UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	CIVIL ACTION NO. 05-00049-CKK

EMILY'S LIST'S REPLY MEMORANDUM AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

Dated June 27, 2005

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I. INTRODUCTION

At the beginning of the 2006 election cycle, the Federal Election Commission adopted new rules that made it harder for independent political committees to support both federal and nonfederal candidates. Challenged in this Court by EMILY's List, a political committee which extensively supports candidates for state and local office, the Federal Election Commission has responded with three basic arguments.

The Commission contends that, because courts have upheld restrictions placed by Congress on political party committees, corporations and labor organizations, this Court should uphold restrictive rules that the Commission decided on its own to place on independent political committees. It contends that, because EMILY's List is a federally registered political committee, the agency is free to regulate all the committee's activities. Finally, the Commission contends that its new rules were rationally developed. Each of these arguments is incorrect.

First, the Constitution limits the FEC's authority to regulate political activity. These limits can be surmounted, but only when carefully drawn to prevent corruption or its appearance. The Commission has not met this standard here. When Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, it regulated the activities of party committees effectively under the control or substantial influence of federal candidates, and those of corporations and unions with the potential to corrupt those candidates. It relied on extensive record evidence, and was conspicuously silent on the activities of independent committees.

These new rules are wholly different. Independent committees do not, by definition, have these relationships with federal candidates. They present no such record of corruption, and the Commission considered no such record. The considerations that led the Supreme

Court to uphold BCRA are not present here, and yet the Commission assumes that the same outcome should automatically result.

Second, the Commission can only regulate contributions and expenditures made for the purpose of influencing federal elections. That a political committee is registered with the Commission does not automatically make its state and local election activities subject to Commission regulation as well. Nonetheless, these new rules regulate purely state and local election activity. They also regulate some activity well beyond their effect on federal elections. The Commission defends this by saying that it could have required all of a committee's state and local election activity to be paid for entirely with federal funds. This is not so.

Third, these rules are not the product of rational decision-making. The requirement that a committee must pay for administrative expenses and voter drive activity at least half with federal funds has nothing to do with the actual effect of that spending on federal elections. The fundraising and public communication rules are poorly tailored also. For example, they require a committee to pay for a public communication referring to a New York federal candidate and directed to voters in Utah entirely with federal funds – on the theory that the communication might affect voters in New York. These are not simply rules that could have been better drafted. They are flawed to the core, having been poorly conceived.

The Commission tries to evade accountability for these unlawful rules by questioning EMILY's List's standing, and by claiming that plaintiff did not adequately cite to the record to support its claims. At the same time, however, it acknowledges that these rules prevent EMILY's List from doing things that it could otherwise have lawfully done. This Court should reject the Commission's arguments in defense of its unlawful rules, spurn its disingenuous attempt to avoid a decision on the merits, and grant summary judgment to EMILY's List.

II. PRELIMINARY ISSUES

A. Standing

The Commission does not dispute that the rules challenged here apply to EMILY's List. Moreover, it acknowledges that EMILY's List cannot do things under the new rules that it could have lawfully done before. For example, it suggests that if EMILY's List wants to ensure compliance with the new fundraising restrictions at 11 C.F.R. § 100.57, "it can adjust the wording of its solicitations." (Def's. Mot. Summ. J. 33.) When the next presidential incumbent is on the ballot, EMILY's List can "reword" its communications to refer to "the Administration" instead. (Def's. Mot. Summ. J. 23.). It can ask the Government for permission to engage in once-lawful conduct, by seeking "advisory opinions for clarification . . . ." (Def's. Mot. Summ. J. 34.). All of this is justified by the speculative possibility that EMILY's List might become an "attractive vehicle[] for circumvention . . . ." (Def's. Mot. Summ. J. 22.) In the end, the Government faults EMILY's List for not being "seriously interested in complying with the regulation." (Def's. Mot. Summ. J. 33.). Yet at the same time, the Commission repeatedly claims that EMILY's list is entirely unaffected by the new rules. (Def's. Mot. Summ. J. 2, 3. 29.).

To achieve Article III standing, a plaintiff must show (1) injury in fact, (2) fairly traceable to the defendant's challenged action, and (3) redressable by a favorable court decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Injury is presumed when a First Amendment violation is found. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendments freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."), *quoted in Nat'l Treasury Employees Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991).

The Commission does not make a direct assault on EMILY's List's standing, because there is no real question that EMILY's List has standing. EMILY's List is unquestionably injured by these rules. As discussed above, it cannot now do things that it once could do. It

cannot send a public communication referring to a lone federal candidate, even if the communication is not directed to that candidate's voters, without paying for it entirely with federal funds. *See* 11 C.F.R. § 106.6(f)(1)(i). It cannot raise funds jointly for federal and nonfederal candidate activities, while mentioning federal candidates, without treating any less than 50% of the receipts as federal funds. *See id.* § 100.57(b). These new restrictions are a real burden, not an imaginary one, and the Commission acknowledges as much.

EMILY's List is also injured by the new rules' requirement that it pay for at least half of its administrative and voter drive expenses with federal money. By citing EMILY's List's past allocation history as predictive of its future intent, (Def's. Mot. Summ. J. 3), the Commission radically misunderstands the historical context in which EMILY's List has operated, in which women are becoming increasingly active and successful, particularly at the nonfederal level. In 2006, three incumbent women Democratic governors will seek reelection. Their campaigns, and those of countless women seeking lesser state and local office, will be an unprecedented focus of attention for EMILY's List.

In contrast, in 1996, when "EMILY's List reported a final allocation ratio of 70% federal candidate support and 30% nonfederal," (Def's. Mot. Summ. J. 3.), there were three women Democratic statewide candidates for governor – and two of them lost. *See* Center for American Women and Politics, *Women Candidates for Governor 1970-2004*, http://www.cawp.rutgers.edu/Facts/CanHistory/canwingov_histlst.pdf. Recent years have seen women shatter the glass ceiling separating them from statewide executive office. This, in turn, has significantly altered EMILY's List's focus.

With nonfederal elections comprising a larger and larger share of EMILY's List's business, and with the Commission's rules requiring more and more of that business to be paid for with federal money, the injury to EMILY's List is clear. It does not matter whether EMILY's List has "the most hard money." (Def's. Mot. Summ. J. 2.). It does not matter whether "it can appeal to its existing supporters or find new supporters." (Def's. Mot. Summ.

J. 29.). Every additional federal dollar that EMILY's List has to spend to support state and local candidates under the new rule is a dollar that cannot be used to make a direct contribution or expenditure in actual support of a federal candidate. Even if this Court found it unnecessary to reach EMILY's List's First Amendment claim, for which injury is presumed, there would still be injury to EMILY's List as a result of these rules.

With standing not really in doubt, and with the Commission not really challenging it, the Commission complains instead that EMILY's List has not submitted enough evidence to prove it. The FEC reads *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002) and succeeding cases as creating an inflexible rule requiring the submission of affidavits to buttress standing in every case. That position is precisely the one rejected in *American Library Ass'n v. FCC*, 401 F.3d 489 (D.C. Cir. 2005). There, the court held: "Nothing in *Sierra Club* suggests that it is intended to create a 'gotcha' trap whereby parties who reasonably think their standing is self-evident nonetheless may have their cases summarily dismissed if they fail to document fully their standing at the earliest possible stage in the litigation." *Id.* at 493.

Moreover, *Sierra Club* and its progeny involved cases where the standing question was genuinely complex, such as when the plaintiff is an association asserting representational standing. *See, e.g.*, *Communities Against Runaway Expansion, Inc. v. FAA*, 355 F.3d 678, 684 (D.C. Cir. 2004); *Sierra Club*, 292 F.3d at 900. For example, *Democratic Senatorial Campaign Committee v. FEC* was an unprecedented case in which a national party committee had established a private right of action under the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.*, to sue its Republican counterpart directly. *See* 139 F.3d 951 (D.C. Cir. 1998). There is no such complexity or novelty here, where EMILY's List is unquestionably affected by these rules, and where it has sued on its own behalf.[1]

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[1] A plaintiff may submit an affidavit with a reply brief to demonstrate standing when the defendant would not be unfairly prejudiced. *See Communities Against Runaway Expansion*, 355 F.3d at 684-85. To dispose of the Commission's disingenuous argument once and for all, Plaintiff attaches

B. Material Facts

The Commission also contends that EMILY's List's Statement of Material Facts violates LCvR 7(h), and that this violation should lead to the denial of Plaintiff's Motion for Summary Judgment. In particular, the Commission complains that EMILY's List did not cite to the record for every numbered claim.

This argument, too, is disingenuous. Upon this Court's request, Plaintiff and Defendant conferred regarding the need for discovery, and jointly stipulated that no discovery would be necessary. Because no discovery was conducted, there is no record in this case, save the administrative record the FEC considered when promulgating the regulations at issue. The Commission cannot now pretend to be surprised at the paucity of the record.

In any case, the Commission misreads LCvR 7(h). The rule, in relevant part, states: "Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement." The rule does not require a citation for every point; what it requires is that when portions of the record are relevant, they should be noted. EMILY's List has cited to documents available in the administrative record, when they are available.

The Commission's listed cases are also disingenuous. They consider situations in which the moving party did not submit any statement of material facts, *see Heasley v. D.C. Gen. Hosp.*, 180 F. Supp. 2d 158, 163 (D.D.C. 2002), or submitted one containing a grossly insufficient statement of material facts in the face of a developed record, *see Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996).

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an affidavit from Britt Cocanour, EMILY's List's Treasurer and Chief of Staff, detailing the effect of the Commission's rules on EMILY's List. Because Plaintiff has been clear from the beginning in how and why it was asserting standing, there is no unfair prejudice to Defendant.

These cases do not speak to a situation like the instant case, where the record is undeveloped due to mutual agreement by the parties.

Finally, LCvR 7(h) requires the opposing party to list "all material facts as to which it is contended there exists a genuine issue necessary to be litigated." The Commission has challenged only a few of EMILY's List's facts on their face; Defendant's Statement of Material Issues rests primarily on the lack of an evidentiary record. The purpose of LCvR 7(h) is to establish which facts require further investigation and which do not. The Commission therefore asserts that this Court should proceed to trial on these issues even if both parties actually agree on the basic facts. This Court should reject such an exercise in futility.

C. Remedy

If this Court finds that sections 100.57 and 106.6 violate the First Amendment, the boundaries on the Commission's statutory authority, or the Administrative Procedure Act ("APA"), §§ 553-706, the regulations should be immediately vacated. The FEC argues that this would constitute "extraordinary relief." (Def's. Mot. Summ. J. 45.). The FEC misreads the relevant authority concerning remand without vacation.

It is true that this circuit has held that regulations inadequately supported need not be vacated. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). When making the determination, the factors to be weighed include "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Int'l Union, UMW v. FMSHA,* 920 F.2d 960, 967 (D.C. Cir. 1990). If it is unlikely that the flaw can be corrected upon remand, courts should immediately vacate instead. *See Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1268 (D.C. Cir. 1994).

Here, the FEC has shown no willingness or capability to satisfy the requirements of the APA; this Court should not further indulge the Commission. Moreover, there is no way

for the Commission to correct its violations of the statutory authority or of the First Amendment. Given that there was a set of functioning regulations in place prior to the promulgation of the regulations at issue, any disruption would be minimal. To do otherwise, and remand without vacation, would unduly prejudice EMILY's List.

III. THE REGULATIONS VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

To the extent that the Commission bothers to defend the constitutionality of the new rules, its defense is premised almost entirely on the Supreme Court's decision in *McConnell v. FEC,* 540 U.S. 93 (2003). The Commission argues that, because the Supreme Court permitted Congress to impose more onerous restrictions on party committees, corporations and unions, this Court should allow the Commission to enforce these new rules against independent committees like EMILY's List.

For example, the Commission cites the Supreme Court's affirmance of a ban on national party committee soft money fundraising and spending to justify restrictions on EMILY's List's partial use of soft money for public communications and voter drives. (Def's. Mot. Summ. J. 22.). It cites the affirmance of BCRA's Federal election activity restrictions on state and local party committees to justify limitations on the financing of EMILY's List communications that refer to federal candidates. (Def's. Mot. Summ. J. 22, 28.). It cites the survival of the electioneering communication restrictions to support its new restrictions on how EMILY's List may pay for public communications. (Def's. Mot. Summ. J. 23.).

However, *McConnell* addressed an altogether different situation. When Congress passed BCRA, it responded to record evidence of corruption and its appearance resulting from the activities of candidates, parties, and unregistered organizations using corporate and union funds. Those restrictions were upheld in *McConnell,* because they were found to be closely drawn to address real or apparent corruption. The Court particularly found that there

was a close relationship – one of control and substantial influence – between parties and candidates that, in turn, justified the law's restrictions on party activities. *See* 540 U.S. at 146-47.

When the Commission adopted these rules, it found no record of corruption or its appearance. It found only the speculative possibility that "political committees like EMILY's List … *could* similarly be attractive vehicles for circumvention of the FECA's aggregate and individual contribution limits." (Def's. Mot. Summ. J. 22.) (emphasis supplied). It imposed new, restrictive rules not on entities that were closely associated with candidates, or thought to be controlled by candidates, but rather on groups that operated largely independently of candidates.

McConnell is not a blank check for the Commission to regulate however it pleases. The Supreme Court itself praised "Congress' decision to proceed in incremental steps in the area of campaign finance regulation," prudence which the Commission has not exercised. *McConnell*, 540 U.S. at 158.

"When a law burdens core political speech, we apply 'exacting scrutiny' and we uphold the restriction only when it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 334-35 (1995). The Government "must show concrete evidence that a particular type of financial transaction is corrupting or gives rise to the appearance of corruption and that the chosen means of regulation are closely drawn to address that real or apparent corruption." *McConnell,* 540 U.S. at 185 n.72. The mere "hypothetical possibility" of corruption is not enough. *FEC v. National Conservative Political Action Comm.,* 470 U.S. 480, 498 (1985).

The Commission cannot meet this constitutional burden. It cannot explain how an independent communication that merely references a federal officeholder, months or even years away from that officeholder's election and in another geographic location entirely, can

possibly be a corrupting influence on that officeholder. Not even electioneering communications by corporations and unions themselves are regulated this strictly.

The fifty-percent minimum fares no better. The FEC does not show how the administrative expenses and voter drive activities of independent committees have a corrupting influence on officeholders. The FEC relies on the Supreme Court's approval of similar restrictions on political party activity; but *McConnell* took no position on such activities by outside organizations, and Congress pointedly chose to leave them alone. Political party committees are affiliated with, and are controlled by, elected officials and candidates; independent organizations are not. Congress readily grasped this distinction; the FEC did not.

The solicitation restrictions in section 100.57 also cannot be linked to the corruption of federal officeholders or candidates. Once again, the independent nature of the organization is highly relevant; there is no record of federal candidate or officeholder involvement in independent committee soft money fundraising activities, as there was in BCRA. To the extent corruption was a concern, BCRA's separate restrictions on officeholder and candidate activity have already addressed it.

Yet it is significant that the regulation goes far beyond even an imagined concern about corruption. In some circumstances, it treats a fixed percentage of receipts as federal contributions, even when the solicitation in question explicitly states that much less than that percentage will be used to support or oppose federal candidates. That is, the regulation treats some receipts as potentially corrupting of federal officeholders even when they will not be used for federal purposes at all. The First Amendment does not permit so imprecise a result.

Finally, the FEC argues that these regulations are not restrictive of free speech, because EMILY's List can merely "appeal to its existing supporters or find new supporters." (Def's. Mot. Summ. J. 29.) It cites to *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976), for this proposition. But the *Buckley* court did not find that the contribution limits were not

restrictive of free speech and associational right; it instead found that constitutional rights were impinged, but that there was a "constitutionally sufficient justification." *Id.* at 26. Here, there is no such justification. Because the FEC cannot link these rules to the prevention of corruption, much less show that the regulations are narrowly tailored to serve that end, the regulations cannot stand.

IV. THE REGULATIONS ARE IN EXCESS OF THE FEC'S STATUTORY JURISDICTION AND AUTHORITY

The Commission presents this Court with a novel doctrine of administrative law – that once an entity falls within the agency's jurisdiction, the agency is free to regulate all of its activities. For example, if a political committee is active also in state and local elections, the Commission may require the committee to pay for its state and local election activity entirely with federal money. (Def's. Mot. Summ. J. 16-17.). To the extent that the Commission decides to let the committee pay for its state and local election activity with funds raised under state law, it "is a permissive administrative construction, not a statutory entitlement." (Def's. Mot. Summ. J. 17.).

However, the APA prevents the Commission from regulating "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The APA prohibits "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). In the case of a political committee like EMILY's List, the agency may regulate only contributions or expenditures made for the purpose of influencing a federal election. *See* 2 U.S.C. § 431(8)(A), (9)(A).

The Commission has plainly exceeded this authority. First, the rules affect some activities that cannot, under any theory, influence federal elections. For example, it restricts the financing of a public communication that refers to a federal candidate even when it is distributed to an audience that includes none of the candidate's voters, far in advance of any

election. As noted above, this radical approach goes beyond even Title II of BCRA, which contained geographic and temporal limits that proved essential to its survival.

Second, the rules restrict some activities far beyond their effect on federal elections. In some cases, section 100.57 defines *all* receipts as contributions, when the solicitation indicates that a clearly identified candidate will be supported or opposed only with *some* of the funds. This is true even if the solicitation itself states unequivocally that only a smaller percentage of funds will be used for federal elections. This is true even when a majority of the funds are in fact segregated and used solely for nonfederal elections, or for entirely nonpolitical purposes. The Commission does not bother to address these anomalies. It claims only that that "plaintiff does not really contend that even the hypothetical communications it crafted to support its argument *cannot* have any influence on federal elections." (Def's. Mot. Summ. J. 23.)

The principal argument that the Commission offers in defense of these rules is a telling and dangerous one: that the Commission is free to regulate *all* the activities of a federally registered political committee however it sees fit. It points to *McConnell*, 540 U.S. at 1, and *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987), for the proposition that the Commission has the statutory power to require an independent political committee to pay for its state and local election activity entirely with federal funds. (Def's. Mot. Summ. J. 16-17.).

Neither *McConnell* nor *Common Cause* stands for this proposition. The Court in *McConnell* did say that "a literal reading of FECA's definition of 'contribution' would have required" activities influencing both federal and nonfederal elections "to be funded with hard money . . . ." 540 U.S. at 123. However, the Court did not enforce this "literal reading" against the continued allocation of some mixed expenses by state parties. Moreover, as noted above, the Court upheld Congress' repeal of allocation by national party committees only after considering extensive evidence that the parties were using "soft money" expressly to

influence federal elections, and that their close relationship with federal candidates had created the appearance if not actuality of corruption. *See id.* at 146.

Nor does *Common Cause* support the proposition that the Commission may withhold allocation whenever it wants. In *Common Cause,* this Court wrote: "Indeed, it is possible that the Commission may conclude that *no* method of allocation will effectuate the Congressional goal that *all* monies spent by state political committees on those activities permitted in those activities permitted in the 1979 amendments be 'hard money' under the FECA." 692 F. Supp. at 1396. Yet the Commission does not present the full context of this discussion. The Court was not considering the administrative and voter drive activities of independent political committees like EMILY's List. Rather, it was discussing the so-called "exempt activities" of state and local party committees. *See id.* at 1394. These were activities that otherwise would have been contributions to federal candidates, had Congress not specifically chosen to exempt them from the definition of "contribution" in 1979. They expressly urged people to vote for federal candidates, were targeted at the candidates' voters, and were financed by parties in which the candidates were closely involved. Congress expressly required them to be financed with "contributions subject to the limitations and prohibitions of the Act." *See id.* at 1394; *see also* 2 U.S.C. § 431(8)(B)(ix)(2), (xi)(2), (viii)(2), (ix)(2).

The Commission stands *Common Cause* on its head. *Common Cause* does not stand for the proposition that the Commission can force a political organization, active principally in state and local elections, to pay its administrative or generic expenses entirely with hard money. It does not stand for the proposition that the Commission can force a political committee to pay for a communication that has no demonstrable effect on federal elections entirely with hard money. It does not stand for the proposition that, once Congress has pointedly chosen to leave untouched the activities of independent committees, the Commission can regulate them anyway.

Finally, the Commission relies on *FEC v. Survival Educ. Fund*, 65 F.3d 285 (2d Cir. 1995) to support the over-reaching of section 100.57. That case held that contributions under FECA would result from a solicitation that left "no doubt" that funds given in response would be used to influence federal elections. *Id.* at 295. Yet once again, the Commission has twisted the case law to support an overreach of its authority. In some cases, section 100.57 defines *all* receipts as contributions, when the solicitation indicates that a clearly identified candidate will be supported or opposed only with *some* of the funds.

The Commission does not attempt to defend this result under the terms of 2 U.S.C. § 431(8)(A), because the result is indefensible. The FEC only has the power to regulate payments made to influence a federal election. The rationale of *Survival Education Fund* was based on the fact that the funds would be used to influence federal elections, and that this was easily ascertained from the solicitation. To treat all funds as contributions even when only a small portion of them will be used to influence federal elections, and even when the solicitation explicitly states as such, is a regulatory effort far beyond that permitted by the FECA.

V. THE REGULATIONS ARE ARBITRARY AND CAPRICIOUS

Just as the FEC may not regulate the state and local election activities of independent political committees however it pleases, it may not write rules however it wants. The rules must have some "relationship to the underlying regulatory problem." *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir. 1977)). It is ironic that the FEC would cite *RNC v. FEC,* 76 F.3d 400 (D.C. Cir. 1996) to defend its rulemaking prerogatives. (Def's. Mot. Summ. J. 24.). In that case, the court invalidated a Commission rule so poorly crafted, it required political committees to make an "inaccurate and misleading" statement of the law. 76 F.3d at 406. That rule, too, involved issues that the Commission had "wrestled with" for decades. (Def's. Mot. Summ. J. 17.). *See* 76 F.3d at 404-05.

These rules suffer from the same slipshod, arbitrary approach. For example, the Commission arbitrarily decided to require independent political committees to pay for at least half of their administrative and voter drive expenses with hard money, because a fifty percent allocation ratio "fairly reflects the dual nature of the disbursements." (Def's. Mot. Summ. J. 27.). It is nonsensical to conclude that, because someone does two different things, the effect of one is as significant as that of the other. Yet this is just the sort of illogic in which the Commission has indulged here.

Moreover, the record reflects no actual evidence to show why the Commission reached the decision that it did. It cites "anecdotal evidence" that committees were "confused" by the old rule, but it does not say what that evidence is. (Def's. Mot. Summ. J. 26.). It says that "audit experience had also shown that some committees were not properly allocating under the complicated funds expended method," (Def's. Mot. Summ. J. 26), but it does not identify the complexity that supposedly resulted in such improper allocation, nor does it say how the addition of a minimum federal percentage to a variable allocation scheme leaves anyone less confused.[2] It claims to have relied on a review of public disclosure reports, but it does not say how which reports led to its conclusion or how; anyone wishing to divine the Commission's thought processes must look at the untold thousands of reports "publicly available on the Commission's web site and in its public records office." (Def's. Mot. Summ. J. 42.).

This rulemaking effectively began when a sham Republican PAC, mimicking the activities of a prominent Democratic organization, sought an advisory opinion inviting the Commission to disallow these activities. (Def's. Mot. Summ. J. 3 n.8, 8.). The Commission issued the opinion sought, placing restrictions on the financing of public communications by

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[2] Indeed, the rules do not state how a committee would go about calculating a federal share greater than fifty percent.

independent political committees that had not yet been written into rules. *See* FEC Advisory Opinion 2003-37 (Feb. 19, 2004). The Commission undertook the rulemaking to attempt to ratify the new rules improperly imposed by the advisory opinion process, and it did so with extreme haste. *See* Political Committee Status, 69 Fed. Reg. 11,736 (proposed Mar. 11, 2004). (Def's. Mot. Summ. J. 6.).

The Commission claimed that the true purpose of its rulemaking was the professed desire "to simplify the allocation system, and to make it easier for SSFs and nonconnected committees to comprehend and for the Commission to administer these requirements." Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,060 (Nov. 23, 2004). But the Commission can point to no independent political committee that sought such simplification. The only calls for simplification cited by the Commission in its brief came from a public interest organization that supported more restrictive campaign financing rules; and from the Republican National Committee, which was no longer permitted to allocate because of BCRA. (Def's. Mot. Summ. J. 8-9.).

This is not rulemaking within a "zone of reasonableness," *ExxonMobil Gas Mktg. Co. v FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002), where the agency's policy preferences should be respected, *Worldcom, Inc. v. FCC*, 238 F.3d 449, 461 (D.C. Cir. 2001). Unlike this case, the cases cited by the FEC involved agencies that carefully considered the relevant factors before choosing the thresholds. In *ExxonMobil*, the court required the agency to "give[] 'reasoned consideration to each of the pertinent factors' and articulate[] factual conclusions that are supported by substantial evidence in the record." 297 F.3d at 1084 (quoting *Conoco Inc. v. FERC*, 90 F.3d 536, 544 (D.C. Cir. 1996)). In *Worldcom*, the FCC "considered alternatives," rejected them, and "provided an adequate explanation." 238 F.3d at 461. The FEC engaged in none of this conduct.

The arbitrary thresholds of section 100.57 fare even worse. There is no analysis – none – for why the solicitation restriction treats one hundred percent of the receipts as contributions. There is no analysis – none – for why the regulation treats fifty percent of the receipts as contributions when a clearly identified nonfederal candidate is referenced. Why the FEC chose these amounts is never explained. The Commission's papers before this Court also fail to explain from whence these numbers originate, or why they were chosen. In the face of the Commission's complete abdication of its duty to justify the choice of the arbitrary amounts contained in section 100.57, this Court should strike that regulation down as arbitrary and capricious.

As to the use of hypothetical examples, the Commission complains that "Plaintiff offers no evidence" to support its hypothetical examples, in particular those concerning solicitations that ask for only a small percentage of federal funds. (Def's. Mot. Summ. J. 32.) As the Commission should know, the review of an agency's action under the APA is limited to the record before the agency at the time of the rulemaking. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). The Commission would no doubt complain if EMILY's List attempted to include evidence of its hypothetical examples.

In any case, the FEC's complaint that there is "no evidence that anyone actually uses solicitations" that devote only a small percentage of receipts for federal purposes is disingenuous. (Def's. Mot. Summ. J. 32-33.) Before the advent of section 100.57, it was common practice for allocating committees, or joint fundraising committees for federal and nonfederal committees, to issue solicitations that would devote the first $5,000 of contributions for federal purposes, up to the contribution limit for federal committees, and to use the rest for solely nonfederal purposes. For solicitations targeting large contributions, then, only a small percentage of each contribution would be given for the purpose of influencing federal elections; however, section 100.57 requires at least half of those funds to be treated as federal contributions.

In any case, the use of hypothetical examples to demonstrate absurdities in administrative regulations is perfectly permissible. The two cases Defendant cites are inapposite. (Def's. Mot. Summ. J. 33.) The court in *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 57 (D.C. Cir. 1990) refused to consider a hypothetical *misapplication* of a rule, not a straightforward hypothetical application. *See id.* at 56. And the issue in *Florida League of Professional Lobbyists v. Meggs*, 87 F.3d 457 (11th Cir. 1996) was a challenge to a state regulation under the First Amendment, not under the APA. *See id.* at 458.

Courts regularly use hypothetical examples to test the arbitrary and capricious nature of a rule. *See Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005); *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1150 (10th Cir. 2004). Indeed, this Court in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) used hypotheticals again and again when striking down Commission regulations. *See, e.g.*, *id.* at 113-14 (considering the possibility that political parties would spread federal election responsibilities throughout their employees to avoid the 25 percent threshold).

VI. THERE WAS NOT A SUFFICIENT OPPORTUNITY FOR NOTICE AND COMMENT

Section 553(b) of the APA permits notice by publishing either a "description of the subjects and issues involved," or "the terms or substance of the proposed rule." 5 U.S.C. § 553(b)(3). The Commission argues that EMILY's List focuses on the latter, but ignores the former when arguing that the regulations were preceded by insufficient notice. (Def's. Mot. Summ. J. 34-34.) The Commission apparently does not understand that both of these prongs are governed by the "logical outgrowth" standard. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). The Commission has not met this standard, and the rules fail as a result.

EMILY's List does not complain simply that the proposed rules did not match the final rules exactly; under § 553(b), that is not required. What is required is that the notice be

"sufficient to apprise the public, at a minimum, that the issue . . . was on the table." *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1276 (D.C. Cir. 1996). EMILY's List did not fail "even to argue about the alternative type of notice." (Def's. Mot. Summ. J. 35.) To the contrary, it focused on the logical outgrowth test and why it has not been met. This test encompasses both prongs of § 553(b). Defendant cannot avoid the strictures of the logical outgrowth test by focusing on one prong of § 553(b) instead of the other.

The FEC offers no defense of its notice of the mere reference portions of section 106.6, other than to say that it was "within the range of noticed possibilities." (Def's. Mot. Summ. J. 40). There is no attempt to explain how the final rules were a logical outgrowth of either the initial proposed rule, or of the description of the subjects and issues involved. The Commission never indicated that anything but the support or oppose standard would be used – the same standard already in place under AO 2003-37.

As Defendant's Motion for Summary Judgment itself notes, the "logical outgrowth" test is only satisfied when "a new round of notice and comment would not provide commenters with their first occasion to offer new and different criticisms which the agency might find convincing." *Ass'n of Battery Recyclers, Inc. v. U.S. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000) (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1225 (D.C.Cir. 1980)). Here, the administrative record makes obvious that new and different criticisms were clearly first available when the final rules were made public. This is why EMILY's List, in its letter of August 17, 2004 to the Commission, asked that a new round of notice and comment be permitted. That request was refused, and Plaintiff was never afforded an opportunity to offer comments and criticisms that were relevant to the regulations in their final form.

The "refers to" standard contained in the final rules was unlike any regulation promulgated by the Commission, with the sole exception of the electioneering communications provisions, which expressly do not apply to groups like EMILY's List.

There was no hint in the proposed rules that the Commission would travel down this road. The overreaching of the rules to extend to nonfederal activity is due largely to the use of the "refers to" standard instead of the proposed "support or oppose" standard. EMILY's List never had the opportunity to comment on the use of this standard, and the Commission's resulting foray into the regulation of purely nonfederal activity. If it had, the Commission might have been dissuaded from this course, and this case might have been unnecessary.

Finally, the FEC quarrels with Plaintiff's argument that the agency used data not made available to the public. Defendant argues that all the data used – publicly available disclosure reports – were available to the general public. (Def's. Mot. Summ. J. 42.) While that is technically true, the sheer number of reports available, and the lack of sorting ability on the FEC system, makes segregating out allocating committees practically impossible. This argument is akin to arguing that a scientific study of air samples nationwide was publicly available because the public could have conducted their own study by collecting their own samples. The public nature of the data points does not equate to the results of the analysis being made public.

More importantly, neither EMILY's List nor anyone else had any idea that administrative convenience was the rationale. EMILY's List had no chance to contest the findings, or the administrative conclusion drawn from those findings. If given the chance, EMILY's List would have noted that it would vastly prefer the former regime to a regime where the illusion of clarity takes precedence over common sense, and that the FEC was overstating the savings in time and convenience from using a minimum allocation ratio.

The Commission continues to rely only on the deference traditionally afforded federal agencies in the rulemaking process. But that deference only extends so far; the agency must present arguments and evidence to be deferred to. The FEC has not done that here. The revisions to section 106.6, and the promulgation of section 100.57, are arbitrary and capricious and should be struck down.

VII. CONCLUSION

These regulations offend the Constitution, the boundaries on the Commission's statutory authority, and the Administrative Procedure Act. Yet when EMILY's List asserted its rights before this Court, the Commission responded in a manner that can only be described as cavalier.

The Commission's answer to the First Amendment claim was that EMILY's List should "appeal to its existing supporters or find new supporters." (Def's. Mot. Summ. J. 29.) When told that it could not regulate EMILY's List's state and local election activities, the Commission replied that freedom from such regulation "is a permissive administrative construction, not a statutory entitlement." (Def's. Mot. Summ. J. 17.) Presented with serious defects in the administrative process, the Commission assured EMILY's List that it had the committee's best interests at heart, and that it was just trying to "make it easier" for the committee. (Def's. Mot. Summ. J. 26.)

Such a response is unacceptable from an agency whose activities go to the heart of the First Amendment, and that is governed like any other by the bounds of reasoned decision-making. The Commission may believe that it can treat independent committees with no record of corruption in the same way that Congress treated parties, corporations and unions, but it cannot. It may believe that it is free to regulate the totality of a political committee's state and local election activities however it chooses, but it cannot. It may believe that it can generate irrational rules through an irregular process without being required to provide an adequate explanation, but it cannot.

For the foregoing reasons, Plaintiff EMILY's List's Motion for Summary Judgment should be granted, and Defendant Federal Election Commission's Motion for Summary Judgment should be denied.

Respectfully submitted,

Dated June 27, 2005	/s/ Robert F. Bauer (D.C. Bar No. 938902) Ezra W. Reese (D.C. Bar No. 487760) PERKINS COIE LLP 607 Fourteenth Street, N.W. Washington, D.C. 20005-2011 (202) 628-6600 Attorneys for EMILY's List

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

CIVIL ACTION NO. 05-00049-CKK

DECLARATION OF BRITT COCANOUR IN SUPPORT OF EMILY'S LIST'S MOTION FOR SUMMARY JUDGMENT

In accordance with 28 U.S.C. § 1746, Britt Cocanour declares as follows:

1. I serve as Treasurer and Chief of Staff of EMILY's List.

2. EMILY's List is a political organization whose purpose is to recruit and fund viable 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.

3. EMILY's List identifies viable opportunities to elect pro-choice Democratic women to 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.

4. EMILY's List also works through its Women Vote! Program to mobilize women voters through broadcast advertising, web sites, direct mail and personal voter contact.

5. EMILY's List was founded in 1985. At that time, no Democratic woman had ever been elected to the U.S. Senate in her own right, no woman had ever been elected governor of a large state, and the number of Democratic women in the U.S. House had declined to twelve.

6. Since 1985, EMILY's List has helped to elect sixty-one Democratic women to Congress, eleven to the U.S. Senate, eight to governorships, and 215 to other state and local offices.

7. Leadership development at the state and local level is an important part of EMILY's List's mission, more so than in previous election cycles. EMILY's List is acutely concerned with promoting the participation and upward mobility of women in the political process. Toward that end, it systematically recruits and promotes women candidates for state and local office.

8. After the 2000 election cycle, EMILY's List noted that the cycle had seen the first decrease in the number of women state legislators in 30 years. Concerned that women might be losing ground at the state and local level, even while enjoying significant success at the federal level, EMILY's List created the Political Opportunity Program ("POP").

9. The goal of POP is to recruit and train women for nonfederal office, to provide them with strategic guidance, and to financially support their campaigns.

10. In the 2004 election cycle, POP helped 140 pro-choice Democratic women win key positions in state and local government. Through POP, EMILY's List held 40 training sessions in 29 states, training 1,600 nonfederal candidates and staff – more individuals than had gone through the training program in the previous eight years combined.

11. EMILY's List expects that the POP program will train significantly more state and local candidates during the 2006 election cycle. Moreover, EMILY's List intends to engage in more direct nonfederal candidate support than in prior election cycles. This is partly because there will be more opportunities to support women nonfederal candidates than in previous years. This is also because there will be an unprecedented number of Democratic women seeking re-election for statewide political office, including the incumbent governors of Arizona, Kansas and Michigan.

12. The federal account of EMILY's List is a nonconnected political committee that is registered with, and reports to, the Federal Election Commission.

13. 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, not permissible under federal campaign finance law.

14. Were it not for the rules published at 69 Fed. Reg. 68,056, EMILY's List would pay for less than fifty percent of its administrative expenses, generic voter drives, and public communications that refer only to a political party from its federal account.

15. Because of the rules published at 69 Fed. Reg. 68,056, EMILY's List will have to devote funds from its federal account to administrative expenses, generic voter drives, and public communications that refer only to a political party that it would otherwise spend on direct federal candidate support.

16. EMILY's List has found that its success in electing clearly identified federal candidates has been a powerful inducement to encourage persons to donate to EMILY's List's nonfederal account. This is because donors can be confident that EMILY's List will have this same sort of success in electing candidates to nonfederal office.

17. Were it not for the rules published at 69 Fed. Reg. 68,056, EMILY's List would discuss its past success in promoting the election of clearly identified federal candidates while soliciting contributions for its nonfederal account, whether through public communications or through one-on-one solicitations.

18. There have been instances in the past where support of a federal candidate by EMILY's List has been relevant to requests for support of multiple nonfederal candidates. For example, in the 2004 election cycle, the decision by Gwen Moore to run for Congress in Wisconsin's Fourth Congressional District created a vacancy in the Wisconsin State Senate that Lena Taylor ran to fill in that same election. In turn, Lena Taylor's decision to run for the Wisconsin State Senate created a vacancy in the Wisconsin State Assembly that Tamara Grigsby ran to fill in that same election. EMILY's List supported all three of these candidates in that election. All three won.

19. EMILY's List has, in the past, made solicitations that ask for both federal and nonfederal contributions. These solicitations sometimes asked for less than fifty percent federal funds. Some of these solicitations have indicated that the funds will be used to support or oppose clearly identified federal candidates.

20. Among EMILY's List's administrative expenses is a program called Campaign Corps, which trains young people in campaign skills and assists in placing them on campaigns. Although 77% of the individuals trained by the program during the 2004 election cycle ultimately worked on nonfederal races, the rules published at 69 Fed. Reg. 68,056 requires at least half of the training expenses to be paid from EMILY's List's federal account.

21. Were it not for the rules published at 69 Fed. Reg. 68,056, EMILY's List would continue to make solicitations that indicate that some of the funds will be used to support or oppose clearly identified federal candidates, and would treat less than fifty percent of the receipts as federal funds.

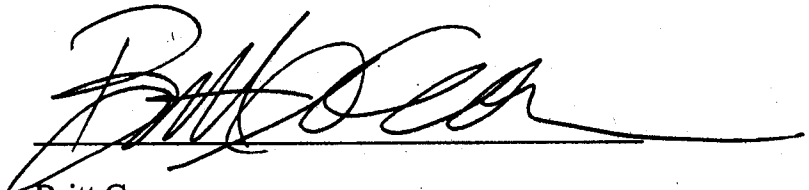
22. EMILY's List has sent in the past, and will continue to send in the future, public communications that refer to federal candidates, but do not support or oppose federal candidates, and do not refer to any clearly identified non-federal candidates. Some of these communications are sent outside of the federal candidates' electoral jurisdiction.

23. Because of the rules published at 69 Fed. Reg. 68,056, EMILY's List will have to devote funds from its federal account to public communications that refer to federal candidates that it would otherwise spend on direct federal candidate support.

24. Overall, the rules published at 69 Fed. Reg. 68,056 have impeded and will impede the ability of EMILY's List to raise and spend money in support of and in opposition to candidates for public office.

I declare under perjury that the foregoing is true and correct.

Executed this 27th day of June, 2005.



Britt Cocanour