ORAL ARGUMENT SCHEDULED FOR MAY 4, 2009

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

REPLY BRIEF OF PLAINTIFF-APPELLANT EMILY'S LIST

Dated: March 26, 2009

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GLOSSARY

ACT	America Coming Together
AO	Advisory Opinion
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
WRTL	Wisconsin Right to Life, Inc.

I. STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the Addendum to Appellant's Opening Brief.

II. SUMMARY OF THE ARGUMENT

The regulations at issue in this case violate the First Amendment, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the Administrative Procedure Act ("APA"). They restrict vast amounts of state and local election activity. And yet, they were promulgated without any record to show that they were needed to avoid corruption or its appearance. Indeed, before this litigation, the Commission had not once articulated how the regulations prevented candidate corruption. Promulgated on a theory that the Commission, on its own, may do whatever it wants in the name of anti-circumvention, the rules are not tailored to meet the government's interest.

The defenses raised in the Commission's response brief are disingenuous or miss the point. First, the Commission constantly seeks to downplay or minimize the radical effect of these rules. They do not merely "clarify" or "simplify" the old regulations, nor do they merely "refine" the definition of "contribution." Rather, without any intervening act of Congress, they vastly expand the range of fundraising and spending regulated by the Commission. Second, while asserting such expansive authority, the Commission repeatedly overlooks a core constraint on its conduct: the need to engage in reasoned decision-making. The agency's failure to properly tailor these rules causes them to fail First Amendment, *Chevron* and APA scrutiny.

III. ARGUMENT

A. The Regulations Have Radically Changed How Groups Like EMILY's List May Engage in State and Local Elections.

The Commission argues that new section 106.6 merely "simplifies" the previous allocation regulation and section 100.57 only "clarifies" the definition of "contribution."

(FEC Br. 1, 13, 40, 50; Amicus Br. 24). Because the rules purport merely to "implement[]" FECA's contribution limits, the Commission supposes that it was not obligated to tie the regulations to any anticorruption rationale. (FEC Br. 13, 18, 20, 30, 55; Amicus Br. 23). But this is not so. These rules impose entirely new requirements, expand the range of activity regulated by the government beyond the congressional design, and curtail EMILY's List's First Amendment-protected activity.

The regulations place new, real limits on EMILY's List's ability to support candidates for state and local office. *First*, EMILY's List must use at least 50 percent federally restricted funds to pay for its administrative expenses and for generic communications that do not refer to any candidates, regardless of its actual federal and nonfederal activities. 11 C.F.R. § 106.6 (b)(1); FEC Adv. Op. 2005-13, at 2-3 (Oct. 20, 2005) (JA at 300-01). Thus, it requires EMILY's List to consume the limited federal funds that it would have used to support federal candidates in order to pay for the administrative costs involved in supporting state and local candidates. It effectively federalizes a significant portion of EMILY's List's state and local election activity, and diminishes the resources available for that activity.

EMILY's List has demonstrated a twenty-year commitment to supporting state and local candidates. (JA at 70). Never has there been a suggestion that these activities were a subterfuge, or somehow a cover for supporting federal candidates or parties. And Congress in BCRA did not limit in any way EMILY's List's programs for supporting state and local candidates. Yet, unbidden by Congress, and with no factual record to rely upon, the Commission chose to make it harder for groups like EMILY's List to support state and local candidates. EMILY's List now faces the choice of diverting its limited federal resources to state and local candidate support, or curtailing its support of state and local candidates.

Second, the FEC imposes a brand-new mere "reference" rule for communications that refer to clearly identified candidates: a rule which has no parallel, even in BCRA's soft

money restrictions. *Cf.* 2 U.S.C. § 431(20)(A)(iii) (limiting party financing of communications that promote, support, attack or oppose a federal candidate); *id.* § 434(f)(3) (limiting "electioneering communications" to those distributed to the candidate's own voters within 30 or 60 days of the election). 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* 11 C.F.R. § 106.6(b), (f)(1). Using entirely federal funds is required even if the communication does not promote, support, attack, or oppose the referenced candidate; even if it cannot be seen or heard by the referenced candidate's own voters; even if it is made years before the referenced candidate is up for election; and even if its clear, unambiguous purpose is to support nonfederal candidates. FEC Adv. Op. 2005-13, at 4-6 (JA at 302-04).

Third, the new solicitation regulation requires, for the first time, that organizations treat the funds 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." 11 C.F.R. § 100.57(a). 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* Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,057 (Nov. 23, 2004) (JA at 283). The Commission's protestations to the contrary, this rule is a trap. As *amici* point out, language that a federal officeholder or anyone else might use in a direct mail appeal for the March of Dimes or Hurricane Katrina relief – "I need your help" – will be taken by the agency as an indication that she seeks to promote her own election – even if she lives in Michigan, the prospective donor lives in California, and her election is not for five years. (Amicus Br. 32).

The Commission did not try to pass these rules off as mere "simplifications and "clarifications" at the administrative stage. It asked bluntly "whether either BCRA or *McConnell* requires, permits, or prohibits changes to the allocation regulations for separate segregated funds and nonconnected committees." Political Committee Status, 69 Fed. Reg. 11,736, 11,753 (Mar. 11, 2004). The Commission knew well that it was significantly changing the rules – and did so despite a lack of either legal or factual justification.

These new requirements have directly impacted how EMILY's List engages in political expression. The Commission has no record to show how its rules are necessitated by corruption or its appearance, but EMILY's List has demonstrated with specificity how its programs would be adversely affected by the application of these new requirements. The facts before this Court tell this one consistent story.

As an undisputed matter of fact, the rules 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, such as its Campaign Corps program. (JA at 70-71). And the agency has decided summarily that it can impose a 50 percent federal funds requirement irrespective of the level of federal activity in an election cycle. The Commission seeks to downplay the impact of this new requirement on EMILY's List by arguing that in the ten years before the regulations were promulgated, EMILY's List never reported less than a 50 percent allocation ratio. (FEC Br. 26 n.19). This is fallacious. The proper question is how these new rules impact the committee now, and how they will affect it in the future. And, since 2004, EMILY's List has devoted a greater and greater proportion of its efforts to nonfederal elections.

Also as a matter of fact, EMILY's List has had to change what it says when it communicates about state and local candidates and issues because of the new allocation

rules. (JA at 73). 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 included a reference to a clearly identified federal candidate in these advertisements to make them more persuasive. But instead, EMILY's List had to change the communications and remove the federal candidate references in order to make the costs fit within its budget. It had to diminish the effectiveness of its nonfederal advocacy to comply with the Commission's arbitrary rules, and to assuage imagined fears of circumvention.

And finally, the facts are clear that EMILY's List has had to change what it says while raising money. EMILY's List has found that certain well-known federal candidates and officeholders are uniquely effective at raising funds for its efforts on behalf of state and local candidates. (JA at 71). However, under section 100.57, 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, just so it can treat some of the funds received as nonfederal contributions. (JA at 72, 77). Again, it has had to diminish the effectiveness of its fundraising for state and local candidates, solely because of the Commission's rules.

The Commission tries repeatedly to minimize the consequences of its new rules, claiming that they "do not restrict what organizations can spend" (FEC Br. 19), and that groups like EMILY's List retain "complete control" of what they say when raising funds (FEC Br. 44). But this is the same disingenuousness that led the Commission to tell the Supreme Court in *Davis v. FEC*, 128 S. Ct. 2759 (2008), that the Millionaire's Amendment did not abridge Jack Davis's rights because he could still spend whatever he wanted on his own election. Brief for Appellee FEC at 29, *Davis*, 128 S. Ct. 2759 (No. 07-320). The Court

was not persuaded. *See Davis*, 128 S. Ct. at 2772.[1] And, in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2672 (2007) ("*WRTL*"), the Commission argued that it could prohibit Wisconsin Right to Life, Inc. from sponsoring electioneering communications, arguing that it was enough that WRTL could speak though its federally registered political action committee using federal funds. Brief for Appellant FEC at 7, *WRTL*, 127 S. Ct. 2652 (Nos. 06-969, 06-970). But the Court flatly rejected this argument as well. *See WRTL*, 127 S. Ct. at 2671 n.9.

The Commission also argues, no more successfully, that EMILY's List's facial challenge must fail because it relies on "hypothetical," "unlikely," and "worst-case scenarios." (FEC Br. 29). But the scenarios described by EMILY's List are neither hypothetical nor worst-case. Indeed, many of these scenarios came from an advisory opinion that EMILY's List sought from the Commission, having taken at face value the agency's assurance that it could always ask for advance approval of its communications and solicitations. (FEC Br. 29 n.20.)

EMILY's List has shown that the rules severely limit its activities in nonfederal elections. And they have the potential to impact many others. In particular, section 100.57 is a Trojan horse for the vast expansion of the Commission's authority. A local nonprofit organization or state PAC that raises funds while mentioning a federal candidate risks receiving "contributions" and thus triggering registration and reporting obligations, *see* 2 U.S.C. §§ 433(a), 434, and running afoul of the Act's myriad prohibitions and limitations. *See id.* §§ 441, 441a, 441b, 441e. Violation of these provisions can result in large civil fines as well as criminal penalties. *See id.* § 437g.

[1] The Commission argues that EMILY's List waived its argument that the solicitation regulations are subject to strict scrutiny. EMILY's List has always maintained that section 100.57 burdens its speech, and *Davis* provides intervening authority 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.

The simple, unavoidable fact is that these rules have changed the way groups like EMILY's List raise and spend funds – to their own and severe disadvantage. The question for this Court now becomes whether they pass constitutional, *Chevron*, and APA review.

B. The Commission's Regulations Are Not Properly Tailored to Serve Any Interest

When the Commission accuses EMILY's List of "conflating" its First Amendment and administrative law arguments, it unwittingly reveals the central defect of these rules. They were written without regard to the relationship between the burdens placed and the interest served. Their flaw is their arbitrariness. EMILY's List would contend that they are invalid under strict scrutiny, or, alternatively, under the "closest scrutiny" standard of *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). But they even fail a more basic requirement: they do not result from reasoned decision-making.

1. The Regulations Irrationally Penalize Nonconnected Political Committees

The Commission cites *California Medical Association v. FEC*, 453 U.S. 182 (1981) ("*Cal-Med*") for the proposition that "'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" (FEC Br. 28 (quoting *Cal-Med*, 453 U.S. at 201)). But this dictum does not relieve the Commission of its obligation to regulate rationally. And, these rules lead to impermissibly irrational results.

When the Commission wrote these rules, for example, a corporation could broadcast an advertisement in a senator's home state 61 days before her general election. As long as the ad did not expressly advocate the election or defeat of that senator, it would not trigger any obligations under FECA. *See* 11 C.F.R. § 100.29. And yet, the Commission, at the same time, asks this Court to accept a 100 percent federal funds requirement for an EMILY's List communication that mentions a Senator before voters in another state, more than five years

before her own re-election, because it might affect her long-distant re-election, or because it might affect another federal election in that state. This is not rational.

When the Commission wrote these rules, 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. *See* 2 U.S.C. §§ 431(20)(A)(iii); 441i (b)(1). 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 rational.

And when the Commission wrote these rules, state parties – which, according to the Court in *McConnell v. FEC*, 540 U.S. 93, 164 (2003), had a record of close identification with federal candidates and national parties, and thereby could serve as vehicles of actual circumvention – could pay for administrative expenses with as little as 15 percent federal funds. *See* 11 C.F.R. § 106.7 (d)(2)(iv). However, under 106.6(c), nonconnected committees like EMILY's List, with no comparable history, must pay their administrative expenses with an arbitrary minimum of 50 percent federal funds. This is not rational.

The Commission tries to justify this disparate treatment of political committees and state parties by asserting that state and local party committees "have a vital interest in nonfederal elections – and [their] major purpose . . . is usually not the election of *federal* candidates." (FEC Br. 33). But the Commission is asking the Court to accept onerous restrictions on groups Congress never intended to regulate, while minimizing the activities of groups that Congress singled out for special regulation. Furthermore, the Commission provides absolutely no basis to support its supposition that EMILY's List has less of an interest in nonfederal elections than state parties, when EMILY's List's stated purpose is to help elect candidates for local and state, as well as federal office, and when it has helped to elect hundreds of women to state and local offices. (JA at 69-70). This is not rational.

In any event, the Commission's attempt to justify the more stringent regulation of nonconnected committees runs squarely into *McConnell*. There the Court upheld restrictions on state party soft money spending on a well-developed factual record, which led it to conclude that state parties would "function as an alternative avenue for precisely the same corruption forces" operating through national parties. 540 U.S. at 164. But there is no such factual record here. Congress found none. The Commission made no effort to develop one. At best, the Commission can only conjecture that "political committees like EMILY's List . . . *could* similarly be attractive vehicles for circumvention." (FEC Br. 33-34 (emphasis added)). But such speculation cannot support the Commission's First Amendment burden. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000).

In its opening brief, EMILY's List raised a substantial number of other applications that regulate activity far removed from that aimed at influencing federal elections. (*See, e.g.*, Br. 28-29). Together, these examples show that the Commission's regulations are substantially overbroad. But rather than address them together, the Commission employs a "divide and conquer" approach. And rather than seriously engaging EMILY's List's arguments, the Commission's responses are largely non sequiturs.

For example, the Commission repeatedly justifies the regulations by arguing that it cannot regulate with "scientific precision." (FEC Br. 15, 51, 54, 56). But just because it is impossible for the Commission to regulate with a scalpel does not mean it may still use a chainsaw. The Commission does not explain why, in setting the allocation ratio for administrative and generic expenses, the Commission chose to round to the nearest 50 percent. It fallaciously assumed that, because a political organization does two things at the same time, it must be doing both in equal measure.

Similarly, in its opening brief, EMILY's List argued that the solicitation regulations violated the First Amendment and the APA in part because they trump express statements in

a solicitation that indicate that a lower percentage of funds received would be used to support or oppose federal candidates. Rather than seriously engaging this argument, the Commission dismisses it as "an unsupported worst-case hypothetical." (FEC Br. 56). But it is not a hypothetical. It is precisely how the Commission said it would apply the rule in its rulemaking. *See* 69 Fed. Reg. at 68,057 (JA at 283). Further, in defending the solicitation regulations, the Commission's response asserts that the standard in *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995) is clear enough. (FEC Br. 46). But it fails to address the core of EMILY's List's claim, which is that, as implemented by the Commission, the standard is used to sweep in solicitations unrelated to federal elections.

The Commission's justification of 106.6(f) is similarly evasive. In response to the Stabenow example (Br. 13-14) and several other examples provided by EMILY's List (Br. 28-29), the Commission first asserts that a communication that references a federal candidate "*could* influence federal elections." As described above, this is purely speculative –an attenuated standard found nowhere else in federal campaign finance law.[2] The Commission also did not bother to offer this justification in the rulemaking. Next, the Commission argues that 106.6(f) is closely tailored because "to the extent the federal references are as small a part of the communication as EMILY's List implies, the federal share of the expenditure would be proportionately small under the time/space allocation rules . . . ." But this ignores the illogic of the Commission's own proxy for federal election-influencing purpose. A sole, fleeting reference to a lone federal candidate is sufficient to make the communication payable with 100 percent federal funds, even if it runs five years before her own election and is not even broadcast to her electorate. But if an equally fleeting reference to a nonfederal

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[2] The Commission also defends its regulation of nonfederal election activity by citing to *United States v. Slone*, 411 F.3d 643 (6th Cir. 2005). (FEC Br. 52 n.30). *Slone* is entirely inapposite, as it involved Congress's power to regulate vote buying under the Elections Clause and the Necessary and Proper Clause. It had nothing to do with the First Amendment or with FECA.

candidate can be dropped in arbitrarily, then the federal "price" of the piece drops by 50 percent.

In yet another example, EMILY's List argued that it would have to pay for a communication supporting a *state* ballot initiative with at least 50 percent federal funds if the communication stated that "both Democrats and Republicans" supported the initiative. Such a communication is hardly "unlikely" (FEC Br. 28); bipartisanship is a common selling point in electoral appeals. In any event, the Commission's response to the example is that "EMILY's List has not asked the Commission to opine on whether such a bipartisan mention of political parties would be covered by the regulation" and that it can request an advisory opinion if it desires clarification (FEC Br. 28-29 & n.20). And yet, under the plain language of 106.6(c), the 50 percent allocation rule would still apply here. It is unclear why EMILY's List should have to submit an advisory opinion request and wait up to 60 days for Commission response, *see* 11 C.F.R. § 112.4(a), when the regulation is already clear on its face.

As EMILY's List's examples demonstrate, the Commission's regulations treat nonconnected political committees irrationally, and the Commission's attempt to justify the regulations post hoc fails.

2. The Regulations Are Not Supported by Any Established Corruption Rationale

The only constitutionally permissible purpose relied upon by the Supreme Court when approving campaign finance regulation is to "prevent the corruption or the appearance of corruption" in election campaigns. *McConnell*, 540 U.S. at 100-01; *WRTL*, 127 S. Ct. at 2672 (citing *Buckley*, 424 U.S. at 45). And, under the APA, an agency's action is arbitrary and capricious if it fails to consider all "relevant factors." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983). For Commission action, failing to justify regulation with the only legitimate state interests that can sustain restrictions on

campaign spending – preventing corruption and the appearance of corruption – is arbitrary and capricious. *See Shays v. FEC*, 337 F. Supp. 2d 28, 87 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

As EMILY's List described in its opening brief, the Commission failed to tie the new allocation and solicitation regulations to any purported interest in combating corruption or the appearance thereof. The Commission's response to this charge is self-contradictory. On the one hand, it argues that the challenged regulations merely implement FECA's contribution limits and therefore do not need to show a corruption rationale. (FEC Br. 21-22) On the other, the agency argues that it did consider corruption, through possible circumvention of FECA's limitations, in its rulemaking. (FEC Br. 20). Both defenses fail.

a. The Regulations Do Not Merely "Implement" FECA's Contribution Limits

The Commission maintains that the regulations "implement" FECA's contribution limits, therefore removing the need to tie the regulations to a government interest in countering corruption. (FEC Br. 13, 18, 20, 30, 55; Amicus Br. 23). But these regulations do not simply change what EMILY's List may raise. They actually change what a wide range of groups may say when raising and spending funds. For example, a local nonprofit organization that raises funds while mentioning a federal candidate is halfway to political committee status by virtue of that fact alone. It will need an experienced campaign finance lawyer to assure it that the Commission will not interpret the reference as supporting or opposing her election, and that its activities will not trigger the "major" purpose test – which the Commission evaluates on a case-by-case basis through enforcement. Political Committee Status, 72 Fed. Reg. 5,595, 5,601 (Feb. 7, 2007).

The Commission also argues that, because these regulations merely implement FECA, they are permissible anti-circumvention provisions that can be supported solely by the Court's reasoning in *Cal-Med*. (FEC Br. 21-22, 27). In *Cal-Med*, the Supreme Court

upheld FECA's $5,000 limit on contributions to multicandidate political action committees as a permissible means to prevent donors from evading FECA's contribution limits. 453 U.S. at 199 (plurality opinion). In upholding the law, the Court cited FECA's legislative history, in which Congress recognized that a donor who wanted to circumvent the candidate contribution limits by filtering money through political committees. *Id.* at 199 & n.18.

Cal-Med does not, however, stand for the proposition that all restrictions on political action committees can be justified by this rationale. In *Nixon*, the Supreme Court noted that "[t]he 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." 528 U.S. at 391. And it found that, under no circumstance may "mere conjecture" suffice to carry the Commission's First Amendment burden. *Id.* at 392. The type of circumvention that the Commission purports to prevent here is highly attenuated and ungrounded in any facts. To support the allocation regulations here, the Commission would have to conclude that there was a close relationship between non-connected, non-party committees and candidates; that donors wanting to evade the contribution limits have made large soft money contributions to such nonconnected committees (even though the candidates themselves are barred from raising this money under BCRA, *see* 2 U.S.C. § 441i (e)); that those committees then conspire to use the soft money to produce communications that "mention" a federal candidate with the tacit goal of helping him or her; and that federal candidates "mentioned" in the communications will somehow seem to lavish special favor on the PAC donors.

b. The Commission's Circumvention Rationale is Devised Post Hoc

The Commission tries to bolster the non-existent record of political committee "corruption" by stating that "nonconnected political committees often have close relations with federal candidates, political parties, and officeholders." (FEC Br. 20-21). But this

judgment is reached entirely after the fact. There is no evidence that the Commission even tried, when writing its rules, to build the sort of case Congress did when it specially regulated national and state parties with BCRA.[3]

The Commission leans heavily on the 2003-04 experience of another nonconnected committee, America Coming Together ("ACT"). But this reliance is entirely post hoc. While two commentators – including one of *amici* – mentioned ACT in the comments they submitted to the Commission during the rulemaking, the Commission cites no document showing that the Commission actually considered ACT's alleged behavior.[4] Indeed, the Commission's explanation and justification for the final rules did not mention ACT once, did not discuss corruption (except to explain why it did *not* expressly broaden the definition of "political committee"), and made only a single reference to "anti-circumvention." *See* 69 Fed. Reg. at 68,063-65 (JA at 289-291). And, while the Commission states that it "was not required to anticipate [EMILY's List's] argument during the rulemaking" (FEC Br. 35 n.23), if there is one argument that the Commission must consider when regulating First Amendment activity, it is the connection between the regulation and the anticorruption rationale. *WRTL*, 127 S. Ct. at 2672; *State Farm*, 463 U.S. at 42-43.

To the extent that the conduct of a single entity, ACT, actually influenced the Commission's decision to regulate an entire category of actors, it underscores the Commission's arbitrariness and irrationality. And it also demonstrates that the Commission was acting in derogation of its duty to adjudicate pending enforcement actions consistent

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[3] The Commission cites to two fleeting mentions of EMILY's List in the district court's decision in *McConnell* to support the proposition that there is a close relation between nonconnected committees and candidates. (FEC Br. 21). But the Commission overlooks a point it acknowledges elsewhere: that neither Congress nor the *McConnell* Court did anything to regulate the activities of non-party PACs like EMILY's List. (FEC Br. 6).

[4] On the subject of ACT, *amici* find themselves tripped up in a contradiction. They claim that ACT's conduct was already illegal, but that the new rules were created to stop it. (Amicus Br. 25).

with established Commission procedure. Under Commission regulations, when the Commission receives a complaint from a third party alleging that a committee has violated FECA, the Commission must first determine if there is "reason to believe" that a violation has occurred. 11 C.F.R. § 111.9. Such a determination means that the complaint sets forth specific facts, which, if proven true, would constitute a violation of FECA. *Id.* § 111.4(d)(3); *see* Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, FEC MUR 4960 (Dec. 21, 2000). Once the Commission finds "reason to believe," it commences an investigation to verify the truth of the factual claims contained in the complaint. 11 C.F.R. § 111.10. Upon the completion of the investigation, the Commission's General Counsel makes a recommendation to the Commission as to whether it should find "probable cause to believe" that a violation has occurred. *Id.* § 111.16. If four commissioners vote to find probable cause to believe, the Commission will try to conciliate with the committee. *Id.* §§ 111.17, 111.18.

In the case of ACT, several third parties – including *amici* – filed complaints against ACT in the first half of 2004. *See, e.g.*, Complaint, FEC MUR 5403 (Jan. 15, 2004).[5] In October 2004, the Commission notified ACT that it had found "reason to believe" that ACT violated campaign finance law. *See* Notification with Factual and Legal Analysis, FEC MUR 5403 (Oct. 20, 2004). And ACT and the Commission did not conciliate until August 2007, presumably at the end of the Commission's investigation. (JA at 108). Thus, when the rulemaking was initiated following "press reports" of ACT's alleged misconduct in February 2004 (Amicus Br. 14), the Commission had not yet made *any* actual finding as to the validity of the allegations. And when the Commission promulgated the final rules in November 2004, the Commission had only found that the complaints stated facts that, *if true*, would constitute a violation of FECA.

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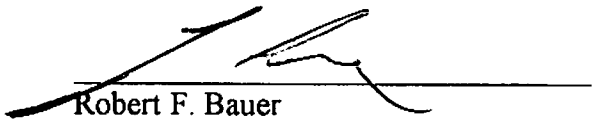
[5] MUR documents are available at http://eqs.nictusa.com/eqs/searcheqs.

IV. CONCLUSION

For the foregoing reasons, the 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 ground 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.

Respectfully submitted,

Dated: March 26, 2009



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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 5,029 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 March 26, 2009 I, by messenger service, delivered two copies of the Reply Brief of Plaintiff-Appellant to:

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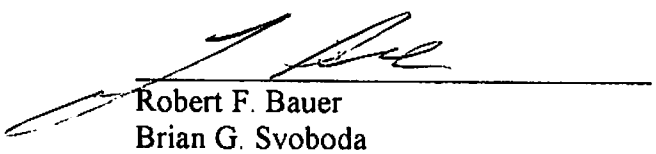
Dated: March 26, 2009



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