrast, the Court found that limits on a contributor's ability to contribute to a candidate imposed only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* The Court reasoned that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. But contribution limits are still subject to "closest scrutiny" and must be "closely drawn" to meet an "important" state interest. *Id.* at 25 (internal quotation marks and citation omitted).

Since *Buckley*, the Court has followed this framework, applying strict scrutiny to spending limits, and evaluating contribution limits under the "closely drawn" standard. *See, e.g., Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000). But the government cannot evade strict scrutiny simply by denying that the regulation limits spending. Quite recently, the Court has rejected Commission efforts to avoid strict scrutiny by characterizing its restrictions as something other than spending limits. It has found, for example, that a law which "substantial[ly] burden[s]" political expression is subject to strict scrutiny, even if it

does not limit spending per se. *Davis*, 128 S. Ct. at 2772; *see also WRTL*, 127 S. Ct. at 2664[6]; *Buckley*, 424 U.S. at 44-45.

In *Davis*, the Court struck down the so-called "Millionaire's Amendment" of BCRA. 128 S. Ct. at 2766. That provision held that, when a candidate for federal office contributed personal funds in excess of $350,000 to his or her campaign, the candidate's opponent could receive contributions at treble the normal limit. *Id.* The Court found that this scheme violated the First Amendment because it "require[d] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Id.* at 2771.

The rules under challenge here substantially burden EMILY's List's expression and are subject to strict scrutiny. The allocation rules are the functional equivalent of spending limits: they prohibit EMILY's List from supporting state and local candidates in certain ways when its federal funds are exhausted. For example, under the "reference" rule of section 106.6(f), if EMILY's List sponsors a public communication distributed only in Missouri in which a United States Senator from New York endorses a Missouri state ballot initiative, it must pay for that communication with 100 percent federal funds, which are subject to the strict limitations of FECA and are more difficult to raise. Thus, even in the absence of any real nexus to a federal election, EMILY's List must refrain from participating in nonfederal elections in the most effective way. This result is impermissible under the First Amendment. As the Supreme Court found in *WRTL*, a restraint on speech is not permissible merely because a speaker can change his or her message to avoid mentioning a candidate:

[6] Because the Supreme Court did not issue a majority opinion in *WRTL*, the opinion of Chief Justice Roberts, decided on the narrowest grounds, is the holding of the Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

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

WRTL, 127 S. Ct. at 2671 n.9 (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) and *Cohen v. California*, 403 U.S. 15 (1971), and quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995)).

Section 106.6(c) imposes a similar burden, requiring EMILY's List to pay for a general communication that merely refers to a political party with at least 50 percent federal funds. If EMILY's List wanted to sponsor a communication to Missouri voters about a Missouri ballot initiative and included a line stating that the initiative had the support of "both Democrats and Republicans," the communication would have to be paid for with 50 percent federal funds. Again, the regulations require an allocating committee to choose between changing its message or effectively capping what it can spend.

The solicitation regulations suffer from the same defect. Under section 100.57, a solicitation that "indicates" that it will use funds to support a federal candidate must treat at least 50 percent of the proceeds from that solicitation as "contributions," which are subject to the limitations of FECA. This is a nebulous standard that captures a sweeping range of conduct. The advisory opinion issued by the Commission to EMILY's List says as much. It said flatly that a solicitation voiced by an out-of-cycle senator, outside her state, for the explicit purpose of supporting candidates for state and local office, would trigger federal contributions and associated limits. *See* FEC Adv. Op. 2005-13, at 2, 6 (JA at 300, 304). As a result of this ambiguous and overbroad standard, EMILY's List has changed its speech so

that it can raise, under state law, the funds that such law authorizes for state and local elections: it has done this by naming nonfederal candidates in its solicitations so that half of the proceeds would not be subject to the limits of FECA. (JA at 72, 77).

The Court's recent decision in *WRTL* prevents the Commission from defending these rules on the grounds that EMILY's List can simply use federal funds. In *WRTL*, the Court invalidated a provision in BCRA that prohibited corporations like Wisconsin Right to Life, Inc. from sponsoring "electioneering communications" – communications that named a clearly identified candidate, were aired within 30 days before a federal primary election or 60 days before a federal general election, and were targeted to the candidate's electorate – as applied to "genuine issue ads" that did not expressly advocate the election or defeat of a federal candidate and that were not the "functional equivalent" of express advocacy. 127 S. Ct. 2671-73. Like EMILY's List, Wisconsin Right to Life had a federally registered political committee into which it deposited only contributions permissible under federal law, and from which it made independent expenditures to influence federal elections. *See id.* at 2697 (Souter, J., dissenting). The law was clear that it could make the advertisement in question through this account, but it sought the right to do so using funds that were unregulated by the Commission, for purposes it considered unrelated to federal elections. The Supreme Court considered its request under the strict scrutiny standard, and found that the law impermissibly impinged on Wisconsin Right to Life's speech. *See id.* at 2664 (majority opinion). The Court rejected the Commission's argument that the availability of a federal funds option trumped the First Amendment concerns. *Id.* at 2671 n.9.

Because the regulations impose a "substantial burden" on EMILY's List speech, they violate the First Amendment. *Davis*, 128 S. Ct. at 2772.

2. The Allocation and Solicitation Regulations are Not Narrowly Tailored to Achieve a Compelling Government Interest

Following *McConnell v. FEC*, and ignoring the subsequent cautions laid out by the Court in *WRTL* and *Davis*, the district court denies that the challenged regulations actually burden EMILY's List's spending or speech, and labors to defend them as "contribution limits." *EMILY's List*, 569 F. Supp. 2d at 41 (JA at 160). Yet even contribution limits are still subject to the "closest scrutiny" and can be upheld only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25 (internal quotation marks and citation omitted). The Commission failed to meet its burden under either test.

a. The Commission Has Not Shown a Compelling Government Interest

The Court has recognized only two constitutionally permissible purposes that can justify campaign finance limitations: "'preventing corruption and the appearance of corruption' in election campaigns," *WRTL*, 127 S. Ct. at 2672 (citing *Buckley*, 424 U.S. at 45), and "corruption" flowing from the "distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form," *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).[7] In *Buckley*, the Court recognized Congress's interest in preventing "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on *candidates'* positions and on their actions if elected to office." 424 U.S. at 25 (emphasis added); *see also Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 296-97 (1981) ("*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary

[7] The Commission did not state in its rulemaking, nor did it argue below, that the solicitation and allocation regulations were justified by the corporate "corruption" rationale of *Austin*.

to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*."). There, and in subsequent cases, the Court has also upheld restrictions on entities other than candidates in order to prevent the circumvention of candidate contribution limits. In all of these cases, the Court has required the government to provide at least some evidence of circumvention and demonstrate a connection between the anti-circumvention measure and the risk of *candidate* corruption. *See, e.g., WRTL*, 127 S. Ct. at 2672; *McConnell*, 540 U.S. at 144-146, 155-56, 164-166; *Nixon*, 528 U.S. at 392 ("we have never accepted mere conjecture as adequate to carry a First Amendment burden"); *id.* at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."); *Buckley*, 424 U.S. at 27 & n.28.

For example, in upholding the "core" provisions of BCRA, *McConnell*, 540 U.S. at 142, the *McConnell* Court repeatedly relied on a factual record that tied the provisions to the goal of preventing corruption and the appearance thereof. In upholding BCRA's ban on national party soft money, the Court found that "common sense and the ample record" confirmed that "large soft-money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption." *Id.* at 145. The Court pointed to evidence in the record that candidates had exploited the soft money loophole, asking donors to make soft-money donations to political parties to increase their prospects of election. *Id.* at 146. In that case, "[t]he record [was] replete with . . . examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 150 (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 492-506 (D.D.C. 2003) (Kollar-Kotelly, J.).

Similar record evidence led the Court in *McConnell* to uphold statutes preventing state political parties from using soft money for so-called "federal election activity." *Id.* at 173. The Court cited evidence "that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. Rather, state committees function as an alternative avenue for precisely the same corrupting forces." *Id.* at 164. Indeed, there was specific record evidence of federal parties directing big-ticket donors – who had contributed the federal maximum – to state parties, to whom they could contribute even more. *Id.* at 164 & n.60. This evidence led the Court to conclude that "[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest." *Id.* at 165-66.

But the Court has since revealed the limits of this anti-circumvention rationale. In striking down BCRA's prohibition on corporation-sponsored communications as applied to "genuine issue ads," the Court explained that the state has an interest in regulating ads that are the "functional equivalent" of express advocacy because such "large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions." *WRTL*, 127 S. Ct. at 2672 (quoting *Buckley*, 424 U.S. at 45). Issue ads that do not expressly advocate the election of a federal candidate, however, "are by no means equivalent to contributions, and the *quid pro quo* corruption interest cannot justify regulating them." *Id.* Such a ban on issue ads would be an impermissible "prophylaxis-upon-prophylaxis." *Id.*

While *McConnell* upheld rules that were supported by an "ample record," 540 U.S. at 145, this Court faces rules that have been supported by no evidence at all. In its rulemaking, the Commission did not once mention the need to prevent corruption as the rationale behind

the allocation and solicitation regulations. Nor was there any record evidence that nonconnected committees had been complicit in corrupt practices. While the record in *McConnell* was rich with evidence of the close relationship between federal candidates and state parties, there is no record evidence of comparable relationships between nonconnected committees like EMILY's List and federal candidates. Indeed, in passing BCRA, Congress chose not to subject nonconnected committees like EMILY's List to stricter soft money regulations.

In discussion of the solicitation and allocation rules in the explanation and justification, the Commission made a single desultory reference to anti-circumvention, in the context of section 106.6(f).[8] 69 Fed. Reg. at 68,063 (JA at 289). But it cited no record of attempted circumvention by nonconnected committees, nor did it use this rationale to justify the other solicitation and allocation provisions. Instead, the new regulations were justified by repeated reference to the need for ease of administration and ease of compliance. *See, e.g.*, 69 Fed. Reg. at 68,060, 68,063 (JA at 286, 289). Administrative conveniences, however, cannot justify the burdening of core First Amendment speech. *See WRTL*, 127 S. Ct. at 2672.

Only after the Commission adopted the rules and after this litigation commenced did the Commission attempt to offer evidence of circumvention, in an effort to rationalize its rules post hoc. In the Commission's Motion for Summary Judgment, it cited a conciliation agreement, dated August 29, 2007, years after the rulemaking, alleging that in the 2004

[8] In the NPRM, the Commission did discuss anti-circumvention in recommending that the definition of "political committee" be expanded to include unregistered section 527 organizations. *See* 69 Fed. Reg. at 11,741 (JA at 245). And the explanation and justification discussed corruption briefly in discussing the definition of "political committee." 69 Fed. Red. at 68,064-65 (JA at 290-91). This proposed regulation would not have affected EMILY's List, which voluntarily registered as a political committee with the Commission. Ironically, the final rules did not include a revised definition of "political committee," *id.*, which would have regulated the organizations whose activities prompted the rulemaking in the first place.

election cycle, ACT used an allocation ratio of just 2 percent federal funds and 98 percent nonfederal funds for its administrative expenses and generic voter drives.[9] (JA at 108).

But there is no record evidence that the Commission considered ACT's alleged violation during its rulemaking. *See Bourgeois v. Peters*, 387 F.3d 1303, 1323 (11th Cir. 2004) (holding that a state may not rationalize the regulation of speech post hoc); *cf. KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1059 (D.C. Cir. 2003) ("[P]ost hoc salvage operations of counsel cannot overcome the inadequacy of the Commission's explanation.") (internal quotation marks and citation omitted). And, even assuming that ACT violated the allocation provision, a single example of noncompliance is insufficient to support broad rules that burden protected expression. Indeed, not once has the FEC alleged that EMILY's List devised allocation formulas inconsistent with the requirements of the law.

The district court accepted the Commission's post-hoc claims of circumvention with complete credulity, despite the absence of any actual record evidence. In denying EMILY's List's preliminary injunction, the court stated that "the FEC promulgated these rules in an effort to close an oft-exploited loophole in federal election law." *EMILY's List*, 362 F. Supp. 2d at 57 (JA at 53). Granting summary judgment to the Commission, it reached the same conclusion, quoting its earlier opinion for the same proposition. *EMILY's List*, 569 F. Supp. 2d at 45 (JA at 167). It is unclear how the district court arrived at the conclusion that the Commission's pre-rulemaking allocation rules created a "loophole," or that such a "loophole" was "oft-exploited" by nonconnected committees. There is no record to support these conclusions in the Commission's rulemaking. This was reversible error. It is the

[9] In fact, ACT's final allocation ratio based on its actual federal activity was 12 percent federal and 88 percent nonfrederal. (JA at 109).

government's burden to demonstrate that its regulation achieves an important state interest, *Buckley*, 424 U.S. at 25, and a court may not uphold a restriction on constitutionally protected speech based on mere conjecture. *Nixon*, 528 U.S. at 392. Nevertheless, that is what the district court did here. This Court should reverse.

b. The Allocation Regulations Are Not Tailored to Achieve a Compelling Government Interest

Under the allocation regulations, a mere reference to a clearly identified federal candidate in a public communication requires EMILY's List to pay for the communication with 100 percent federal funds, if there is no concomitant reference to a clearly identified nonfederal candidate. 11 C.F.R. § 106.6(f). And a communication that refers to a political party without naming a clearly identified candidate must be paid for with at least 50 percent federal money. *Id.* § 106.6(b)(1)(iv), (c). These provision are untethered to any congressional interest in preventing the corruption of federal candidates. For example,

- A communication that promotes a gubernatorial candidate, by citing his support of an incumbent President's social or fiscal policies, must be paid in part with federal funds if the President is running for reelection.
- A communication promoting the candidacy of a gubernatorial candidate, in part on the basis of her support for the "McCain-Feingold" legislation, must be paid in part with federal funds, as a federal election activity, if either Senator McCain or Senator Feingold is running for reelection, even if the communication is made thousands of miles away from Arizona or Wisconsin.
- A communication in support of a state legislative candidate must be paid in part with federal funds if the communication mentions endorsement of the candidate by a federal officeholder who is running for reelection, even if the

federal officeholder is in another state entirely, and even if the officeholder's election is months or years away.

- A communication that supports a political party generally, that refers to no clearly identified candidates, and that is run before an election in which there are no federal candidates on the ballot, must be paid for with 50 percent federal funds.

There is no record evidence to justify this broad sweep. As described above, the Commission did not consider the relationship between these provisions and the federal interest in corruption. And the Commission has only identified one example of a nonconnected committee purportedly trying to circumvent the contribution limits, and only did so after the rules were adopted, never suggesting for a moment – as it could not – that EMILY's List's situation was remotely comparable.

The reference standard is even broader than the one rejected in *WRTL*. In *WRTL*, the Court found that, as applied to ads that were not "express advocacy or its functional equivalent," the restrictions on corporate and union advertising even on the eve of an election bore too little relation to the government interest in preventing quid pro quo corruption to pass constitutional scrutiny. 127 S. Ct. at 2671. In contrast, the allocation rules regulate speech that merely *mentions* a political party or a clearly identified federal candidate, "[r]egardless of its context." FEC Adv. Op. 2005-13, at 3-4 (JA at 301-02). And unlike the provision struck down in *WRTL*, it has no time limit and no geographic targeting requirement to ensure that the provision is tailored to regulate communications that would actually affect federal elections.

For example, even though EMILY's List's proposed Stabenow communication would not have been distributed in Senator Stabenow's home state of Michigan, would not have referenced her federal candidacy, and would have been distributed in a year in which Senator Stabenow was not on the ballot, the Commission found that the communication would have to be paid for with 100 percent federal funds. *Id.*. This goes far beyond what the Court stopped in *WRTL*.

Despite section 106.6's total lack of tailoring, the district court still upheld it, imagining hypothetical situations in which communications that merely "refer" to a federal candidate could have an effect on federal elections. For example, with respect to EMILY's List's proposed Stabenow communication, the court opined that "a communication referring to Senator Stabenow might well inspire recipients outside of her home state to contribute to her campaign, and thus influence her federal election, or might otherwise raise her national profile and ultimately influence her election." *EMILY's List*, 569 F. Supp. 2d at 41 (JA at 173). But this was reversible error. It is the *government's* burden to demonstrate that a regulation is narrowly tailored under the First Amendment. *See Buckley*, 424 U.S. at 25. And it cannot be carried – neither by the government, nor by a court seeking to justify its outcome – by hypothesizing attenuated chains of causality based on "mere conjecture." *Nixon*, 528 U.S. at 392.

In upholding the regulations, the district court also relied on *McConnell*. But, as shown above, *McConnell* involved a well-developed record supporting a concern that state parties would "function as an alternative avenue for precisely the same corrupting forces" operating through national parties. 540 U.S. at 164. Even there, Congress limited the scope of the restrictions to the types of activities that had been abused in the past and that were

likely to effect federal elections. For example, a state party's public communication had to promote, support, attack, or oppose a federal candidate to be payable entirely with federal funds. 2 U.S.C. §§ 431(20)(A)(iii); 441i(b)(1). And the rules limiting other activities were time-bound. For example, voter registration by state parties had to be conducted within 120 days of a regularly scheduled federal election to trigger a 100 percent federal funds requirement. *Id.* § 431(20)(A)(i). Hence, the Court in *McConnell* could credibly say that BCRA's state party committee restrictions were "narrowly focused on regulating contributions that pose the greatest risk of this kind of corruption: those contributions to state and local parties that can be used to benefit federal candidates directly." 540 U.S. at 167. And, "[f]urther, these regulations all are reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anticorruption interests to be served." *Id.*

The allocation regulations at issue here are entirely different. These rules were wholly a Commission invention, as Congress was silent on the subject of nonparty PACs during BCRA's passage. And unlike Congress, the Commission gathered no evidence of corruption and no evidence that nonconnected committees have conspired with candidates to help them circumvent the limits. The Commission did not carefully pick the type of activity to be regulated or limit the scope of the rules' sweep. And the rules go well beyond communications that "promote" or "attack" federal candidates.

Moreover, the results are perverse, resulting in notable instances of treatment *more* favorable for parties than for nonconnected committees like EMILY's List. A state party could use soft money to pay for a communication in which a federal candidate from the state endorsed a state ballot initiative, as long as the communication did not support or oppose the

federal candidate. But, under the Commission's regulations, EMILY's List would have to spend hard money for the same communication – even if the endorsement came from a candidate in another state. This is not close tailoring.

Likewise, section 106.6(c)'s arbitrary 50 percent minimum allocation scheme for administrative expenses, generic voter drives, and generic party communications regulates activity far removed from federal elections for those committees whose federal activities comprise a small portion of their overall efforts. Unlike the provisions upheld in *McConnell*, these provisions are not tailored to reach particular types of activity that have been prone to abuse. 540 U.S. at 168. Rather, they capture *all* of a nonconnected committee's administrative expenses. And while the Commission's regulations require state parties, which have a documented history of trying to exploiting soft money loopholes, to pay for administrative expenses with as little as 15 percent federal funds, *see* 11 C.F.R. § 106.7(d)(2)(iv), the allocation regulations require nonconnected committees like EMILY's List, with no comparable history, to pay their administrative expenses with an arbitrary minimum of 50 percent federal funds.[10]

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[10] In finding that the allocation regulations were not overbroad, the district court accepted the Commission's argument that a committee who spent a majority of its funds on nonfederal races would not be considered a political committee under the Commission's "major purpose" test, which purports to limit the definition of "political committee" to those organizations whose major purpose is federal campaign activity. *EMILY's List*, 569 F. Supp. 2d at 48 (JA at 176). This is not a safety net upon which any political committee can rely. The Commission has never defined what the major purpose test entails, or how an organization is to determine whether its major purpose is federal campaign activity, preferring to rely on a "case-by-case analysis of an organization's conduct." Political Committee Status, 72 Fed. Reg. 5,595, 5,601 (Feb. 7, 2007).

Further, the use of this test is not consistent with the Commission's enforcement practices. The Commission has found that a state political committee is required to register and report as a federal political committee if it makes more than $1,000 in expenditures in a calendar year, with no analysis of whether the major purpose of the organization is federal activity. For example, the Commission recently made findings that Freedom, Inc., a nonfederal political committee registered with the Missouri Ethics Commission, had become a federal political committee based on its federal

The Commission has failed to meet its burden in showing that the allocation regulations are closely tailored to achieve the compelling government interest in preventing candidate corruption or the appearance thereof. This court should reverse.

c. The Solicitation Regulation Is Not Tailored to Achieve a Compelling Government Interest

The solicitation provision of section 100.57 also fails for lack of tailoring. The regulation requires EMILY's List to treat as a federal "contribution" all funds received in response to a solicitation that "indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a). If the solicitation refers to a nonfederal candidate as well as a federal candidate, at least 50 percent of the funds received must be treated as federal contributions; if the solicitation does not refer to a clearly identified nonfederal candidate, 100 percent of the funds received are deemed federal contributions. *See id.* § 100.57(b). And the regulation trumps even clear language in the solicitation itself stating that a smaller percentage of funds will be used for federal election purposes. *See* 69 Fed. Reg. at 68,057 (JA at 283). A solicitation that states outright that only one percent of contributions received will be used to support federal candidates – and that the rest will be used to support non-federal candidates – will still trigger the 50 or 100 percent minimum. *Id.* As a result, the rule regulates funds that will never be spent on federal elections, and it does so without any connection to the government's interest in preventing the corruption of federal candidates.

Section 100.57's overbreadth is exacerbated by the Commission's aggressive interpretation of the regulation's scope. When it enacted the rule, the Commission purported

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expenditures, despite a lack of evidence, or even an allegation, that the federal activity was a significant portion of its activity or an area of particular focus. Conciliation Agreement, FEC MUR 5492 (Oct. 31, 2006), *available at* http://eqs.nictusa.com/eqs/searcheqs.

to "leave[] the group issuing the communication with complete control over whether its communications will trigger new section 100.57" by adopting the test of *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995). 69 Fed. Reg. at 68,057 (JA at 283). But the Commission has read this standard broadly to create peril for any organization raising funds while mentioning a federal candidate. For example, the Commission found a letter to be a federal solicitation when Senator Stabenow asked: "EMILY's List's support over the years for candidates like me has made an enormous difference to the progress of women toward equality in the pursuit of political office. But we have a long way to go. That's why I need your help." FEC Adv. Op. 2005-13, at 6 (JA at 304). The Commission reasoned that Senator Stabenow was appealing on her own behalf. This solicitation, however, is ambiguous at best. A more natural reading is that Senator Stabenow is asking for help to support a cause she supports, not help to support her reelection campaign.

Far from affording committees "complete control" over their solicitations, this regulation is a trap for the unwary. The Commission's broad and confusing reading of section 100.57 has caused committees like EMILY's List to alter their communications, either by avoiding the mention of federal candidates in their solicitations or by adding references to nonfederal candidates. (JA at 72). And it has caused organizations to incur hundreds of thousands of dollars in civil fines from the Commission. *See, e.g.*, Conciliation Agreement, FEC MUR 5487, at 14 (Feb. 28, 2007), *available at* http://eqs.nictusa.com/eqs/searcheqs. Section 100.57 impermissibly chills EMILY's List's speech and is not closely tailored to achieve the compelling government interest in preventing candidate corruption.

D. The Regulations Violate the Commission's Statutory Authority

The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500-706, forbids federal agencies from promulgating regulations "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Deference to an administrative agency's interpretation is only appropriate when "Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (citation omitted); *see also Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("[T]he agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue."). Courts must vacate "administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984).

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

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

The final rules apply severe financing restrictions on the basis of a mere "reference" to a federal candidate or a political party. *See* 11 C.F.R. § 106.6(f). The rules require that communications that merely reference a clearly identified federal candidate must be paid for with at least some federal funds, and with 100 percent federal funds if no clearly identified nonfederal candidate is mentioned. *See id.* This is a course that Congress rejected when developing FECA and its subsequent amendments. Congress focused the statutory scheme instead on expenditures "for the purpose of influencing" a federal election. *See* 2 U.S.C. § 431(8)(A)(i), (9)(A)(i). The Commission's rules stray impermissibly beyond these boundaries.

Congress' enactment of BCRA shows why this is so. Acting on record evidence, Congress found certain types of political party activity to be in connection with federal elections. *See id.* § 441i(a); *McConnell*, 540 U.S. at 132-34, 142. Yet Congress, in the most comprehensive campaign finance legislation passed in more than twenty years, chose not to regulate the activities of nonparty committees like EMILY's List at all. Thus, there is no statutory basis for the Commission's regulation of nonfederal activity. The Commission remains tethered to the definitions of "contribution" and "expenditure," which are linked inextricably to federal elections.

Yet even if BCRA had provided a basis to regulate EMILY's List nonfederal disbursements and solicitations, the Commission would still have exceeded its statutory authority. By regulating communications that merely refer to federal candidates, on that basis alone, the Commission flies past the clear limits Congress set in BCRA when

regulating party, corporate and union activity. Congress chose a complicated and varied scheme for the regulation of state and local parties: it restricted some activities to federal funding, allowed fully nonfederal or soft money financing for others, and adopted, for still other activities, a program of allocation. *See* 2 U.S.C. § 441i(b); *McConnell*, 540 U.S. at 161-64. In the case of corporate and union spending, it limited regulation to only certain media, targeted to specific voters, in specific time periods. 2 U.S.C. § 434(f)(3); *see WRTL*, 127 S. Ct. at 2663. But in none of these cases did Congress regulate based on simple "references" in public communications to candidates or parties.

Of particular significance is Congress' choice of means to address the state and local parties' financing of so-called "issue advertisements." Those ads – a foundational concern of the 2002 amendments – name particular candidates, praising or criticizing them on issues, but do not expressly advocate their election or defeat. *McConnell*, 540 U.S. at 126, 132. Even though Congress placed great weight on evidence that these types of ads were typically a "sham," constructed in fact to influence the election or defeat of named candidates, it declined to base any financing restrictions on these ads' "reference" to candidates or parties. Rather, Congress required that these ads be funded under federal restrictions if and only if they "supported, promoted, attacked or opposed" a federal candidate. *See* 2 U.S.C. § 431(20)(A)(iii); *McConnell*, 540 U.S. at 169-70. In other words, Congress tied the restriction to some indicia of federal election-influencing purpose.

The FEC can write and revise allocation rules. But it must write them to capture only "expenditures." And it cannot write them to capture activities that Congress consciously chose not to regulate, even when conducted by the entities that provided the impetus for legislation. Regulating mere references to federal candidates in the communication of

allocating committees goes well beyond a statutory basis for FEC regulation. When applied beyond the sphere of federal election activity, such as to the state and local election activity vital to EMILY's List, these restrictions at issue contravene the statute and exceed the Commission's authority.

In summarily rejecting EMILY's List's APA claim, the district court referenced its earlier conclusion that communications that merely "refer" to a federal candidate could have a hypothetical effect on federal elections. *EMILY's List*, 569 F. Supp. 2d at 58 n.17 (JA at 189). This was error. FECA regulates "contributions" and "expenditures" made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i), (9)(A)(i). The Commission does *not* have authority to regulate activity simply because it may have an effect, however attenuated, on federal elections. This Court should reverse.

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

The final rule requires that political organizations like EMILY's List must pay for their administrative costs with federal funding at a level of no less than 50 percent of the total cost, without regard to the actual stake of the organization in federal elections. *See* 11 C.F.R. § 106.6(c). Under this rule, if EMILY's List supports just one federal candidate or allocates just one percent of its total budget to the entire class of federal candidates supported in an election cycle, the result is the same: it must pay for no less than 50 percent of its administrative costs with federal funding.

This arbitrary minimum exceeds the Commission's statutory authority, for the same reason the "mere reference" standard does. It requires political committees to pay 50 percent of their administrative costs with federal funds – regardless of whether they support only a

single federal candidate and 100 nonfederal candidates; or contribute $1,000.01 dollars to one federal candidate plus $100,000 to nonfederal candidates; or devote a million dollars to federal election activity and $2,000 to nonfederal activity.

This irrational rule federalizes the funding and reporting of a large portion of such a committee's nonfederal receipts and disbursements, which are not made for the purpose of influencing federal elections. Bizarrely, it also treats nonparty PACs more harshly than any other type of committee, save national parties and candidates themselves. The very state parties that Congress found to be tools of circumvention can pay for as little as 15 percent of their administrative expenses with federal money. *See* 11 C.F.R. § 106.7(d)(2)(iv). But nonparty political committees like EMILY's List, whom Congress left unscathed by BCRA and who present no such opportunities for evasion, must pay with no less than 50 percent federal funds, year in and year out. There is no basis – let alone a rational one – for this wildly disparate result.[11]

3. The Solicitation Restriction Imposed by the New Rule Impermissibly Burdens Fundraising for State and Local Election Purposes

The new rules also inject federal financing restrictions into fundraising for state and local elections. FECA only grants the Commission the authority to regulate contributions

[11] In finding that the Commission had authority to promulgate the new allocation regulations, the district court relied on *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987), a 22 year-old case that is not binding on this Court, and concluded that "the FEC's decision to allow any given allocation formula by a political committee such as EMILY's List, with respect to its expenditures intended to influence both federal and nonfederal elections [as well as to adjust that allocation formula], is within the Commission's purview." *EMILY's List*, 569 F. Supp. 2d at 57 (quoting *EMILY's List*, 362 F. Supp. 2d at 56) (JA at 188). *Common Cause* does not support this broad proposition. In *Common Cause*, the court was addressing a specific 1979 amendment to FECA that required state and local parties to pay for certain voter registration and "get-out-the-vote" expenses with federal money. The court noted that it was possible that the Commission, through a proper exercise of rulemaking, might conclude that certain types of state party activities must be paid for with federal funds in order to keep nonfederal funds from being spent to influence federal elections. The case does not stand for the proposition that the Commission may pass whatever allocation rules it wishes.

insofar as they are made "for the purpose of influencing" federal elections. 2 U.S.C. § 431(8)(A)(i). "Donations made solely for the purpose of influencing state or local elections are therefore unaffected by FECA's requirements and prohibitions." *McConnell*, 540 U.S. at 122. BCRA limited what federal candidates and officeholders could raise in state and local elections, but only for anticorruption reasons. *Id.* at 182-84. The solicitation regulation goes far beyond that, deeming as "contributions" all funds received in response to a solicitation that "indicates" that "any portion" of the funds will be used for federal purposes. If a solicitation specifies that only a small percentage of funds received will be used for federal purposes, under the statutory definition, only a portion of the funds received are contributions, because only that portion would have been made for the purpose of influencing a federal election. But under the regulation, at least 50 percent and as much as 100 percent are contributions, for no reason other than who is mentioned. The result is a broad overreaching of the Commission's authority to regulate funds solicited and donated for plainly nonfederal purposes.

E. The Commission's Illegal and Disparate Treatment of EMILY's List Is Arbitrary and Capricious

An agency's rulemaking must be vacated if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As part of this task, a court must determine whether "the agency . . . articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "[A]n agency's action is arbitrary and capricious [if] the agency has not considered certain relevant factors or articulated any rationale for its choice."

Republican Nat'l Comm. v. FEC, 76 F.3d 400, 407 (D.C. Cir. 1996) (internal quotation marks and citations).

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

As noted above, the final regulations require that 50 percent of all administrative and voter drive expenses be paid for with federal funds; this minimum threshold amount entirely replaces the funds expended method. This application of a universal threshold to all allocating committees is arbitrary and capricious.

The Commission reported, in its explanation of the final rules, that a "flat 50% allocation minimum recognizes that [separate segregated funds] and nonconnected committees can be 'dual purpose' in that they engage in both Federal and non-Federal election activities. . . . However, the 50% figure also recognizes that some Federal [separate segregated funds] and nonconnected committees conduct a significant amount of non-Federal activity in addition to their Federal spending." 69 Fed. Reg. at 68,062 (JA at 288). That explanation demonstrates the arbitrary nature of the Commission's decision.

The Commission crudely decided that because these committees had a "dual purpose," a 50 percent minimum is appropriate. That decision was, simply put, an illogical one: the appropriate level of federal funding has nothing to do with how many different roles a committee has, and everything to do with their relative importance to the organization. State parties have a "dual purpose" too, and yet they may pay administrative expenses with as little as 15 percent federal funds, and never more than 36 percent federal funds. *See* 11 C.F.R. § 106.7(d)(2). Thus, the Commission cannot even claim the benefit of a "one size fits all" rule. Rather, it singled out non-party PACs for this ungenerous treatment, without ever

explaining why, and at seeming odds with the Congressional design. This is classic arbitrary and capricious agency decisionmaking.

2. The Solicitation Regulation Is Arbitrary and Capricious

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

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

The solicitation regulation also states that funds received in response to solicitations that indicate that funds will be used to support both clearly identified federal and nonfederal candidates will be at least 50 percent federal contributions. Even if a solicitation states how funds will be used, the regulation imposes its own arbitrary threshold amount of federal contributions. The Commission does not explain, in the explanation and justification of the final rules or elsewhere, why this particular uniform level was chosen, even if the solicitation

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

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

The only constitutionally permissible purpose relied upon by the Supreme Court when approving campaign finance reform measures is to "prevent the corruption or the appearance of corruption." *McConnell*, 540 U.S. at 100-01; *see also Austin*, 494 U.S. at 660. Yet the Commission never considered the effect of the final rules, if any, on corruption or the appearance of corruption. This failure renders the regulations arbitrary and capricious. Under *State Farm*, agencies must consider all "relevant factors." 463 U.S. at 43. For Commission action, failing to justify regulations in accordance with the only legitimate state interests that can sustain restrictions on campaign spending – preventing corruption and the appearance of corruption – constitutes arbitrary and capricious action. *See Shays v. FEC*, 337 F. Supp. 2d 28, 87 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

In the publication of the final rules, the Commission only discussed corruption in the context of the definition of "political committee," though, as described earlier, the Commission did not adopt a new definition of "political committee" to regulate unregistered section 527 organizations. 69 Fed. Red. at 68,064-65 (JA at 290-91). In contrast, the final allocation and solicitation rules contain no explanation of their effect on stemming corruption. The solicitation regulation's explanation focused on the Commission's belief that it had the power to act; the allocation regulation's explanation focused on administrative convenience. In neither case did the Commission consider the impact on the only recognized

constitutionally permissible goal of campaign finance reform. *See WRTL*, 127 S. Ct. at 2672; *Austin*, 494 U.S. at 660.

As described in detail above, it was only after this litigation commenced that the Commission advanced arguments connecting the regulations to the goal of preventing corruption. This is impermissible. "[P]ost hoc salvage operations of counsel cannot overcome the inadequacy of the Commission's explanation." *KeySpan-Ravenswood*, 348 F.3d at 1053 (internal quotation marks and citations omitted). Because the Commission did not "consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, the regulations are arbitrary and capricious.

4. The District Court Erred by Providing a Post Hoc Rationale for the Commission

Though the Commission failed to connect the regulations to the goal of preventing corruption, the district court proposed to make this connection for it. In its opinion, the Court stated that its own "discussion above makes the connection between the revised rules and the important government interests of preventing corruption and the appearance thereof abundantly clear." *EMILY's List*, 569 F. Supp. 2d at 60 n.18 (JA at 193). This was reversible error. A "reviewing court should not attempt itself to make up for such deficiencies [in the agency's explanation]: 'We may not supply a reasoned basis for the agency's action that the agency itself has not given.'" *State Farm*, 463 U.S. at 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

VII. CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment to the Commission, and should grant summary judgment to EMILY's

List on the grounds that (1) the Commission's allocation and solicitation regulations violate the First Amendment, (2) the regulations violate the Commission's statutory authority, and (3) the regulations are arbitrary and capricious.

Dated: January 26, 2009

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EMILY'S LIST, Plaintiff-Appellant, v. FEDERAL ELECTION COMMISSION, Defendant-Appellee.	No. 08-5422

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,422 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2).

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CERTIFICATE OF SERVICE

I certify that on January 26, 2009 I, by United States mail, mailed a copy of the Brief of Plaintiff-Appellant and the Joint Appendix to:

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ADDENDUM

§ 100.55 Extension of credit.

The extension of credit by any person is a contribution unless the credit is extended in the ordinary course of the person's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. If a creditor fails to make a commercially reasonable attempt to collect the debt, a contribution will result. (See 11 CFR 116.3 and 116.4.) If a debt owed by a political committee is forgiven or settled for less than the amount owed, a contribution results unless such debt is settled in accordance with the standards set forth at 11 CFR 116.3 and 116.4.

§ 100.56 Office building or facility for national party committees.

A gift, subscription, loan, advance, or deposit of money or anything of value to a national party committee for the purchase or construction of an office building or facility is a contribution.

§ 100.57 Funds received in response to solicitations.

(a) *Treatment as contributions.* A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

(b) *Certain allocable solicitations.* If the costs of a solicitation described in paragraph (a) of this section are allocable under 11 CFR 106.1, 106.6 or 106.7 as a direct cost of fundraising, the funds received in response to the solicitation shall be contributions as follows:

(1) If the solicitation does not refer to any clearly identified non-Federal candidates, but does refer to a political party, in addition to the clearly identified Federal candidate described in paragraph (a) of this section, one hundred percent (100%) of the total funds received are contributions.

(2) If the solicitation refers to one or more clearly identified non-Federal candidates, in addition to the clearly identified Federal candidate described in paragraph (a) of this section, at least fifty percent (50%) of the total funds received are contributions, whether or not the solicitation refers to a political party.

(c) *Joint fundraisers.* Joint fundraising conducted under 11 CFR 102.17 shall comply with the requirements of paragraphs (a) and (b) of this section except that joint fundraising between or among authorized committees of Federal candidates and campaign organizations of non-Federal candidates is not subject to paragraph (a) or (b) of this section.

[69 FR 68066, Nov. 23, 2004, as amended at 70 FR 75384, Dec. 20, 2005]

Subpart C—Exceptions to Contributions

SOURCE: 67 FR 50585, Aug. 5, 2002, unless otherwise noted.

§ 100.71 Scope.

(a) The term *contribution* does not include payments, services or other things of value described in this subpart.

(b) For the purpose of this subpart, a contribution or payment made by an individual shall not be attributed to any other individual, unless otherwise specified by that other individual in accordance with 11 CFR 110.1(k).

§ 100.72 Testing the waters.

(a) *General exemption.* Funds received solely for the purpose of determining whether an individual should become a candidate are not contributions. Examples of activities permissible under this exemption if they are conducted to determine whether an individual should become a candidate include, but are not limited to, conducting a poll, telephone calls, and travel. Only funds permissible under the Act may be used for such activities. The individual shall keep records of all such funds received. See 11 CFR 101.3. If the individual subsequently becomes a candidate, the funds received are contributions subject to the reporting requirements of the Act. Such contributions must be reported with the first report filed by the principal campaign committee of

Federal account or its allocation account are subject to the following requirements:

(A) For each such transfer, the committee must itemize in its reports the allocable activities for which the transferred funds are intended to pay, as required by 11 CFR 104.10(b)(3); and

(B) Except as provided in paragraph (f)(2) of this section, such funds may not be transferred more than 10 days before or more than 60 days after the payments for which they are designated are made.

(iii) Any portion of a transfer from a committee's non-Federal account to its Federal account or its allocation account that does not meet the requirements of paragraph (g)(2)(ii) of this section shall be presumed to be a loan or contribution from the non-Federal account to a Federal account, in violation of the Act.

(3) *Reporting transfers of funds and allocated disbursements.* A political committee that transfers funds between accounts and pays allocable expenses according to this section shall report each such transfer and disbursement pursuant to 11 CFR 104.10(b).

(h) *Sunset provision.* This section applies from November 6, 2002, to December 31, 2002. After December 31, 2002, *see* 11 CFR 106.7(a).

[67 FR 49116, July 29, 2002]

§ 106.6 Allocation of expenses between federal and non-federal activities by separate segregated funds and nonconnected committees.

(a) *General rule.* Separate segregated funds and nonconnected committees that make disbursements in connection with federal and non-federal elections shall make those disbursements either entirely from funds subject to the prohibitions and limitations of the Act, or from accounts established pursuant to 11 CFR 102.5. Separate segregated funds and nonconnected committees that have established separate federal and non-federal accounts under 11 CFR 102.5 (a)(1)(i), or that make federal and non-federal disbursements from a single account under 11 CFR 102.5(a)(1)(ii), shall allocate their federal and non-federal expenses according to paragraphs (c), (d), and (f) of this section. For purposes of this section, "nonconnected committee" includes any committee which conducts activities in connection with an election, but which is not a party committee, an authorized committee of any candidate for federal election, or a separate segregated fund.

(b) *Payments for administrative expenses, voter drives and certain public communications*—(1) *Costs to be allocated.* Separate segregated funds and nonconnected committees that make disbursements in connection with Federal and non-Federal elections shall allocate expenses for the following categories of activity in accordance with paragraphs (c) or (d) of this section:

(i) Administrative expenses including rent, utilities, office supplies, and salaries not attributable to a clearly identified candidate, except that for a separate segregated fund such expenses may be paid instead by its connected organization;

(ii) The direct costs of a fundraising program or event including disbursements for solicitation of funds and for planning and administration of actual fundraising events, where Federal and non-Federal funds are collected through such program or event, except that for a separate segregated fund such expenses may be paid instead by its connected organization;

(iii) Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate; and

(iv) Public communications that refer to a political party, but do not refer to any clearly identified Federal or non-Federal candidate;

(2) *Costs not subject to allocation.* Separate segregated funds and nonconnected committees that make disbursements for the following categories of activity shall pay for those activities in accordance with paragraph (f) of this section:

(i) Voter drives, including voter identification, voter registration, and get-out-the-vote drives, in which the printed materials or scripted messages refer to, or the written instructions direct

the separate segregated fund's or nonconnected committee's employee or volunteer to refer to:

(A) One or more clearly identified Federal candidates, but do not refer to any clearly identified non-Federal candidates; or

(B) One or more clearly identified Federal candidates and also refer to candidates of a particular party or associated with a particular issue, but do not refer to any clearly identified non-Federal candidates;

(ii) Voter drives, including voter identification, voter registration, and get-out-the-vote drives, in which the printed materials or scripted messages refer to, or the written instructions direct the separate segregated fund's or nonconnected committee's employee or volunteer to refer to:

(A) One or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates; or

(B) One or more clearly identified non-Federal candidates and also refer to candidates of a particular party or associated with a particular issue, but do not refer to any clearly identified Federal candidates;

(iii) Public communications that refer to one or more clearly identified Federal candidates, regardless of whether there is reference to a political party, but do not refer to any clearly identified non-Federal candidates; and

(iv) Public communications that refer to a political party, and refer to one or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates.

(c) *Method for allocating administrative expenses, costs of generic voter drives, and certain public communications.* Nonconnected committees and separate segregated funds shall pay their administrative expenses, costs of generic voter drives, and costs of public communications that refer to any political party, as described in paragraphs (b)(1)(i), (b)(1)(iii) or (b)(1)(iv) of this section, with at least 50 percent Federal funds, as defined in 11 CFR 300.2(g).

(d) *Method for allocating direct costs of fundraising.* (1) If federal and non-federal funds are collected by one committee through a joint activity, that committee shall allocate its direct costs of fundraising, as described in paragraph (a)(2) of this section, according to the funds received method. Under this method, the committee shall allocate its fundraising costs based on the ratio of funds received into its federal account to its total receipts from each fundraising program or event. This ratio shall be estimated prior to each such program or event based upon the committee's reasonable prediction of its federal and non-federal revenue from that program or event, and shall be noted in the committee's report for the period in which the first disbursement for such program or event occurred, submitted pursuant to 11 CFR 104.5. Any disbursements for fundraising costs made prior to the actual program or event shall be allocated according to this estimated ratio.

(2) No later than the date 60 days after each fundraising program or event from which both federal and non-federal funds are collected, the committee shall adjust the allocation ratio for that program or event to reflect the actual ratio of funds received. If the non-federal account has paid more than its allocable share, the committee shall transfer funds from its federal to its non-federal account, as necessary, to reflect the adjusted allocation ratio. If the federal account has paid more than its allocable share, the committee shall make any transfers of funds from its non-federal to its federal account to reflect the adjusted allocation ratio within the 60-day time period established by this paragraph. The committee shall make note of any such adjustments and transfers in its report for any period in which a transfer was made, and shall also report the date of the fundraising program or event which serves as the basis for the transfer. In the case of a telemarketing or direct mail campaign, the "date" for purposes of this paragraph is the last day of the telemarketing campaign, or the day on which the final direct mail solicitations are mailed.

(e) *Payment of allocable expenses by committees with separate federal and non-federal accounts*—(1) *Payment options.*

Nonconnected committees and separate segregated funds that have established separate federal and non-federal accounts under 11 CFR 102.5 (a)(1)(i) shall pay the expenses of joint federal and non-federal activities described in paragraph (b) of this section according to either paragraph (e)(1)(i) or (ii), as follows:

(i) *Payment by federal account; transfers from non-federal account to federal account.* The committee shall pay the entire amount of an allocable expense from its federal account and shall transfer funds from its non-federal account to its federal account solely to cover the non-federal share of that allocable expense.

(ii) *Payment by separate allocation account; transfers from federal and non-federal accounts to allocation account.* (A) The committee shall establish a separate allocation account into which funds from its federal and non-federal accounts shall be deposited solely for the purpose of paying the allocable expenses of joint federal and non-federal activities. Once a committee has established an allocation account for this purpose, all allocable expenses shall be paid from that account for as long as the account is maintained.

(B) The committee shall transfer funds from its federal and non-federal accounts to its allocation account in amounts proportionate to the federal or non-federal share of each allocable expense.

(C) No funds contained in the allocation account may be transferred to any other account maintained by the committee.

(2) *Timing of transfers between accounts.* (i) Under either payment option described in paragraphs (e)(1) (i) or (ii) of this section, the committee shall transfer funds from its non-federal account or from its federal and non-federal accounts to its separate allocation account following determination of the final cost of each joint federal and non-federal activity, or in advance of such determination if advance payment is required by the vendor and if such payment is based on a reasonable estimate of the activity's final cost as determined by the committee and the vendor(s) involved.

(ii) Funds transferred from a committee's non-federal account to its federal account or its allocation account are subject to the following requirements:

(A) For each such transfer, the committee must itemize in its reports the allocable activities for which the tranferred funds are intended to pay, as required by 11 CFR 104.10(b)(3); and

(B) Except as provided in paragraph (d)(2) of this section, such funds may not be transferred more than 10 days before or more than 60 days after the payments for which they are designated are made.

(iii) Any portion of a transfer from a committee's non-federal account to its federal account or its allocation account that does not meet the requirements of paragraph (e)(2)(ii) of this section shall be presumed to be a loan or contribution from the non-federal account to a federal account, in violation of the Act.

(3) *Reporting transfers of funds and allocated disbursements.* A political committee that transfers funds between accounts and pays allocable expenses according to this section shall report each such transfer and disbursement pursuant to 11 CFR 104.10(b).

(f) *Payments for public communications and voter drives that refer to one or more clearly identified Federal or non-Federal candidates.* Nonconnected committees and separate segregated funds shall pay for the costs of all public communications that refer to one or more clearly identified candidates, and voter drives that refer to one or more clearly identified candidates, as described in paragraphs (b)(2)(i) and (b)(2)(ii) of this section, as follows:

(1) The following shall be paid 100 percent from the Federal account of the nonconnected committee or separate segregated fund:

(i) Public communications that refer to one or more clearly identified Federal candidates, regardless of whether there is reference to a political party, but do not refer to any clearly identified non-Federal candidates, as described in paragraph (b)(2)(iii) of this section; and

(ii) Voter drives described in paragraph (b)(2)(i) of this section.

(2) The following may be paid 100 percent from the non-Federal account of the nonconnected committee or separate segregated fund:

(i) Public communications that refer to a political party and one or more clearly identified non-Federal candidates, but do not refer to any clearly identified Federal candidates, as described in paragraph (b)(2)(iv) of this section; and

(ii) Voter drives described in paragraph (b)(2)(ii) of this section.

(3) Notwithstanding 11 CFR 106.1(a)(i), public communications and voter drives that refer to one or more clearly identified Federal candidates and one or more clearly identified non-Federal candidates, regardless of whether there is a reference to a political party, including those that are expenditures, independent expenditures or in-kind contributions, shall be allocated as follows:

(i) Public communications and voter drives, other than phone banks, shall be allocated based on the proportion of space or time devoted to each clearly identified Federal candidate as compared to the total space or time devoted to all clearly identified candidates, or

(ii) Public communications and voter drives that are conducted through phone banks shall be allocated based on the number of questions or statements devoted to each clearly identified Federal candidate as compared to the total number of questions or statements devoted to all clearly identified candidates.

[55 FR 26071, June 26, 1990, as amended at 57 FR 8993, Mar. 13, 1992; 69 FR 68067, Nov. 23, 2004]

§ 106.7 Allocation of expenses between Federal and non-Federal accounts by party committees, other than for Federal election activities.

(a) National party committees are prohibited from raising or spending non-Federal funds. Therefore, these committees shall not allocate expenditures and disbursements between Federal and non-Federal accounts. All disbursements by a national party committee must be made from a Federal account.

(b) State, district, and local party committees that make expenditures and disbursements in connection with both Federal and non-Federal elections for activities that are not Federal election activities pursuant to 11 CFR 100.24 may use only funds subject to the prohibitions and limitations of the Act, or they may allocate such expenditures and disbursements between their Federal and their non-Federal accounts. State, district, and local party committees that are political committees that have established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate expenses between those accounts according to paragraphs (c) and (d) of this section. Party organizations that are not political committees but have established separate Federal and non-Federal accounts, or that make Federal and non-Federal disbursements from a single account, shall also allocate their Federal and non-Federal expenses according to paragraphs (c) and (d) of this section. In lieu of establishing separate accounts, party organizations that are not political committees may choose to use a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) pursuant to 11 CFR 102.5 and 300.30.

(c) *Costs allocable by State, district, and local party committees between Federal and non-Federal accounts.*

(1) *Salaries, wages, and fringe benefits.* State, district, and local party committees must either pay salaries, wages, and fringe benefits for employees who spend 25% or less of their time in a given month on Federal election activity or activity in connection with a Federal election with funds from their Federal account, or with a combination of funds from their Federal and non-Federal accounts, in accordance with paragraph (d)(2) of this section. *See* 11 CFR 300.33(d)(1).

(2) *Administrative costs.* State, district, and local party committees may either pay administrative costs, including rent, utilities, office equipment, office supplies, postage for other than mass mailings, and routine building maintenance, upkeep and repair, from their Federal account, or allocate such expenses between their Federal and

TITLE 2. THE CONGRESS

Chapter 14—Federal Election Campaigns

Subchapter 1—Disclosure of Federal Campaign Funds

§ 431. Definitions

When used in this Act:

(1) The term "election" means—

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

(2) The term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election—

(A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

(3) The term "Federal office" means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.

(4) The term "political committee" means—

(A) 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; or

(B) any separate segregated fund established under the provisions of section 441b(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) of this section aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

(5) The term "principal campaign committee" means a political committee designated and authorized by a candidate under section 432(e)(1) of this title.

(6) The term "authorized committee" means the principal campaign committee or any other political committee authorized by a candidate under section 432(e)(1) of this title to receive contributions or make expenditures on behalf of such candidate.

(7) The term "connected organization" means any organization which is not a political committee but which directly or indirectly establishes, administers, or financially supports a political committee.

(8) (A) The term "contribution" includes—

(i) 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; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

(B) The term "contribution" does not include–

(i) the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee;

(ii) the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises

or in the church or community room for candidate-related or political party-related activities, to the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iii) the sale of any food or beverage by a vendor for use in any candidate's campaign or for use by or on behalf of any political committee of a political party at a charge less than the normal comparable charge, if such charge is at least equal to the cost of such food or beverage to the vendor, to the extent that the cumulative value of such activity by such vendor on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does exceed $2000 in any calendar year;

(iv) any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or any political committee of a political party, to the extent that the cumulative value of such activity by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(v) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vii) any loan of money by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation...[1] or the National Credit Union Administration, other than any overdraft made with respect to a checking or savings account, made in accordance with applicable law and in the ordinary course of business, but such loan—

(I) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors;

(II) shall be made on a basis which assures repayment, evidenced by a written instrument, and subject to a due date or amortization schedule; and

(III) shall bear the usual and customary interest rate of the lending institution;

(viii)[2] any legal or accounting services rendered to or on behalf of—

(I) any political committee of a political party if the person paying for such services is the regular employer of the person rendering such services and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26, but amounts paid or incurred by the regular employer

[1] The omitted language is an obsolete reference to the Federal Savings and Loan Insurance Corporation, which in past years provided account or deposit insurance. This corporation was abolished and its functions transferred in 1989. See note at 12 U.S.C. § 1437 for a fuller explanation.

[2] Section 103(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 431(8)(B) to strike clause (viii) (regarding donations to party building funds) and redesignate clauses (ix) through (xv) as clauses (viii) through (xiv) respectively. This amendment is effective as of November 6, 2002.

for such legal or accounting services shall be reported in accordance with section 434(b) of this title by the committee receiving such services;

(ix) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That—

(1) such payments are not for the cost of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(x) the payment by a candidate, for nomination or election to any public office (including State or local office), or authorized committee of a candidate, of the costs of campaign materials which include information on or reference to any other candidate and which are used in connection with volunteer activities (including pins, bumper stickers, handbills, brochures, posters, and yard signs, but not including the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising): *Provided*, That such payments are made from contributions subject to the limitations and prohibitions of this Act;

(xi) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection

with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates;

(xii) payments made by a candidate or the authorized committee of a candidate as a condition of ballot access and payments received by any political party committee as a condition of ballot access;

(xiii) any honorarium (within the meaning of section 441i[1] of this title); and

(xiv)[2]any loan of money derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate, if such a loan is made in accordance with applicable law and under commercially reasonable terms and if the person making such loan makes loans derived from an advance on the candidate's brokerage account, credit card, home equity line of credit, or other line of credit in the normal course of the person's business.

(9) (A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include—

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station,

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[1]This is an obsolete reference to a section of the law repealed in 1991 and not to current section 441i.

[2]Section 502(6) of the Department of Transportation and Related Agencies Appropriations Act, 2001, Pub. Law No. 106-346 amended 2 U.S.C. § 431(8)(B) by adding new clause (xv). Section 103(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 431(8)(B) to redesignate clause (xv) as clause (xiv). This amendment is effective as of November 6, 2002.

newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(4)(A)(ii) of this title with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an

amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b), but all such costs shall be reported in accordance with section 434(b);

(vii) the payment of compensation for legal or accounting services—

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26, but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) by the committee receiving such services;

(viii) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-

out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.

(10) The term "Commission" means the Federal Election Commission.

(11) The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

(12) The term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(13) The term "identification" means—

(A) in the case of any individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer; and

(B) in the case of any other person, the full name and address of such person.

(14) The term "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission.

(15) The term "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission.

(16) The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

(17)[1] *Independent expenditure.* The term 'independent expenditure' means an expenditure by a person—

(A) expressly advocating the election or defeat of a clearly identified candidate; and

(B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

(18) The term "clearly identified" means that—

(A) the name of the candidate involved appears;

(B) a photograph or drawing of the candidate appears; or

(C) the identity of the candidate is apparent by unambiguous reference.

(19) The term "Act" means the Federal Election Campaign Act of 1971 as amended.

(20)[2] *Federal election activity.*

(A) *In general.* The term 'Federal election activity' means—

(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);

(iii) a public communication that refers to a clearly identified candidate for Federal office (regardless

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[1]Section 211 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 431 by revising the definition of an independent expenditure. This amendment is effective as of November 6, 2002.

[2]Section 101(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 431 by adding new paragraphs (20) through (24). This amendment is effective as of November 6, 2002.

of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or

(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

(B) *Excluded activity.* The term 'Federal election activity' does not include an amount expended or disbursed by a State, district, or local committee of a political party for—

(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);

(iii) the costs of a State, district, or local political convention; and

(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

(21) *Generic campaign activity.* The term 'generic campaign activity' means a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate.

(22) *Public communication.* The term 'public communication' means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.

(23) *Mass mailing.* The term 'mass mailing' means a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.

§ 441i. Soft money of political parties[1]

(a) *National committees.*

(1) *In general.* A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) *Applicability.* The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

(b) *State, district and local committees.*

(1) *In general.* Except as provided in paragraph (2), an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) *Applicability.*

(A) *In general.* Notwithstanding clause (i) or (ii) of section 301(20)(A) (2 U.S.C. § 431(20)(A)), and subject to subparagraph (B), paragraph (1) shall not apply to any amount expended or disbursed by a State, district, or local committee of a political party for an activity described in either such clause to the extent the amounts expended or disbursed for such activity are allocated (under regulations prescribed by the Commission) among amounts—

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[1]Prior to its repeal on August 14, 1991, by Section 6(d) of the Legislative Branch Appropriations Act, 1991, Pub. L. No. 102–90, section 441i regulated the acceptance of honoraria by Senators and officers and employees of the U.S. Senate. Section 309 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended the Act to add a new section 441i, concerning nonfederal funds of political parties. This amendment is effective as of November 6, 2002.

(i) which consist solely of contributions subject to the limitations, prohibitions, and reporting requirements of this Act (other than amounts described in subparagraph (B)(iii)); and

(ii) other amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection).

(B) *Conditions.* Subparagraph (A) shall only apply if—

(i) the activity does not refer to a clearly identified candidate for Federal office;

(ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;

(iii) the amounts expended or disbursed which are described in subparagraph (A)(ii) are paid from amounts which are donated in accordance with State law and which meet the requirements of subparagraph (C), except that no person (including any person established, financed, maintained, or controlled by such person) may donate more than $10,000 to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and

(iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from—

(I) any other State, local, or district committee of any State party,

(II) the national committee of a political party (including a national congressional campaign committee of a political party),

(III) any officer or agent acting on behalf of any committee described in subclause (I) or (II), or

(IV) any entity directly or indirectly established, financed, maintained, or controlled by any committee described in subclause (I) or (II).

(C) *Prohibiting involvement of national parties, federal candidates and officeholders, and state parties acting jointly.* Notwithstanding subsection (e) (other than subsection (e)(3)), amounts specifically authorized to be spent under subparagraph (B)(iii) meet the requirements of this subparagraph only if the amounts—

(i) are not solicited, received, directed, transferred, or spent by or in the name of any person described in subsection (a) or (e); and

(ii) are not solicited, received, or directed through fundraising activities conducted jointly by 2 or more State, local, or district committees of any political party or their agents, or by a State, local, or district committee of a political party on behalf of the State, local, or district committee of a political party or its agent in one or more other States.

(c) *Fundraising costs.* An amount spent by a person described in subsection (a) or (b) to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(d) *Tax-exempt organizations.* A national, State, district, or local committee of a political party (including a national congressional campaign committee of a political party), an entity that is directly or indirectly established, financed, maintained, or controlled by any such national, State, district, or local committee or its agent, and an officer or agent acting on behalf of any such party committee or entity, shall not solicit any funds for, or make or direct any donations to—

(1) an organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code (or has submitted an application for determination of tax exempt status under such section) and that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity); or

(2) an organization described in section 527 of such Code (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(e) *Federal candidates.*

(1) *In general.* A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not—

(A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or

(B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds—

(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of section 315(a) (2 U.S.C. § 441a(a)); and

(ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

(2) *State law.* Paragraph (1) does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph who is or was also a candidate for a State or local office solely in connection with such election for State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.

(3) *Fundraising events.* Notwithstanding paragraph (1) or subsection (b)(2)(C), a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.

(4) *Permitting certain solicitations.*

(A) *General solicitations.* Notwithstanding any other provision of this subsection, an individual described in paragraph (1) may make a general solicitation of funds on behalf of any organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under

section 501(a) of such Code (or has submitted an application for determination of tax exempt status under such section) (other than an entity whose principal purpose is to conduct activities described in clauses (i) and (ii) of section 301(20)(A)) (2 U.S.C. § 431(20)(A)) where such solicitation does not specify how the funds will or should be spent.

(B) *Certain specific solicitations.* In addition to the general solicitations permitted under subparagraph (A), an individual described in paragraph (1) may make a solicitation explicitly to obtain funds for carrying out the activities described in clauses (i) and (ii) of section 301(20)(A) (2 U.S.C. § 431(20)(A)), or for an entity whose principal purpose is to conduct such activities, if—

(i) the solicitation is made only to individuals; and

(ii) the amount solicited from any individual during any calendar year does not exceed $20,000.

(f) *State candidates.*

(1) *In general.* A candidate for State or local office, individual holding State or local office, or an agent of such a candidate or individual may not spend any funds for a communication described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)) unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) *Exception for certain communications.* Paragraph (1) shall not apply to an individual described in such paragraph if the communication involved is in connection with an election for such State or local office and refers only to such individual or to any other candidate for the State or local office held or sought by such individual, or both.

§ 441j. Repealed.

§ 441k.[1] Prohibition of contributions by minors

An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party.

[1]Section 318 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended the Act to add section 441k. This amendment was effective as of November 6, 2002. However, in *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court ruled that section 441k was unconstitutional.