UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS SECOND MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In its opposition to the second motion for summary judgment by the Federal Election Commission (Commission or FEC), EMILY's List concedes that the Commission has the authority to regulate contributions and expenditures made "for the purpose of influencing" federal elections. Plaintiff also concedes that the Commission may promulgate rules to govern the financing of federal political committees' activities that may simultaneously affect both federal and state elections. Although plaintiff invokes the First Amendment, the Administrative Procedure Act, and federalism principles in its challenge to the three provisions at issue here, plaintiff's challenge ultimately rests on its objections to the Commission's policy choices, a challenge that must fail under the applicable highly deferential standard of review. EMILY's List favors the Commission's previous regulatory regime for "mixed" federal and nonfederal electoral activities, but as this Court noted in denying plaintiff's motion for a preliminary injunction, plaintiff "has not demonstrated any right, statutory or otherwise, to the former system of allocation rules." *EMILY's List v. FEC*, 362 F. Supp. 2d 43, 55 (D.D.C.), *aff'd*, 170 Fed. Appx. 719 (D.C. Cir. 2005).

EMILY's List, like all federal political committees, is subject to numerous restrictions under the Federal Election Campaign Act (Act or FECA), 2 U.S.C. §§ 431-55. Plaintiff may be "independent" in the sense of not being controlled by a particular political party or candidate, but the Supreme Court has upheld restrictions on contributions to "independent" (nonconnected) political committees, in part because those limits help prevent circumvention of the Act's individual and aggregate contribution limits. *See California Medical Ass'n v. FEC*, 453 U.S. 182 (1981). The regulations at issue here serve that end. They modestly refine the prior rules and reasonably implement some of the Act's provisions that govern the activities of federal political

committees like EMILY's List, whose major purpose is federal campaign activity. In particular, the challenged regulations simplify the allocation system applicable to EMILY's List and clarify when funds received in response to solicitations are considered "contributions."

In its opposition, EMILY's List relies heavily upon unjustified generalizations from *FEC v. Wisconsin Right to Life, Inc*. (*WRTL*), 127 S. Ct. 2652 (2007), but it does not refute our argument that it has ignored or conflated the critical distinctions between that case and this one. *WRTL* was an as-applied challenge, not a facial challenge as here; it concerned a limit on expenditures, not contributions; and it was brought by a corporation that claimed it wished to engage in issue advocacy, not by a federal political committee that seeks to finance its mixed election activity with a higher percentage of nonfederal funds. *See* FEC's Memorandum in Support of Its Second Motion for Summary Judgment (FEC Mem.), at 41-44.

As this Court previously noted, the anti-circumvention regulations at issue here do not prevent plaintiff from "engaging in whatever political speech it seeks to undertake"; instead, they mean only that plaintiff "may be required to raise money from a greater number of donors." *EMILY's List*, 362 F. Supp. 2d at 58 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976)). Indeed, the proper test in assessing the effect of the regulations at issue here is "whether [they are] 'so radical in effect as to … drive the sound of [the recipient's] voice below the level of notice.'" *McConnell v. FEC*, 540 U.S. 93, 173 (2003) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000)). That test is significantly more deferential than the strict scrutiny applied in *WRTL* to the spending restriction applicable to a corporation under 2 U.S.C. § 441b. Moreover, plaintiff's conclusory factual assertion that the new rules "impede the ability of EMILY's List to raise and spend money" (Cocanour Declaration (Decl.) ¶ 31) does not meet the standard applicable here.

II. THE COMMISSION'S ALLOCATION AND SOLICITATION REGULATIONS ARE CONSTITUTIONAL AND CONSISTENT WITH THE FECA

The Commission has shown (Mem. 19-46) that the regulations at issue are consistent with the Constitution and the Act. Because plaintiff's case rests on little more than an argument that the Commission should have chosen different allocation percentages or left the prior system unchanged, plaintiff has failed to show that the Commission's interpretation of the Act is impermissible under the highly deferential standard applicable to judicial review under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). *See Rhinelander Paper Co. v. FERC*, 405 F.3d 1, 6 (D.C. Cir. 2005); FEC Mem. at 15-16. In its reply, EMILY's List does not question the applicability of this deferential standard of review. Nor does plaintiff question the Commission's authority to require that the financing of mixed activities be allocated to ensure that activities influencing federal elections be paid for with federal funds. Instead, EMILY's List bases much of its opposition on a straw man: its false claim that the Commission's position is "that once an entity falls within the agency's jurisdiction, the agency is free to regulate all of its activities." EMILY's List's Reply Memorandum and Memorandum in Opposition to Defendant's Second Motion for Summary Judgment (Pl. Reply Mem.), at 7.

EMILY's List does not dispute that the purpose of the regulations at issue in this case is to implement the Act's contribution restrictions, as this Court recognized in denying a preliminary injunction. *EMILY's List*, 362 F. Supp. 2d at 57. Nor does plaintiff dispute that the Supreme Court has repeatedly upheld those statutory contribution restrictions, and measures to foreclose circumvention of them, on the grounds that they serve the important governmental interests in preventing corruption and the appearance of corruption. *See Buckley*, 424 U.S. at 26-28, 46-47; *McConnell*, 540 U.S. at 143-45; *FEC v. Colorado Republican Federal*

Campaign Comm., 533 U.S. 431, 456 (2001) ("all Members of the Court agree that circumvention is a valid theory of corruption"); FEC Mem. 22-23. Indeed, more than a quarter century ago, the Supreme Court upheld the contribution limits applicable to multicandidate political committees like EMILY's List, explaining that those limits were intended in part to prevent circumvention of the aggregate and individual candidate contribution limits upheld in *Buckley*. *California Medical Ass'n*, 453 U.S. at 197-98.

EMILY's List ignores the Supreme Court's ruling in *California Medical Ass'n*, which forecloses plaintiff's suggestions that "independent groups" are somehow immune from corruption concerns and that the potential of such groups to serve as circumvention vehicles is mere speculation. Nonconnected committees like EMILY's List are subject to the Act's restrictions, even though they are not political parties, because their major purpose is the nomination or election of federal candidates, and they often have close relations with federal candidates, political parties, and office holders — as EMILY's List does. *See infra* p. 12. Indeed, the Supreme Court has stressed that, because the term "political committee" need include only committees whose "'major purpose'" is the "'nomination or election of a candidate,'" the expenditures of such a committee "'are, by definition, campaign related.'" *McConnell*, 540 U.S. at 170 n.64 (quoting *Buckley*, 424 U.S. at 79). Thus, it is well-established that regulation of the finances of such committees serves important anti-corruption interests.

As the Commission explained (Mem. 26), the Supreme Court has recognized that Congress may constitutionally regulate different types of political entities in different ways, *see McConnell*, 540 U.S. at 158, and that an entity cannot immunize its federal election activity from regulation by also engaging in some nonfederal activity. To the contrary, *McConnell* upheld the elimination of national parties' solicitation and receipt of nonfederal funds in the Bipartisan

Campaign Reform Act (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002), despite the parties' recognized role in nonfederal elections, and it also upheld BCRA's new allocation system for state and local parties, despite their even more obvious role in nonfederal elections. *See* 540 U.S. at 142-62. Nor must "independent" multicandidate committees like EMILY's List be as directly associated with federal candidates as political parties are to present corruption concerns. *See California Medical Ass'n*, 453 U.S. at 197-98.[1]

In an attempt to revisit the anti-circumvention justification that supports the kind of contribution regulations at issue here, EMILY's List relies upon *WRTL*, particularly Chief Justice Roberts' statement that "enough is enough." Reply Mem. 10 (citing 127 S. Ct. at 2672). But plaintiff takes this remark out of context. In fact, when Chief Justice Roberts explained that Congress could not restrict the financing of electioneering communications that went beyond the functional equivalent of express advocacy, he specifically contrasted the expenditure limitation at issue in *WRTL* with contribution limits upheld in other cases. In that context, while explaining that anti-circumvention principles have been found sufficient to uphold contribution limits, he reasoned that they were not sufficient to support the application of the spending limitation at issue in *WRTL* to the corporate plaintiff's issue advertisements. Here, however, we have shown (Mem. 16-18) that the regulations governing mixed electoral activities by political committees

[1] Since it has long been established that political committees like EMILY's List are properly subject to the Act's contribution limits because of the potential for corruption stemming from circumvention, plaintiff's suggestion (*see* Reply Mem. 11-12) that the Commission provide a new record of corruption as to each adjustment of the allocation and solicitation rules — indeed, as to each hypothetical application that plaintiff can imagine — is mistaken. "[A] regulation is reasonably related to the purpose of the legislation to which it relates if the regulation serves to prevent circumvention of the statute and is not inconsistent with the statutory provisions." *Carpenter v. Secretary of Veteran Affairs*, 343 F.3d 1347, 1352 (Fed. Cir. 2003). "Moreover, it is unnecessary for an agency to prove that circumvention has occurred in the past in order to sustain an anti-circumvention regulation as reasonable; a regulation can be justified by a reasonable expectation that it will prevent circumvention of statutory policy in the future." *Id.* at 1353.

function as contribution limits and that the Court must apply the less rigorous standard of scrutiny applicable to such limits. In its reply, EMILY's List does not contest this argument; thus, its reliance on *WRTL* is misplaced.

A. The Challenged Regulations Address "Mixed" Federal and State Election Activity by Groups Whose Major Purpose Is Federal Campaign Activity

The Commission promulgated the regulations at issue to clarify the extent to which certain activities of political committees would be considered to be "for the purpose of influencing" a federal election under the Act. 2 U.S.C. § 431(8). Plaintiff agrees (Reply Mem. 1, 14) that this is the relevant statutory standard, but asserts (*id.* at 1, 7) that the Commission has claimed the right to require political committees to finance "all" of their activities with federal funds. *See also, e.g., id*. at 15. The Commission has done no such thing. Despite the straw man plaintiff creates, this case is actually about *mixed* activities, that is, those intended to influence both federal and nonfederal elections. As the Commission explained (Mem. 19-20), *McConnell* made clear that a "literal reading of FECA's definition of 'contribution' would have required such activities to be funded with hard money." 540 U.S. at 123. Plaintiff's argument thus boils down to mischaracterizing this mixed activity as "purely" or "wholly" state and local election activity and then expressing outrage that the Commission would suggest it could require that such activity be financed with federal funds. Reply Mem. 1, 14.[2] As the Commission has explained (Mem. 20, 27-28), however, a given activity may influence nonfederal elections and

[2] In stressing its professed goals of engaging in the kind of election activity governed by these regulations, EMILY's List suggests that its subjective intent can override the regulations' objective criteria in determining the extent to which that activity must be financed with federal funds, and whether a solicitation yields "contributions." To the contrary, subjective intent should play no such role here, and the regulations appropriately provide objective standards for resolving those issues. *Cf. WRTL*, 127 S. Ct. at 2665 (test for resolving as-applied First Amendment challenge to electioneering communication provision does not depend on determining a speaker's subjective intent); *infra* p. 18-19 (discussing intent in federal prosecutions for vote buying in mixed federal and nonfederal elections).

also affect federal elections. *See McConnell*, 540 U.S. at 166. A pre-election television ad urging viewers to "vote Democratic," for example, would obviously affect both federal and nonfederal races on the ballot.

Moreover, the allocation regulations challenged here apply only to political committees. *See* 11 C.F.R. §§ 106.6(c), (f). As the Commission has explained (Mem. 20-21), an organization is a "political committee" if it passes one of the financial thresholds specified in the Act, *see* 2 U.S.C. § 431(4)(A), and also satisfies the "major purpose" test announced by the Supreme Court in *Buckley*, 424 U.S. at 79; *see supra* p. 4. Because of that narrowing construction, "[e]xpenditures of . . . 'political committees' . . . can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*

Contrary to plaintiff's assertion (Reply Mem. 8), the Commission has long applied the Supreme Court's major purpose test in determining whether an organization is a "political committee" under the Act. *See* Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,065 (2004) (noting that the Commission "has been applying" this test "for many years"). *See also, e.g.*, Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5605-5606 (2007); *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996), *vacated on other grounds*, 524 U.S. 11 (1998); *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004), *amended on reconsideration*, 2005 WL 588222 (D.D.C. Mar. 7, 2005); FEC Advisory Opinion (AO) 2006-20 and AO 1988-22 (both accessible by AO number at http://saos.nictusa.com/ saos/searchao). [3] As

[3] EMILY's List also errs in asserting (Reply Mem. 8) that the Commission did not refer to the major purpose test in previous memoranda in this litigation. *See, e.g.*, FEC Memorandum in Support of Its [First] Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment (June 6, 2005), at 7, 19, 21, 28; FEC Reply Memorandum in Support of Its [First] Motion for Summary Judgment (July 18, 2005), at 4, 11.

plaintiff notes, the Commission clarified this year that it interprets the "major purpose" test to refer to organizations whose major purpose is *federal* campaign activity. 72 Fed. Reg. 5595, 5601.[4] Because, by definition, the major purpose of EMILY's List and other nonconnected political committees is to influence federal elections, an allocation regime that reflects that federal purpose is tailored to the kind of entity regulated. Moreover, EMILY's List is in no position to complain about this interpretation because it does not deny in its complaint or in the Cocanour declaration that its own major purpose is federal campaign activity.[5]

In BCRA, Congress mandated a specific allocation system for state parties, and the Supreme Court upheld it. For nonconnected political committees like EMILY's List, Congress left undisturbed the regulatory structure that has been in place for over 30 years, a structure that allows — but does not require — the Commission to permit allocation. In this regard, plaintiff continues to distort the meaning of *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987), arguing (Reply Mem. 14-15) that the case does not support regulating all activities of political committees that are "active in state and local elections." *See* FEC Mem. 20, 22-23. But once again, that is not what the regulations at issue here do. Rather, they clarify the extent to which

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[4] Although, as plaintiff states (Reply Mem. 8), no Commission regulation defines "major purpose," the Commission's decision to define that term case-by-case rather than by regulation was upheld in *Shays v. FEC*, ___ F. Supp. 2d ___, 2007 WL 2446159, at *8-10 (D.D.C. Aug. 30, 2007). In addition, EMILY's List errs in claiming (Reply Mem. 9) that the Commission's interpretation of the major purpose test is inconsistent with the Commission's enforcement practices. Sometimes the administrative respondent either explicitly concedes that its major purpose is federal campaign activity or does not dispute its obvious electoral purpose. The administrative Matter Under Review (MUR) singled out by plaintiff (Reply Mem. 9) fits within that category. *See* General Counsel's Factual and Legal Analysis in MUR 5492, at 7 n.3 (July 5, 2005) (available through the Commission's website enforcement query search engine under the MUR case number: http://eqs.nictusa.com/eqs/searcheqs). Likewise, the facts in *Akins* and *Malenick* involved federal campaign activity.

[5] EMILY's List hints (Reply Mem. 4 n.1) that, at some indeterminate future election cycle, it may make state and local campaign activity its major purpose, but this suggestion is speculative and conditional.

mixed activities of federal political committees must be financed with federal funds. Just as plaintiff cannot transform mixed activity into purely nonfederal activity merely by labeling it as such, it cannot transform *federal* political committees into entities active principally or entirely in nonfederal elections merely through assertion. Thus, for example, plaintiff's hypothetical scenario (Reply Mem. 10) of a political committee that "spends 99 per cent of its funds on nonfederal elections" does not make sense: why would such a group be considered a federal political committee in the first place? Indeed, as the Commission showed (Mem. 13), EMILY's List itself is a more realistic example: It had not reported an allocation ratio for administrative expenses and generic voter drives of less than 50% federal funds over the decade preceding this lawsuit, using the "funds expended" method that should have reflected (as plaintiff itself notes) "the share of that organization's goal devoted to federal elections." Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment (Sept. 14, 2007) (Pl. Mem), at 5. *See also* FEC's Statement of Material Facts ¶¶ 5-6, 11.

In asking the Court to set aside the challenged regulations, EMILY's List has relied on several unlikely or worst-case hypothetical scenarios. [6] As we explained (FEC Mem. 29, 44), EMILY's List cannot meet its heavy burden in a facial challenge by relying on such examples, and plaintiff's attempts to distinguish the cases on which the Commission relies are unsuccessful. Plaintiff suggests (Reply Mem. 20) that *Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 461 (11th Cir. 1996), is inapposite because it concerned a First Amendment challenge. This suggestion is especially ill-conceived because plaintiff relies on hypothetical

[6] Plaintiff had every opportunity to participate in the rulemaking and call these scenarios to the Commission's attention, but it chose not to do so. *See National Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) ("It is well established that issues not raised in comments before the agency are waived. . . . [T]here is a near absolute bar against raising new issues — factual or legal — on appeal in the administrative context.") (citations omitted).

examples to support its First Amendment challenge. Pl. Mem. 15; Pl. Reply Mem. 10. Moreover, the cases upon which EMILY's List relies (Reply Mem. 20) to rebut the Commission's criticisms are suits by former employees seeking benefits under the Family and Medical Leave Act in which the courts used quite plausible hypothetical scenarios in their *Chevron* analyses of Department of Labor regulations. *See Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1149-54 (10th Cir. 2004), *cert. denied*, 546 U.S. 822 (2005); *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 738-40 (5th Cir. 2005). In contrast, EMILY's List has invented farfetched hypothetical scenarios in an effort to support its facial challenge to the Commission's regulations. "Of course, a clever lawyer can imagine anomalous applications of any regulation. But the … [agency] had to draw a line between expenses that are allowed . . . and those that are not." *Walsh v. Brady*, 927 F.2d 1229, 1233 (D.C. Cir. 1991).

B. The Revised Allocation Regulations Are Lawful

1. 11 C.F.R. § 106.6(f) Establishes Permissible Allocation Rules for Candidate-Specific Communications by Political Committees Like EMILY's List

The Commission showed (Mem. 24-30) that 11 C.F.R. § 106.6(f) established new, bright-line rules for the financing of candidate-specific public communications and voter drives by federal political committees to enhance compliance with the Act's contribution limits. Under that provision, communications referring solely to federal candidates must be financed solely with federal funds, those referring solely to nonfederal candidates may be financed entirely with nonfederal funds, and those referring to both federal and nonfederal candidates are subject to the time/space method of allocation under 11 C.F.R. § 106.1. Because Congress left these allocation rules to the Commission's discretion, and because section 106.6(f) reasonably implements the statutory contribution limits, the regulation easily satisfies *Chevron* analysis. In challenging

section 106.6(f), EMILY's List fails to take into account the applicable time/space method of allocation, although that allocation method dispels most of plaintiff's concerns.

EMILY's List asserts (Reply Br. 15, 18) that section 106.6(f) is unconstitutional and in excess of the Commission's authority because it would require that federal funds be used to finance a public communication that refers to a federal candidate in a different jurisdiction and is made well in advance of any election in which that candidate is on the ballot. This hypothetical example is not sufficient, however, to invalidate the regulation on its face. *See supra* p.10; FEC Mem. 29. In any event, as the Commission has explained (Mem. 28), if a committee were to try to influence a nonfederal election by identifying an out-of-state federal candidate but not identifying any nonfederal candidate in a communication, the communication could affect an in-state federal election. The communication may well suggest that its audience support a party's full slate of candidates (federal and state) on the basis of their alliance with the prominent out-of-state candidate's policies, or the out-of-state candidate's support for the in-state candidates.[7] EMILY's List also complains that communications are covered without regard to time, but of course there is a time element inherent in the statutory term "candidate," 2 U.S.C. § 431(2), and in any event this regulation applies only to federal political committees, whose major purpose is the nomination or election of federal candidates. *See McConnell*, 540 U.S. at 170 n.64; *supra* p. 7; FEC Mem. 26.

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[7] EMILY's List tries to counter this explanation by arguing that "a communication that included a nonfederal out-of-state candidate for endorsement purposes instead of a federal candidate would have an identical effect on in-state elections, and yet that communication could be paid for with entirely nonfederal funds." Reply Mem. 19. If plaintiff is suggesting that the Commission would have been justified in regulating more broadly to cover that situation, the lack of such broader regulation does not undermine the Commission's actual regulation. The Commission may "proceed in incremental steps in the area of campaign finance regulation" and is not required to restrict all regulable activity. *McConnell*, 540 U.S. at 158. Moreover, plaintiff does not even attempt to respond to the Commission's explanation (FEC Mem. 27-28) of plaintiff's other hypothetical scenarios.

As we explained *supra* pp. 4-5, BCRA restricted the allocation available to state and local party committees, and eliminated the opportunity for allocation by national party committees. EMILY's List argues (Reply Mem. 12) that it differs significantly from state and local party committees and, therefore, that any allocation rules governing it should permit greater use of nonfederal funds for mixed electoral activities than the rules governing those party committees or the rules plaintiff challenges here permit. EMILY's List does differ from a state or local party committee in at least one important respect; as a political committee whose major purpose is to influence federal elections, EMILY's List is *more* likely to engage in federal electoral activity than is a state or local party committee. Indeed, from plaintiff's own description of its activities, plaintiff is more akin to a *national* party committee. It appears to advance the same national Democratic electoral interests as the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee. For example, Ms. Cocanour's declaration (¶¶ 2, 3) states that EMILY's List "identifies viable opportunities to elect pro-choice Democratic women," "recruits qualified candidates," "trains them to be effective fundraisers and communicators," and "helps them build and run effective campaign organizations." *See also id.* at ¶ 6 ("Since 1985, EMILY's List has helped to elect sixty-eight Democratic women to Congress, thirteen to the U.S. Senate, eight to governorships, and over 350 to other state and local offices."). Of course, the allocation regulations at issue here, unlike BCRA's treatment of national political party committees, still allow EMILY's List to allocate nonfederal dollars to help pay for a significant amount of mixed federal/nonfederal election activity.

2. 11 C.F.R. § 106.6(c) Establishes a Permissible 50% Minimum Allocation Rule for Administrative Expenses and Generic Voter Drives by Political Committees

The Commission has shown (Mem. 30-35) that the 50% minimum allocation rule for disbursements by political committees that benefit both federal and nonfederal candidates is well within the range of reasonable regulation in this area. EMILY's List complains (Reply Mem. 17) that the 50% minimum rule was the product of a flawed rulemaking and that it is "nonsensical to conclude that, because someone does two different things, the effect of one is as significant as that of the other." This argument misapprehends the Act, which regulates disbursements that have the purpose of influencing federal elections, regardless of whatever other effects they may also have. Thus, plaintiff has no statutory basis for assuming that the relevant inquiry must quantify the relative "effect" that dual purpose spending has on federal and nonfederal elections. Since EMILY's List concedes that this regulation governs spending that influences both federal and nonfederal elections, its complaint is little more than a policy dispute about how best to allocate expenses for activities that cannot be readily divided with scientific precision — all of which have at least some influence on federal elections.

EMILY's List asserts (Reply Mem. 17) that "the record reflects no actual evidence to show why the Commission reached the decision it did." The plaintiff, however, ignores the extensive administrative record on this point, as summarized below:

- **A Review of Disclosure Reports**: "In examining public disclosure reports filed by SSF's over the past ten years the Commission discovered that very few committees chose to allocate their administrative and generic voter drive expenses under the former section 106.6(c)." Political Committee Status, 69 Fed. Reg. at 68,062;
- **Confusion Under Former Rule**: The Commission explained that, in its experience, "[c]ommittees have consistently requested guidance on the proper application of the allocation methods under the former section 106.6 at various Commission conferences, roundtables, and education events." *Id*;

- **Experience of Commission Auditors**: Based on reports by the Commission's Audit Division, the Commission discovered that some committees were not properly allocating under the old allocation rules. *Id.* (citing final FEC audit reports);
- **Administrative Burden**: The Commission took into account the multiple steps required to comply with the old rule. "[C]ompliance required committees to monitor their Federal expenditures and non-Federal disbursements, compare their current spending to the ratio reported at the start of the election cycle, and then adjust the ratio to reflect their actual behavior." *Id*; *see also* Comments of Media Fund, at 20 (April 5, 2004) (Exh. 12); Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 14, 2004 (Apr. 14 Tr.), at 160 (Exh. 14);[8]
- **Comments Supporting 100% Federal Funds**: *See* Comments of Public Citizen, at 12-13 (April 5, 2004) (Exh. 8); Comments of Republican National Committee, at 7-8 (April 5, 2004) (Exh. 9);
- **Comments Supporting a Specific Percentage**: *See* Comments of Democracy 21, Campaign Legal Center, Center for Responsive Politics, at 17-19 (April 5, 2004) (Exh. 10); Comments of Senators McCain and Feingold, Representatives Shays and Meehan, at 3 (April 9, 2004) (Exh. 11); Comments of Republican National Committee, at 7 (April 5, 2004) (Exh. 15); and
- **Witness Testimony that the Prior Rule Permitted Circumvention**: *See* Apr. 14 Tr. at 158-59 (Exh. 14); Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 15, 2004, at 27-28 (Exh. 9).

Thus, the record amply supports the Commission's conclusion.[9] Moreover, the Commission's recent conciliation agreement with America Coming Together (ACT) shows how a nonparty political committee that did purport to allocate its mixed expenses exploited the former, complicated allocation system. *See* FEC Mem. 23; Memorandum of Amici Curiae Senator John McCain, et al. in Opposition to Plaintiff's Motion for Summary Judgment (Oct. 9, 2007), at 14-18, 20, 24-27. EMILY's List ignores ACT.

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[8] The exhibits cited refer to the exhibits filed with the Commission's memorandum in support of its second summary judgment motion.

[9] "Fewer than 2% of all registered nonparty political committees . . . allocat[ed] administration and generic voter drive expenses under former section 106.6(c) . . . ." Political Committee Status, 69 Fed. Reg. at 68,062. That means that the remaining nonparty committees used only federal funds for such activities. *See also* FEC, PAC Financial Summaries (sortable data files), *available at* www.fec.gov/finance/disclosure/ ftpsum.shtml.

Finally, EMILY's List characterizes (Reply Mem. 17) the line drawn by this regulation as arbitrary. However, there is an inherent degree of arbitrariness in any line-drawing endeavor, but that does not render it unlawful. *See Mathews v. Diaz*, 426 U.S. 67, 83 (1976) ("But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences…."); *American Federation of Government Employees v. OPM*, 821 F.2d 761, 277 (D.C. Cir. 1987) ("The lines drawn as a result of this [rulemaking] process may well be, in one sense, 'arbitrary' without being 'capricious'"); *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 n.7 (D.C. Cir. 1988) (same). *See also Worldcom, Inc. v. FCC*, 238 F.3d 449, 461-462 (D.C. Cir. 2001). EMILY's List has presented no basis for denying the Commission deference and substituting a different line for the one drawn by the Commission.

C. The Solicitation Regulation, 11 C.F.R. § 100.57, Is a Permissible Interpretation of When Funds Given in Response to a Solicitation Are "Contributions" Under the Act

The Commission explained (Mem. 35-41) that 11 C.F.R. § 100.57 clarifies the circumstances in which funds received in response to a solicitation will be considered "contributions" under the Act. EMILY's List ignores the rule's crucial limiting circumstances: funds are contributions when received in response to a solicitation that "indicates that any portion of funds received will be used to *support or oppose the election*" of a clearly identified federal candidate. 11 C.F.R. § 100.57(a) (emphasis added). If the solicitation indicates that the funds will be used to support or oppose the election of only clearly identified federal candidates, then 100% of the funds received will be contributions under the Act. Because it is reasonable for the Commission to infer that funds received in response to such a solicitation are "for the purpose of influencing" federal elections, 11 C.F.R. § 100.57 easily satisfies *Chevron* analysis. The regulation lowers the percentage of the receipts deemed to be contributions when a

solicitation refers to one or more clearly identified nonfederal candidates in addition to one or more clearly identified federal candidates. In that case, at least 50% of the total funds received are considered contributions. 11 C.F.R. § 100.57(b)(2).[10]

EMILY's List argues (Reply Mem. 19) that 11 C.F.R. § 100.57 is unconstitutional and beyond the Commission's authority because it would override express statements in solicitations that a lower percentage of funds received would be used to support federal candidates. However, as the Commission has noted (Mem. 39), EMILY's List identifies no language in the statute inconsistent with this regulation, and provides no evidence that this issue was raised before the Commission. Moreover, EMILY's List has not provided any real examples of a specific "low percentage" solicitation (by a nonparty political committee) that both clearly indicates that funds received will be used to support the election of clearly identified federal candidates and that also voluntarily restricts the use of the committee's receipt of funds. In any event, as explained *supra* pp. 9-10, an unsupported worst-case hypothetical example does not establish that the regulation is unconstitutional on its face or beyond the Commission's authority to promulgate.

If EMILY's List wants some or all of the funds raised in response to a given solicitation to be nonfederal funds, all it need do is avoid stating (for 100% nonfederal proceeds) that the funds collected will be used to support or oppose the election of a clearly identified federal candidate, or (for 50% federal proceeds) also indicate that some of the funds raised will be used to support or oppose the election of an identified nonfederal candidate. A committee might also simply use separate communications to raise funds in connection with federal and nonfederal

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[10] Plaintiff posits a hypothetical situation (Reply Mem. 10) about a solicitation in which an identified out-of-state federal candidate helps a fundraising effort for state candidates. Contrary to plaintiff's apparent expectation, however, this hypothetical scenario does not undermine the constitutionality of section 100.57. Because the solicitation does not indicate that any of the fundraising proceeds will be used to support the election of the out-of-state federal candidate, section 100.57 would not treat any of the proceeds as "contributions."

elections. *See Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 406 (D.C. Cir. 1996) (upholding FEC rule requiring political committees to make separate follow-up information requests that do not include a request for additional funds as a reasonable interpretation of the Act's requirement that committees use "best efforts" to collect contributor information). But if a specific solicitation identifies only *federal* candidates in discussing its purpose *and* indicates that money raised will be used to support or oppose their elections, the regulation reasonably treats the proceeds as federal funds.

Finally, in promulgating new section 100.57, the Commission cited *FEC v. Survival Education Fund* (*SEF*), 65 F.3d 285 (2d Cir. 1995), as helpful precedent. 69 Fed. Reg. at 68,057. In its reply memorandum (at 16), EMILY's List again misreads the case and argues that "solicitations would only be regulated when they indicated that funds would be earmarked for express advocacy." Although the court in *SEF* discussed express advocacy, it did not rule on whether the solicitation in question was express advocacy and instead based its decision on the sentence plaintiff includes at the end of its long block quotation — a sentence that defeats plaintiff's interpretation. *See* FEC Mem. 4, 36-37. The Second Circuit stated: "Even if a communication does not itself constitute express advocacy, it may still fall within the reach of § 441d(a) [the Act's disclaimer provision] if it contains *solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office*." 65 F.3d at 295 (emphasis added). That formulation, which is quite similar to the language of 11 C.F.R. § 100.57, does not rely upon an express advocacy standard.

D. Plaintiff Has Failed to Show that the Regulations Violate Principles of Federalism

EMILY's List implicitly concedes (Reply Mem. 13) that the regulations do not "commandeer the States and state officials in carrying out federal regulatory schemes," the usual

basis for a federalism challenge. *McConnell*, 540 U.S. at 186. *See* FEC Mem. 45. Instead, plaintiff argues (Reply Mem. 13) that the regulations violate principles of federalism because they infringe plaintiff's "right to participate in nonfederal elections." But the regulations in no way prohibit or restrict EMILY's List from participating in nonfederal elections. EMILY's List can do as much nonfederal fundraising as it likes and can spend all the money it has on nonfederal electoral activity. Indeed, EMILY's List can spend all of its *federal* money on nonfederal elections, if it so chooses. The regulations only help ensure that nonfederal dollars are not improperly spent to influence federal elections.

The regulations protect the integrity of federal campaign activity by ensuring that, in engaging in "mixed" federal and nonfederal electoral activities, an organization satisfies the statutory requirement that only federally permissible funds finance federal electoral activity. Like Congress, the Commission "has a fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes." *McConnell*, 540 U.S. at 187. The Commission tailored the regulations to achieve that end while accommodating the need for workable, understandable rules. As the recent conciliation agreement with ACT shows, inadequate tailoring invites abuse. *See* FEC Mem. 23; *supra* p.14. If the resulting tailoring indirectly affects the financing of state and local electoral activity, those indirect effects do not make the regulations unconstitutional. *McConnell*, 540 U.S. at 186-87.

Defendants in federal vote-buying prosecutions have raised — unsuccessfully — federalism arguments similar to those EMILY's List raises here. For example, in *United States v. Slone*, 411 F.3d 643 (6th Cir. 2005), the defendant appealed his conviction for vote buying in a federal election by claiming that he was buying votes only regarding a candidate for county office, although federal offices were also on the ballot. The defendant argued that the federal

vote-buying statute is unconstitutional because it exceeds Congress's enumerated powers by affecting local elections. *Id.* at 644. The Sixth Circuit held that the statute "applies to all elections in which a federal candidate is on the ballot, and the government need not prove that the defendant intended to affect the federal component of the election by his corrupt practices." *Id.* at 648. Citing *McConnell*, 540 U.S. at 187, the court stated, "When the purity of the process is compromised in part, the corruption affects the integrity of the whole." *Id.* at 650. *See also, e.g., United States v. McCranie*, 169 F.3d 723, 727 (11th Cir. 1999) (holding, in a federal vote-buying case, that the Elections Clause and the Necessary and Proper Clause provide Congress with the power to regulate mixed federal and state elections even when federal candidates are running unopposed).

Finally, EMILY's List again invokes *WRTL* (Reply Mem. 13) when it argues that its right to participate in nonfederal elections has been infringed. But that case involved the line between issue advocacy and electoral advocacy, not the line between federal and nonfederal election activity. That difference is critical here, because only the latter dichotomy could possibly involve considerations of federalism. *WRTL* had no occasion to revisit or even mention *McConnell's* discussion of federalism; *WRTL* is thus irrelevant to the issue before this Court.

E. EMILY's List Has Failed to Meet Its Evidentiary Burden at Summary Judgment

At summary judgment, the failure of a party to come forward with evidence "'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" requires entry of summary judgment against that party. *Haynes v. Williams*, 392 F.3d 478, 481 (D.C. Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Indeed, "[o]ne of the principal purposes of the summary judgment

rule is to isolate and dispose of factually unsupported claims" — such as the claims plaintiff has presented here. *Celotex*, 477 U.S. at 323-24.

Plaintiff's summary judgment motion lacks the necessary evidentiary support. Factually, the motion is based almost entirely on a single, conclusory declaration by Britt Cocanour, the chief of staff and assistant treasurer at EMILY's List. That declaration provides her titles but does not explain whether she has personal knowledge of the subjects to which she is attesting. For example, in asserting that particular communications "would not have the purpose of influencing [specific] candidates' elections" (Decl. ¶ 27), Ms. Cocanour does not disclose the basis of her supposed knowledge. *See also id.* at ¶ 24 (same). Also, the purported facts describing plaintiff's Campaign Corps campaign school are vague, ambiguous, and conclusory. They fail to specify, for example, whether the "graduates" the declaration describes worked solely on nonfederal races or whether they spent significant time on federal races or generic campaign activity. *See* FEC Statement of Genuine Issues ¶¶ 29-31; FEC Mem. 33 n.29. More detailed information might show that the participants spent much of their time on federal races. Thus, the Cocanour declaration raises questions but does not answer them or meet plaintiff's evidentiary burden.

III. EMILY'S LIST HAS FAILED TO JUSTIFY THE REMEDY IT SEEKS

EMILY's List requests (Reply Mem. 20) that the Court "immediately vacate[ ]" the Commission's regulations — extraordinary relief that this Court rejected in *Shays v. FEC*, 337 F. Supp. 2d 28, 130 (D.D.C. 2004), a decision EMILY's List ignores. Instead, without offering any supporting evidence, plaintiff simply asserts (Reply Mem. 21) that the Commission has "shown no willingness or capability to satisfy the requirements of the APA" and that there is "no way for

the Commission to correct its violations" of law. This bald ad hominem attack cannot substitute for reasoned argument.

Plaintiff also asserts that "any disruption would be minimal" if the regulations at issue were vacated because functioning regulations were previously in place. Reply Mem. 21. This assertion reflects plaintiff's persistent and incorrect belief that the Commission's prior regulations would somehow spring back to life. The regulations at issue here are adjustments to an interconnected framework of regulation of political committees; vacating these rules would leave that framework in disarray. *See* FEC Mem. 46; *EMILY's List*, 362 F. Supp. 2d at 59. Thus, even if the Court were to rule in plaintiff's favor on the merits, the Court should deny the extraordinary relief that plaintiff requests.

IV. CONCLUSION

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

Respectfully submitted,

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